

NO DATE FOR ORAL ARGUMENT HAS BEEN SET

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.

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

INITIAL BRIEF FOR PETITIONERS

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

June 26, 2006

Counsel for Petitioners

**PETITIONERS' CERTIFICATE OF COUNSEL AS TO PARTIES,
RULINGS, AND RELATED CASES (D.C. CIR. R. 28(a)(1))**

Pursuant to D.C. Circuit Rule 28(a)(1) and Federal Rule of Appellate Procedure 26.1, counsel for petitioners certify as follows:

A. Parties and Amicus

Petitioners are Public Citizen, Citizens for Reliable and Safe Highways (“CRASH”), Parents Against Tired Truckers (“PATT”), Advocates for Highway and Auto Safety (“AHAS”), and the International Brotherhood of Teamsters (“IBT”). The first four groups are nonprofit organizations dedicated to improving truck safety. IBT is a labor union representing 1.4 millions workers, including commercial truck drivers, in the United States and Canada. None of the petitioners has a parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Respondents are the Federal Motor Carrier Safety Administration (“FMCSA”) and the United States.

American Trucking Associations, Inc. (“ATA”); NASSTRAC, Inc. and the Health & Personal Care Logistics Conference, Inc.; United Parcel Service; and the National Industrial Transportation League have intervened in support of respondents.

The Insurance Institute for Highway Safety (“IIHS”) is participating in the case as an amicus curiae in support of petitioners.

B. Rulings Under Review

Petitioners seek review of the final hours-of-service rule issued by respondent FMCSA on August 16, 2005, and published in the Federal Register on August 25, 2005, at 70 Fed. Reg. (“FR”) 49978.

C. Related Cases

The case on review has been consolidated with *Owner-Operator Independent Drivers Ass’n v. FMCSA*, No. 06-1035, which challenges the same rule but on different grounds.

The case on review is closely related to a case previously decided by this Court. On June 12, 2003, Public Citizen, CRASH, and PATT (three of the petitioners in this case), filed a petition for review in this Court (No. 03-1165) challenging an earlier final hours-of-service rule issued by FMCSA at 68 FR 22456 (Apr. 28, 2003). In a decision issued on July 16, 2004, the Court granted the petition in a unanimous opinion. *See Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004). The Court vacated the rule and remanded. The rule challenged here is the product of the second rulemaking, which followed the remand from the Court.

June 26, 2006

Respectfully submitted,

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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GLOSSARY

AHAS	Advocates for Highway and Auto Safety
AMI	Acute myocardial infarction
APA	Administrative Procedure Act
ATA	American Trucking Associations
BLS	Bureau of Labor Statistics
CMV	Commercial motor vehicle
CRASH	Citizens for Reliable and Safe Highways
DE	Diesel exhaust
DOT	Department of Transportation
EOBR	Electronic onboard recorder
EPA	Environmental Protection Agency
EPA HAD	<i>EPA, Health Assessment Document for Diesel Engine Exhaust (2002)</i>
FARS	Fatality Analysis Reporting System
FHWA	Federal Highway Administration
FLSA	Fair Labor Standards Act
FMCSA	Federal Motor Carrier Safety Administration
HOS	Hours of service

ICC	Interstate Commerce Commission
IIHS	Insurance Institute for Highway Safety
ISO	International Standards Organization
LBP	Lower back pain
MCSA	Motor Carrier Safety Act of 1984, Pub. L. 98-554, 98 Stat. 2832 (1984).
MCSIA	Motor Carrier Safety Improvement Act of 1999, Pub. L. 106-159, 113 Stat. 1748 (1999).
MSHA	Mine Safety and Health Administration
NIOSH	National Institute for Occupational Safety and Health
NPRM	Notice of Proposed Rulemaking
NTSB	National Transportation Safety Board
OOIDA	Owner-Operator Independent Drivers Association
OSHA	Occupational Safety and Health Administration
PATT	Parents Against Tired Truckers
PRE	Preliminary Regulatory Evaluation
PVT	Psychomotor vigilance test
RIA	Regulatory Impact Analysis
SPM	Walter Reed Sleep and Performance Model
TIFA	Trucks Involved in Fatal Accidents

TOT	Time-on-task
TRB	Transportation Research Board of the National Academy of Sciences
WBV	Whole body vibration

Two years ago, this Court invalidated a rule governing the hours of service (“HOS”) of commercial motor vehicle (“CMV”) drivers issued by the Federal Motor Carrier Safety Administration (“FMCSA”). *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004). Far from improving highway safety and protecting driver health as Congress directed, that rule dramatically increased the number of daily and weekly hours that truck drivers may drive. In August 2005, FMCSA issued a new rule virtually identical to the one the Court invalidated. Instead of addressing the flaws the Court identified in the rule’s rationale, FMCSA stood pat on the significant driving increases. Moreover, the agency paid only lip service to its statutory obligation to “ensure” that truck driving “does not have a deleterious effect on the physical condition of the operators.” FMCSA’s justifications for expanding driving hours are as inadequate today as they were two years ago, and the rule again should be set aside.

JURISDICTION

Pursuant to the ICC Termination Act of 1995, Pub. L. 104-88, § 408, 109 Stat. 803, 958 (1995) (49 U.S.C. § 31136 note), and 49 U.S.C. § 31502, FMCSA published the HOS rule on August 25, 2005. 70 FR 49978. Petitioners filed a timely reconsideration petition on September 23, 2005, and withdrew it on February 21, 2006. Petitioners filed a timely petition for review on February 27, 2006. This Court has jurisdiction under 28 U.S.C. § 2342(3).

As described in their declarations (Appendix C), petitioners are the International Brotherhood of Teamsters, representing drivers regulated by the rule, and other truck safety organizations. Petitioners bring this challenge on behalf of their members, who are endangered by the rule.

STATUTES AND REGULATIONS

See Appendix B.

STATEMENT OF ISSUES

Whether FMCSA’s hours-of-service rule is arbitrary and capricious or contrary to law because it—

- (a) raises maximum consecutive driving hours from 10 to 11, without establishing that the increase is safe;
- (b) permits drivers to “restart” their weekly accumulation of hours after only 34 hours off-duty, dramatically increasing permissible weekly driving;
- (c) fails to ensure that the operation of commercial motor vehicles does not adversely affect driver health; and/or
- (d) relies on a flawed regulatory impact analysis, in which FMCSA changed its methodology for estimating costs and benefits without notice and comment.

STATEMENT OF THE CASE

I. BACKGROUND

A. Truck Crashes and Driver Health

In 2004, 416,000 large trucks were involved in crashes, 4,862 in fatal crashes. Truck crashes killed 5,190 people (154 more than in 2003 and 272 more than in 1995, when Congress ordered HOS revisions), and injured 116,000.

Traffic Safety Facts 2004, at 17, 30, 62, www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSFAnn/TSF2004.pdf. Although only 3% of vehicles, large trucks are involved in 8% of fatal crashes and 12% of traffic fatalities. *Traffic Safety Facts 2004 Data*, www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSF2004/809907.pdf.

Driving a truck has other costs. In the late 1990s, FMCSA undertook a Wellness Study, which recognized the “generally poor state of health of commercial drivers” and catalogued myriad driver health problems, including obesity, diabetes, hypertension, and high stress causing cardiovascular, hypertensive, gastrointestinal, and immune-system impairments. Roberts, I-2 to I-9, I-36 (1997) (2004-19608-1999).¹ Moreover, a wealth of research establishes that long, irregular driving hours significantly impair driver health, both directly and by increasing truckers’ exposure to other hazards, such as cancer-causing

¹ Documents in FMCSA’s dockets are identified by author and year.

diesel emissions, excessive noise levels (causing hearing loss), and vibration (causing back pain and injuries).

Truckers experience more nonfatal injuries than any other workers. 70 FR 3339, 3345 (2005) (“2005 NPRM”). In 2004, heavy-truck and tractor-trailer drivers suffered 17,770 musculoskeletal disorders—third highest among U.S. workers. Bureau of Labor Statistics (“BLS”), *Lost-Worktime Injuries and Illnesses, 2004*, www.bls.gov/news.release/pdf/osh2.pdf. Truckers also miss the highest median days of work (12) because of illness or injury of any occupation. *Id.*

B. Driver Fatigue, Long Hours, and HOS Violations

The Department of Transportation (“DOT”) has long acknowledged the major role fatigue plays in truck crashes. 65 FR 25540, 25541, 25545 (2000). The National Transportation Safety Board (“NTSB”) estimates that 30-40% of truck crashes are fatigue-related. NTSB, *at v* (1995) (1997-2350-239) (“1995 NTSB”). In its 2000 Notice of Proposed Rulemaking (“2000 NPRM”), FMCSA estimated that “fatigue is either a primary or secondary factor” in 15% of fatal truck crashes. 65 FR 25546; *Preliminary Regulatory Evaluation* ES-1, 30 (2000) (1997-2350-954) (“PRE”). In the 2003 rule, however, the agency reduced its estimate to 8.15% for long-haul drivers. *Regulatory Impact Analysis*, 8-14 to 8-15

(2002) (1997-2350-23302) (“2003 RIA”).

Driver fatigue from arduous work schedules is exacerbated by widespread HOS violations. Truckers have powerful incentives to violate HOS rules. The trucking industry is exempt from the FLSA’s overtime provisions. 29 U.S.C. § 213(b). Approximately 93% of long-haul drivers are paid by the mile or load, not hours worked, creating economic pressure to drive for many hours as fast as possible. Beilock 32 (1988) (1997-2350-859). According to a widely cited University of Michigan survey pre-dating the 2003 rule, the average driver worked 64.3 hours in 7 days, with long-haul drivers at the 75th and 90th percentiles working 80 and 96 hours per week, respectively. Campbell & Belzer 104 (2000) (1997-2350-1136). Moreover, at the 75th percentile, long-haul drivers drove 12 hours daily and worked 15.5; at the 90th percentile, they drove 15 hours daily and worked 19. *Id.* 106-07. As FMCSA recognized in 2000, these findings corroborated previous surveys evidencing pervasive HOS violations. 65 FR 25558; PRE 4-5; *see also* Transportation Research Board, *Literature Review* 141-42 (2005) (2004-19608-2084) (“TRB”).

As multiple studies demonstrate, exceeding the pre-2003 limits exacerbated driver fatigue. *E.g.*, 1995 NTSB 26, 52 (82% of single-vehicle truck crashes involving drivers exceeding HOS limits were fatigue-related); Jones & Stein 13,

17 (1987) (1997-2350-759) (three-fold increase in crash risk for drivers with logbook violations); Summala & Mikkola 319 (1994) (1997-2350-521) (truckers at fault in fatal crashes 2½ times more likely than faultless truckers to have driven at least 10 hours). These results comport with two seminal DOT-sponsored studies demonstrating that performance of long-haul drivers degraded *well before* the 10-hour driving limit. Mackie & Miller, vi-viii, xiii-xv, 2-3 (1978) (1997-2350-278); Harris & Mackie, viii-xi (1972) (1997-2350-272).

Over the past 16 years, the agency has acknowledged that “risk of accidents appears to increase with the number of hours driven.” Federal Highway Administration (“FHWA”), *HOS Study: Report to Congress* 5 (1990) (1997-2350-244) (“1990 FHWA”). Citing Jones & Stein, which found (at 11-12, 15-16) that crash risk nearly doubles after 8 hours, the FHWA reported to Congress that “driving in excess of 8 hours may be associated with a significantly increased risk of crash involvement.” 1990 FHWA 6; *accord* 65 FR 25546 (research evidences “dramatic and consistent increase in crash risk after 8 hours”).

Falling asleep at the wheel is commonplace. TRB 92. In one survey, 28% of drivers reported falling asleep while driving during the previous month. Abrams 14 (1997) (1997-2350-797). According to a recent IIHS driver survey, sleepy driving remained prevalent under the 2003 rule. IIHS Comments 5 &

Appendix A (3, 11) (2005) (2004-19608-1800) (“2005 IIHS”).

C. Statutory Mandates

1. Revision of HOS Rules

In 1995, Congress ordered this rulemaking, requiring consideration of an array of HOS issues to “reduc[e] fatigue-related incidents and increas[e] driver alertness.” 49 U.S.C. § 31136 note.

2. Preeminent Safety Mission

Congress established FMCSA to promote CMV safety. Motor Carrier Safety Improvement Act of 1999 (“MCSIA”), Pub. L. 106-159, § 101(a), 113 Stat. 1748. Enacted “to reduce the number and severity of large-truck involved crashes,” *id.* § 4(2) (49 U.S.C. § 113 note), MCSIA codifies FMCSA’s preeminent safety mission:

SAFETY AS HIGHEST PRIORITY.—In carrying out its duties, the Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation.

49 U.S.C. § 113(b).

3. Driver Health and Safety Protection

The Motor Carrier Safety Act of 1984 (“MCSA”), Pub. L. 98-554, 98 Stat. 2832, requires that, in regulating CMV safety, FMCSA must protect truck driver

health. MCSA requires that, “[a]t a minimum, the regulations shall ensure that . . . the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators.” 49 U.S.C. § 31136(a)(4). Because “enhanced protection of the health of [CMV] operators is in the public interest,” *id.* § 31131(b)(3), FMCSA must “minimize dangers to the health of operators of [CMVs].” *Id.* § 31131(a)(2).

FMCSA must also “ensure” that drivers’ responsibilities “do not impair their ability to operate the vehicles safely” and that their “physical condition” is “adequate to enable them to operate the vehicles safely.” *Id.* § 31136(a)(2) & (3).

D. Pre-2003 HOS Rules

The pre-2003 rules prohibited truckers from driving after either 10 hours driving or 15 hours on-duty until they took 8 hours off-duty. Drivers could extend the 15-hour driving window by taking off-duty breaks during the day. *Public Citizen*, 374 F.3d at 1212; 49 C.F.R. § 395.3(a) (2002) (superseded). The pre-2003 rules allowed work/rest cycles as short as 18 hours if drivers maximized driving time (alternating 10 hours driving and 8 hours off-duty)—cycles that conflict with human beings’ 24-hour circadian rhythm. 68 FR 22457, 22460 (2003); 65 FR 25554. The old rules also set weekly limits of 60 on-duty hours in 7 consecutive days or 70 hours in 8 consecutive days. 374 F.2d at 1212; 49 C.F.R.

§ 395.3(b) (2002).

II. FIRST RULEMAKING

A. 2000 NPRM

The pre-2003 rules allowed noncircadian, backward-rotating driving schedules. 65 FR 25553. In the 2000 NPRM, FMCSA acknowledged that people are more alert and perform better on regular, 24-hour schedules. *Public Citizen*, 374 F.3d at 1213 (citing 65 FR 25553-54). Moreover, “nighttime drivers [are] in a physiologically vulnerable position . . . because they must sleep during the day, when their bodies are least receptive to sleep, and work during the night, when they are physiologically and cognitively least able.” *Id.* Nightworkers’ daytime sleep is as much as 2-4 hours shorter, and of poorer quality, than their night sleep on rest days. 65 FR 25555, 25561-62; *see* Belenky 12-13 (1998) (1997-2350-618) (“Expert Panel”); Åkerstedt 107 (1997) (1997-2350-879).

In 2000, FMCSA therefore concluded that drivers need at least “eight consecutive hours of uninterrupted sleep every day,” 65 FR 25554, and that 8 hours off-duty did not allow 8 hours *sleep*, given competing life activities. *Id.* Accordingly, FMCSA proposed a minimum of 10 hours off-duty for long-haul

drivers. *Id.* 25581.² Heeding its Expert Panel (at 5), FMCSA also proposed to “[i]ncrease the 18-hour on-duty/off-duty cycle to a normal 24-hour work cycle.” *Id.* 25558; *see also id.* 25561. FMCSA proposed to permit long-haul drivers to work/drive up to 12 hours within a 14-hour work period each 24-hour cycle, with 10 consecutive hours off-duty and 2 additional off-duty hours during the day. *Id.* 25568, 25581.

FMCSA also determined, consistent with its Expert Panel’s recommendation, that drivers need a weekly off-duty period to recover from cumulative fatigue from multiple long driving days, to compensate for “sleep debts” accrued each week, and to alleviate fatigue from nighttime driving. *Id.* 25555-58, 25561-62; Expert Panel 12-13, 18, 33-34, 40; *see* 374 F.3d at 1214. FMCSA pointed to a comprehensive literature review confirming that one day off was insufficient, especially for nightworkers. 65 FR 25556 (citing Smiley & Heslegrave (1997) (1997-2350-593)). The agency proposed a mandatory “weekend,” encompassing two consecutive nights and the intervening day, *id.* 25555, 25558, 25587, which its Expert Panel pronounced “absolutely minimal.” Expert Panel 40.

² FMCSA also proposed to abolish for single drivers the “sleeper-berth exception,” which permitted bifurcation of off-duty periods. In the 2005 rule, FMCSA modified the provision, which is not challenged here.

B. 2003 Final Rule

In contrast to the 2000 proposed rule, FMCSA's 2003 rule did not require a 24-hour schedule or provide a weekly recovery period, but *increased* permissible consecutive daily driving hours and weekly driving and working hours.

First, the final rule increased off-duty periods to 10 hours, 68 FR 22470, because “[e]ach driver should have an opportunity for eight consecutive hours of uninterrupted sleep every day.” *Id.* 22469; 49 C.F.R. § 395.3(a) (2004) (superseded).

Second, the 2003 rule increased permissible consecutive driving hours from 10 to 11, within a 14-hour window. 68 FR 22473, 22475, 22492; 49 C.F.R. § 395.3(a) (2004). FMCSA conceded that “studies show[] that performance begins to degrade after the 8th hour on duty and [that risk] increases geometrically during the 10th and 11th hours.” *Public Citizen*, 374 F.3d at 1218 (citing 68 FR 22471); *accord* 68 FR 22470. It contended, however, that the increase was justified by the decrease in the driving window from 15 to 14 hours and the increase in mandatory off-duty time from 8 to 10 hours. 374 F.3d at 1218 (citing 68 FR 22471, 22473).

Third, FMCSA rejected a 24-hour work/rest cycle because “it is simply not practical and too inflexible to require of the industry.” 68 FR 22468. The rule

produced a 21-hour cycle for drivers who maximized driving time by alternating the maximum 11 hours driving with the minimum 10 hours off-duty, and a 24-hour cycle only if drivers worked 14-hour shifts, followed by 10 hours off-duty. *Id.*; see 374 F.3d at 1214.

Finally, FMCSA nominally retained the 60- and 70-hour weekly limits from the pre-2003 rules, but added a “restart” provision, 68 FR 22477, 22479; 49 C.F.R. § 395.3(b) & (c) (2004), under which 34 hours off-duty would reset weekly driving/working hours to zero, allowing truckers who exhausted their weekly hours to resume driving much sooner than under the pre-2003 rules—increasing driving time at the expense of off-duty time. The 34-hour restart, coupled with the daily driving increase, enabled so many more driving hours that FMCSA concluded the 2003 rule would allow industry to hire 58,500 *fewer* long-haul drivers, saving nearly \$1.1 billion annually. 68 FR 22495 (Tables 5 & 6).

C. The Court’s Decision

This Court held the 2003 rule arbitrary and capricious because FMCSA completely failed to consider its impact on driver health, as required by MESA. *Public Citizen*, 374 F.3d at 1216. The Court also discussed “the troubling nature of . . . other facets of the rulemaking.” *Id.* at 1217.

The Court said the increase in driving time from 10 to 11 hours “raise[d]

very real concerns,” *id.*, expressing “doubts” about whether FMCSA’s two justifications—the decrease in driving window and increase in off-duty time—were sufficient. The Court emphasized that FMCSA “freely concedes that performance begins to degrade after the 8th hour on duty and [that risk] increases geometrically during the 10th and 11th hours,” and that “the effects from the increased weekly driving hours may offset any decrease in fatigue flowing from the fact that drivers have shorter over-all tours of duty.” *Id.* at 1218.

The Court found “dubious” FMCSA’s contention that the increase in off-duty hours justified additional driving. The argument depended on FMCSA’s cost-benefit analysis, which “assumes, dubiously, that time spent driving is equally fatiguing as time spent resting—that is, that a driver who drives for ten hours has the same risk of crashing as a driver who has been resting for ten hours, then begins to drive.” *Id.* (citing 68 FR 22497). Because the 2003 RIA’s model considered only drivers’ sleep, not “time on task,” the Court found it of “questionable value in justifying the increase in daily driving time.” *Id.* at 1219.

Finally, the Court found it “problematic” that FMCSA did “not even acknowledge, much less justify, that the [34-hour restart] . . . dramatically increases the maximum permissible hours drivers may work each week.” *Id.* at 1222.

III. SECOND RULEMAKING

A. 2005 NPRM and Final Rule

In January 2005, FMCSA published a new NPRM, offering the invalidated 2003 rule as the “proposal” on which it invited comment. 70 FR 3339.³ In August 2005, after unsuccessfully lobbying Congress to codify the 2003 rule, *e.g.*, S. Hrg. 109-196, at 18, 21 (Apr. 5, 2005) (FMCSA Administrator Annette Sandberg). FMCSA re-issued the same HOS rule for long-haul truckers, except for a change to the “sleeper-berth exception.” 70 FR 50073.⁴

The NPRM and final rule acknowledged the massive increase in driving and on-duty hours enabled by the 34-hour restart. 70 FR 3348; 70 FR 50021-22. Under the rule, a driver on a 60-hour-in-7-days schedule who drives 21-hour rotations and takes 34 hours off-duty can drive *77 hours in 7 days*—28% more hours than the pre-2003 rules allowed. Similarly, a driver on a 70-hours-in-8-days schedule can drive *88 hours in 8 days*—a 26% increase. The graphs at Appendix A-1 illustrate these increases. For drivers maximizing on-duty time, weekly workload increases are even greater. A driver working 14-hour shifts can

³ FMCSA also issued an advance notice of proposed rulemaking on electronic onboard recorders, 69 FR 53386 (2004), not at issue here.

⁴ The 2003 rule remained in effect until the new rule’s effective date. Pub. L. 108-310, § 7(f), 118 Stat. 1144, 1154 (2004).

accumulate 84 hours in 7 days or 98 hours in 8 days—a 40% increase. *See* Appendix A-2.

1. Whether Drivers Are Driving Longer

Throughout the preamble, FMCSA minimized the rule’s health and safety effects by discounting the possibility that drivers are actually working and driving the much longer hours permitted by the rule. *See* 70 FR 49984; *accord id.* 49981, 50005, 50022, 50036.

Citing its own 2005 motor carrier survey, FMCSA said that drivers worked “on average” 8.78 hours per day and 61.4 hours per week, *id.* 50001; FMCSA Survey 4 (2005) (2004-19608-2090), and that 22.9% of driving periods for long-haul drivers exceeded 10 hours. 70 FR 50001; FMCSA Survey 2. FMCSA also cited surveys by the Owner-Operator Independent Drivers Association (“OOIDA”), Burks, and Schneider (2004-19608-2092, -1991, -1996, respectively), which found usage levels of the 11th driving hour ranging from 10 to 31%. 70 FR 50001-02. With utilization rates “far below 50 percent,” *id.* 50012, FMCSA declared that “[t]here is no reason to believe that a full 11 hours of driving will ever become the standard for the industry.” *Id.* 50010. The surveys also reflected a significant minority of drivers using restarts with rest periods close to the minimum, thereby enabling more driving hours. *Id.* 50001 & FMCSA Survey 2

(almost 27% of drivers had one recovery period of 36 hours or less); 70 FR 50002, 50019 & Schneider Survey 2 (26-32% of drivers took 34-44 hour restarts); 2005 IIHS, Appendix A (13) (28-37% of drivers took 34-hour restarts or shorter). But FMCSA emphasized that its survey showed 67% of restart off-duty periods exceeding 44 hours. 70 FR 50001.

FMCSA's 2005 cost-benefit analysis took a far different view of the new rule's impact. It predicted that drivers and carriers would increasingly take advantage of the rule's longer hours and charted mammoth losses in industry productivity if they were eliminated. *Regulatory Impact Analysis* 70, 73 (2005) (2004-19608-2094) ("2005 RIA"). Relying on the driver surveys, the RIA claimed that "the 11th hour is definitely being used." *Id.* 24; *see also id.* 68 (Exh. 6-2) (estimating 11th-hour usage as high as 55%, depending on industry sector); 70 FR 50049. Emphasizing that it was unclear whether carriers had adjusted to the new rule, 2005 RIA 83; 70 FR 50057, the RIA acknowledged that industry's 11th-hour usage was evolving and that many companies "have long runs" and "may be building the 11th hour into their schedules." 2005 RIA 24. The RIA predicted: "[A]s the 11th hour of driving becomes more incorporated into normal operations in the future, we believe its use much more likely to increase rather than decrease." *Id.* 77.

Similarly, contradicting FMCSA’s preamble, the RIA touted productivity gains enabled by the 34-hour restart, *id.* ES-3, 1, conceding outright that many trucking operations bump up against HOS limits and should thus be affected by changes in those limits. *Id.* 67; 70 FR 50049.

The RIA admitted that FMCSA’s survey represented only a small share of trucking activity, 2005 RIA 16-17, 20, and that its data likely “understates the intensity of regular operations to some degree.” *Id.* 67 n.41. For random-service drivers, moreover, who follow no fixed routes or regular schedules and comprise 60% of the truckload sector, *id.* 9-10, 12-13, 67, the RIA commented that “a short restart can be very advantageous” from a productivity standpoint. *Id.* ES-3, 64. The RIA emphasized that “at least one-third of restarts are short enough to bring a productivity gain,” *id.* 22—*i.e.*, more weekly driving hours.

2. FMCSA’s Safety Analysis

a. 11 Driving Hours

FMCSA contended again that a 14-hour driving window and 10-hour off-duty requirement affords drivers enough rest to drive 11 consecutive hours per shift. 70 FR 49992-93, 50038. It relied on preliminary findings that drivers operating under the 2003 rule were averaging 6.28 hours of sleep per day, which FMCSA claimed was over 1 hour more than under the pre-2003 rules. *Id.* 49983,

49991, 49993, 50003; *see* Hanowski 8 (2005) (2004-19608-2089). FMCSA cited no research establishing that 6.28 hours' sleep was sufficient to enable truckers to drive safely either for 11 consecutive hours or 77/88 hours every 7/8 days.

FMCSA deflected attention from its previous admission regarding the sharp risk increase after 8 hours' driving by attempting to show that research was "conflicting" and "inconclusive" regarding the magnitude of risk in the 10th and 11th hours. 70 FR 49993, 49999, 50011-12.

First, FMCSA examined an analysis of the Trucks Involved in Fatal Accidents ("TIFA") database. Campbell (2005) (2004-19608-2116). TIFA data shows that the relative risk of a fatigue-related crash in the 11th hour of driving or later is "substantially higher than in the 10th hour." 70 FR 50010; *accord id.* 49997, 50000. In the 10th hour, 4.4% (22 of 495) of fatal crashes were deemed fatigue-related, while that percentage *more than doubled* to 9.6% in the 11th hour (9 of 94). 2005 RIA 45 (Exh. 5-1). Compared to the first hour, with a fatigue percentage below 1% (102 of 10,412), the crash risk at 10 hours was 4.5 times higher and at 11 hours, *nearly 10 times higher. Id.*⁵

⁵ In text, the RIA misstated the relative risk levels shown in Exhibit 5-1 by a factor of 2, claiming that compared to the first hour, relative risk in the 10th hour was only 2.5 times greater and in the 11th hour, only 5 times greater. 2005 RIA 45.

Second, FMCSA discussed ongoing research by the Pennsylvania Transportation Institute modeling the effects of various driving schedules on crashes. Using logistic regression, “the study found a pattern of increased crash risk associated with hours driving, particularly in the 9th, 10th, and 11th hours, and multi-day driving” and that “the 11th hour of driving has a crash risk of more than three times that of the first hour.” 70 FR 49997-98, 50010; Jovanis 2, 7-9 (2005) (2004-19608-2091).

Third, FMCSA cited an incomplete study of crash risk in the 10th and 11th driving hours for 82 drivers. Hanowski (2005) (2004-19608-2089). That study preliminarily found no significant difference between the 10th and 11th hours regarding driver alertness or involvement in critical events. 70 FR 49997, 50010; Hanowski 1, 9. Hanowski recorded high numbers of “critical incidents” (crashes, near-crashes, and crash-relevant conflicts) in both the 10th and 11th hours, Hanowski 2, 4, but provided no information about how these numbers compared with critical incidents after fewer driving hours.

FMCSA ignored most of the immense body of research, cited by many commenters, demonstrating that crash risk increases sharply after driving 8-10

hours, even after controlling for time-of-day effects.⁶ *See* 2005 IIHS 3; Braver Comments 3 (2005) (2004-19608-1854); Public Citizen Comments 19-21 (2005) (2004-19608-1861); AHAS Comments 7-20 & n.10 (2000) (1997-2350-22593) (“2000 AHAS”); NIOSH Comments 3 (2000) (1997-2350-22637) (“2000 NIOSH”); IIHS Comments 1-2, 5-7 (2000) (“2000 IIHS”) (1997-2350-20062); *see also* TRB 142-43, 161 (2004-19608-2084).

Because, FMCSA claimed, available crash data “do not clearly indicate whether the 11th hour of driving, combined with 10 hours of off-duty time, poses a significant risk,” 70 FR 50012, 50038, and because an 11-hour limit is economically beneficial to carriers, the agency set maximum driving time at 11 hours. *Id.* 50000, 50012.

b. 34-Hour Restart

FMCSA praised the 34-hour restart as a “safety net” or “benefit” affording a majority of drivers two nights’ sleep each week to alleviate cumulative fatigue. 70 FR 50023, 50038-39, 50041. It disregarded the fact that the restart exacerbates truckers’ cumulative fatigue by dramatically increasing driving/working hours, while curtailing by more than half the approximately 3-day off-duty period to

⁶ *See, e.g.*, Lin 8-10 (1993); Lin 7 (1994); Jones & Stein 11-12, 15-17 (1987); Saccomanno 157, 167-72 (1996); Frith 24-28 (1994) (1997-2350-815 & 1997-2350-759).

which the most tired drivers—those maximizing driving or on-duty hours—were entitled under the pre-2003 rule. *See* Appendix A-1 to A-2; 70 FR 3347-48.

FMCSA evaluated the 34-hour restart solely from the standpoint of the minimum recovery period drivers need to alleviate fatigue, without regard to their workloads. *E.g.*, 70 FR 49994-95. It continued to embrace its 2000 NPRM finding, 65 FR 25555-56, 25558, that drivers need at least two consecutive nights' sleep, including midnight-6 a.m., to recover from sleep deprivation and cumulative fatigue. 70 FR 50021, 50023; *see also id.* 49995, 50017 (citing Expert Panel's emphasis on need for two-night recovery). However, the 34-hour restart does not guarantee two nights' sleep.

c. 2005 RIA

FMCSA's updated RIA treated the invalidated 2003 rule, "Option 1," as the baseline to which regulatory changes would be compared. FMCSA evaluated Option 2, which became the 2005 rule; Option 3, which barred more than 10 consecutive driving hours, prohibited splitting off-duty periods, and provided a 58-hour restart; and Option 4, which resembled Option 3, but with a 44-hour restart. *Id.* 50045; 2005 RIA 3-4. The RIA concluded that only Option 2 showed net benefits relative to the 2003 rule. 70 FR 50046; 2005 RIA 73.

The 2005 RIA relied on a slightly modified version of the Walter Reed

Sleep and Performance Model (“SPM”) used in the 2003 RIA and criticized by this Court as inapt. 374 F.3d at 1218-19. The “closely related” version, 2005 RIA 49, called the FAST/SAFTE Model, like the SPM, calculates alertness and performance based only on timing and duration of sleep, is indifferent to how waking hours are spent, and excludes time-on-task effects, ignoring risks of longer daily or weekly driving and working hours, except as they affect sleep. 2005 RIA 42, 48-50, 54-55; 70 FR 50045, 50052; 2003 RIA 8-22; 68 FR 22497.

To account for the elevated risk of longer driving hours, FMCSA decided to “err[] on the side of caution” and rely “conservatively” on the TIFA data, 70 FR 49981, 49999-50000, to generate time-on-task (“TOT”) multipliers to apply to the model’s outputs. *Id.* 50012, 50045, 50052. The 2005 RIA was released at the same time as the final rule, and FMCSA provided no opportunity for comment on the legitimacy of altering the sleep-dose model in this manner or the methodology for deriving TOT multipliers. Moreover, the RIA did not use the actual risk increases from the TIFA data, but modified the data to minimize the risk difference between the 10th and 11th hours. 2005 RIA 58-62.

The RIA did not account for cumulative time-on-task effects and disregarded the consequences of fatigue from expanded *weekly* driving hours. However, the RIA assessed the impact of the restart’s additional driving hours on

the industry productivity side, noting that “[b]ecause they limit driving hours and require longer restart periods, the relative productivity loss caused by Options 3 and 4 are substantially greater than that for Option 2 in almost all cases.” *Id.* ES-3, 64.

3. FMCSA’s Health Analysis

FMCSA commissioned the Transportation Research Board (“TRB”) of the National Academy of Sciences to conduct a literature review on driver health. Its findings underscored the grave health risks of longer driving hours, including heightened risks of lung and bladder cancer (from diesel-exhaust exposure), cardiovascular disease, noise-induced hearing loss, and back disorders. TRB 8, 49. FMCSA ignored TRB’s findings, proclaimed the rule “does not have a deleterious effect on the physical condition of drivers,” 70 FR 49981, and wholly disregarded health effects in its cost-benefit analysis. *Id.* 50051.

a. Lung Cancer

Because many trucks have diesel engines, drivers are exposed to diesel exhaust (“DE”). Environmental Protection Agency (“EPA”), *Health Assessment Document for Diesel Engine Exhaust 2-107 (2002) (2004-19608-1995) (“EPA HAD”)*. Elevated DE exposure occurs at freight docks, where drivers spend time fueling and loading/unloading, and within the truck. NIOSH Comments 4 (2005)

(2004-19608-1856) (“2005 NIOSH”). TRB found “numerous articles reporting on an association between lung cancer and work in occupations where there is exposure to [DE] and other combustion particles.” TRB 10. DE is considered a “probable” human carcinogen by EPA, the World Health Organization, the International Agency for Research on Cancer, the U.S. Department of Health and Human Services’ National Toxicology Program, and NIOSH. *Id.*; 70 FR 49984, 2005 NIOSH 3.

After reviewing 22 epidemiologic studies, EPA concluded that “epidemiologic studies of exposure to DE and occurrence of lung cancer furnish evidence that is consistent with a causal association. This association observed in several studies is unlikely to be due to chance or bias.” EPA HAD 7-82. The increased lung cancer relative risks for DE exposure generally ranged from 1.2 to 1.5, and as high as 2.6. *Id.* 7-138. EPA determined “the human evidence for potential carcinogenicity for DE . . . to be strong,” *id.* 7-139, and that “long-term (i.e., chronic) inhalation exposure is likely to pose a lung cancer hazard to humans.” *Id.* ii, 9-11.

Based on “the epidemiologic evidence, as well as supporting data from certain animal and mode of action studies,” EPA adopted a 2001 rule reducing DE from new heavy-duty highway engines and vehicles in 2007 and requiring cleaner

diesel fuel in 2006. 66 FR 5002, 5022 (2001). After reviewing 47 epidemiologic studies, the Mine Safety and Health Administration (“MSHA”) similarly adopted rules reducing miners’ exposure to diesel particulate matter. 66 FR 5706, 5774 (2001); 66 FR 5526, 5582 (2001). MSHA concluded “that long term exposure to [DE] in a variety of occupational circumstances is associated with an increased risk of lung cancer.” 66 FR 5709; 66 FR 5638.

Numerous studies have found significant connections between lung cancer and DE exposure from truck driving. *See* 70 FR 49984, 49986; Bhatia 87 (1998) (2004-19608-2025) (lodged) (relative risk of lung cancer 1.49 for truck drivers);⁷ Lipsett 1013 (1999) (2004-19608-139) (lodged) (relative risk of lung cancer 1.47 for truck drivers); Hansen 814-15 (1993) (2004-19608-138) (lodged) (cohort exceeding 14,000 Danish truckers displayed excess cancer mortality, with a lung-cancer standardized mortality ratio of 160, compared to 100 baseline); Steenland 673 (1990) (2004-19608-2067) (lodged) (Teamsters drivers of primarily diesel trucks had odds ratios of 1.27 to 1.89 for lung cancer); Steenland 227-28 (1998) (2004-19608-2068) (lodged) (truckers had 1-2% lifetime excess lung-cancer risk);

⁷ For many studies in the second rulemaking, FMCSA placed only an abstract into the docket. After protests and after the comment period ended, FMCSA placed the full studies in its reading room. (2004-19608-1964). Copies of those studies cited here will be lodged when the Deferred Appendix is filed.

Brüske-Hohlfeld 410 (1999) (2004-19608-2029) (lodged) (relative risk of lung cancer 1.44 for West German professional drivers); *see also* TRB 13-14, 31.⁸

Notwithstanding its inclination to dismiss epidemiological studies because they “can never prove causation,” 70 FR 49982, FMCSA, like EPA and MSHA, concluded: “Studies show a causal relationship between exposure to DE and lung cancer.” *Id.* 49985, 50036. Nonetheless, FMCSA emphasized that EPA had not concluded definitively that DE is a human carcinogen or “develop[ed] a quantitative dose-response cancer risk.” *Id.* Given the “uncertain effects of exposure to DE,” FMCSA did “not include this factor in any cost/benefit analysis for any regulatory change it wished to consider.” *Id.* 49986. It also cited EPA-projected declines in heavy-vehicle diesel emissions over the next 25 years. *Id.* 49985.

b. Hearing Loss/Back Disorders

FMCSA recognized that “[d]rivers face extended exposure to highway noise that may lead to hearing loss.” 70 FR 3345. But it dismissed concerns that the rule’s longer hours could exacerbate that risk, citing two studies. 70 FR 49987.

Robinson (1997) (2004-19608-2080) (lodged) tested trucks under different driving

⁸ FMCSA contends Brüske-Hohlfeld found a statistically significant risk only for exposures longer than 30 years. 70 FR 49984. That was the finding for farm-tractor drivers, not professional drivers.

conditions and found overall truck-cab noise levels at 89.1 decibels (“dBA”), *id.* 110, which was “loud enough to warrant concern for truck driver hearing loss.” *Id.* 166. That level is close to FMCSA’s 90 dBA limit, 49 C.F.R. § 393.94, and OSHA’s standard (90 dBA limited to 8 hours per day). 29 C.F.R. § 1910.95. One year later, Seshagiri (1998) (2004-19608-100) (lodged) found truck noise levels ranging from 78 to 89 dBA, with a mean of 82.7. Seshagiri 205, 208. Seshagiri found that truck cabs reached noise levels of 86.6 dBA, exceeding the Canadian 85 dBA limit, when the window was open and radio on, *id.* 208, that 10.7% of long-haul drivers experienced noise levels exceeding 90 dBA, and that 32.2% experienced levels above 87 dBA. *Id.* 210.

According to FMCSA, this research “suggests cab noise levels are well within FMCSA’s 90-dBA noise standard” and “have not been shown to exceed OSHA or FMCSA standards.” Therefore, it concluded, “the noise levels in CMVs should not result in significant hearing loss over a lifetime of on-the-job exposure, even if drivers drove the maximum hours allowed by this final rule.” 70 FR 49987.

Regarding back problems, FMCSA focused on whether research shows a causal association between whole body vibration (“WBV”) and lower back pain (“LBP”), rather than on whether, for various reasons (including vibration, long

hours sitting in one position, heavy lifting, etc.), drivers experience an elevated incidence of LBP that increases with longer driving/working hours. *Id.* 49987-88.

For example, FMCSA cited the Teschke (1999) (2004-19608-2001) literature review for the proposition that many risk factors relate to back pain, “mak[ing] it difficult to isolate the effects of WBV, or even to conclude that WBV is the cause of lower back pain,” 70 FR 49988, without mentioning that many of the other risk factors are highly associated with truck driving. *Id.*; Teschke 7-8. In fact, LPB has multiple causes relevant to truck driving, including vibration, lifting, poor posture, or sitting or standing for long periods of time. *E.g.*, Pope 7 (1998) (2004-19608-99) (lodged); Miyamoto 186 (2000) (2004-19608-2049) (lodged). FMCSA also did not acknowledge Teschke’s findings that 39 of 40 studies examining driving and equipment-operating professions found elevated risks of back disorders. Teschke 10.

c. Adverse Effects of Longer Hours

On the health impact of long hours, FMCSA focused on the NIOSH literature review, Caruso (2004) (2004-19608-1856), which FMCSA acknowledged “generally concluded that long work hours appear to be associated with poorer health, increased injury rates, more illnesses, or increased mortality.” 70 FR 49989. FMCSA dismissed NIOSH’s findings, however, claiming “a

significant lack of data on general health effects.” *Id.* 49990. FMCSA also fell back on its assertion that drivers are not working more hours. *Id.* 49992, 50036.

SUMMARY OF ARGUMENT

The 2005 rule suffers from the same shortcomings as the near-identical 2003 rule. Congress required FMCSA to “reduc[e] fatigue-related incidents” involving trucks and “increas[e] driver alertness,” 49 U.S.C. § 31136 note, “consider the assignment and maintenance of safety as the highest priority,” *id.* § 113(b), and “ensure that . . . the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators.” *Id.* § 31136(a)(4). Yet FMCSA sacrificed driver health and public safety for industry productivity; scuttled longstanding policy by increasing maximum consecutive driving hours from 10 to 11; and recklessly adopted a “restart” allowing drivers to reset weekly hours after only 34 hours off-duty, increasing permissible weekly driving hours by 26-28% and weekly on-duty hours by 40%. The record establishes overwhelmingly that such staggering workloads subvert highway safety and imperil drivers’ health. FMCSA misused the scientific and medical record to manufacture uncertainty regarding the safety and health consequences of these longer work/driving hours where no uncertainty exists.

Given its statutory mandates, FMCSA had a heavy burden to show that the

2005 rule, with its dramatically expanded daily and weekly hours, would safeguard public safety and the health of drivers. It did not satisfy that burden, and the rule must be set aside.

STANDARD OF REVIEW

The Court generally reviews a final rule under the Administrative Procedure Act (“APA”) to determine whether it is arbitrary or capricious, an abuse of discretion, or otherwise contrary to law. 5 U.S.C. § 706(2)(A). More exacting review is appropriate here, where FMCSA arrived at a nearly identical result after this Court vacated the 2003 rule. *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006) (citing cases).

ARGUMENT

I. THE 2003/2005 RULE IS CONTRARY TO LAW AND ARBITRARY AND CAPRICIOUS IN INCREASING DAILY AND WEEKLY DRIVING HOURS WITHOUT ESTABLISHING THAT THE INCREASES ARE SAFE.

A. The Contradiction Between FMCSA’s Safety Analysis and Its Cost-Benefit Analysis

FMCSA attempts to evade its obligation to demonstrate that higher driving limits are safe by claiming that drivers cannot “realistically” drive the longer daily and weekly hours permitted by the 2003/2005 rule. 70 FR 50010, 50022, 50039-40. In other words, the new maximums, especially for weekly driving hours, are

so high that FMCSA does not see how truckers can possibly use them.

But many truckers *are* driving those hours, and FMCSA knows it, which is why its disavowals tend to be worded in terms of whether truckers “on average” are driving more hours. *E.g., id.* 49981, 49984, 50022. The importance of this sleight-of-hand is demonstrated by Campbell & Belzer’s oft-cited pre-2003 driver survey. *See supra* p. 5. There, drivers worked an *average* of 64.3 hours per week, Campbell & Belzer 104, but long-haul drivers in the 75th and 90th percentiles *drove 12 and 15 hours daily and worked 80 and 96 hours weekly, respectively. Id.* 104, 107. Even these numbers may be understated because “[d]river noncompliance with federal regulation in this and related areas might be described as the stuff of legend.” *Public Citizen*, 374 F.3d at 1221 n.1.

FMCSA’s RIA, which claims that a more safety-conscious rule will increase industry costs, makes our point: “Were we to look only at the averages shown above for hours of driving and hours and days of work, we might conclude that all drivers work well within the limits imposed by the HOS rules (not allowing for non-compliance). This is, of course, not the case; *many drivers work and drive longer hours than the averages.*” 2005 RIA 18 (emphasis added). For example, 41% of Schneider drivers worked more than 64 hours in 8 days. *Id.* 19 (Exh. 2-10). Indeed, the RIA conceded “that *more than half of for-hire operations, and*

somewhat less than half of private fleet operations, are intensive enough to press the HOS limits, and should therefore be affected by changes in those limits.” Id. 67 (emphasis added); 70 FR 50049.

FMCSA cannot have it both ways, downplaying the significance of longer hours in the preamble to avoid justifying them, while simultaneously playing up the additional hours in the RIA to show huge productivity losses under a 10-hour driving limit and lengthened (or eliminated) weekly restart. According to the RIA, the restart provision, by facilitating additional driving hours and requiring fewer drivers, is the rule’s chief contribution to industry productivity. 2005 RIA ES-3 to ES-4, 1. Likewise, the RIA predicted that, “as the 11th hour of driving becomes more incorporated into normal operations in the future, we believe its use much more likely to increase rather than decrease.” *Id.* 77. Based on survey data, the RIA found “the 11th hour is definitely being used,” *id.* 24, and its analysis assumed usage as high as 55%. *Id.* 68 (Exh. 6-2); 70 FR 50049. FMCSA’s contradictory positions about whether truckers are driving (or will drive) longer hours are not “well-reasoned, logical[,] and consistent,” and are “in short, arbitrary and capricious.” *McDonnell Douglas Corp. v. Dep’t of Air Force*, 375 F.3d 1182, 1191 (D.C. Cir. 2004).

Even assuming counterfactually that few drivers will drive the 11th hour or

use the restart, HOS rules are unacceptable unless the *maximums* they set are safe. In 1995, Congress directed the agency to revise the rules to “reduc[e] fatigue-related incidents and increas[e] driver alertness,” 49 U.S.C. § 31136 note—not to *increase* HOS limits and then pronounce them “largely irrelevant” because not every driver bumps up against them. 70 FR 50005. Moreover, the APA embodies a presumption “*against* changes in current policy that are not justified by the rulemaking record.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); accord *Public Citizen v. Steed*, 733 F.2d 93, 100 (D.C. Cir. 1984). As discussed below, FMCSA did not justify either the 11-hour driving limit or the 34-hour restart.

B. 11 Driving Hours

In 2004, this Court observed that “[t]he exponential increase in crash risk that comes with driving greater numbers of hours . . . raises eyebrows about the agency’s increase of daily driving time.” *Public Citizen*, 374 F.3d at 1219. It doubted FMCSA’s justifications—that a driving increase is offset by a shorter driving window and longer off-duty time between shifts—would survive scrutiny. *Id.* at 1218. In 2005, FMCSA re-issued the 11-hour limit with more ink, but no better rationale.

1. 14-Hour Driving Window. FMCSA continues to rely on the 14-hour driving window in concluding that drivers can safely drive 11 hours, 70 FR 49992-93, 50038, even though its own Expert Panel found (at 21) that “a 14-hour work day is excessive.” *Accord* 2000 NIOSH 3. As before, the 2005 rule “cite[s] absolutely no studies,” 374 F.3d at 1218, showing that a shorter driving window compensates for increased driving hours. Furthermore, as the Court observed, “the effects from the increased *weekly* driving hours may offset any decrease in fatigue flowing from the fact that drivers have shorter over-all tours of duty.” *Id.* (emphasis added).

2. 6.28 Hours’ Sleep. FMCSA attempted to bolster its argument that drivers are so well-rested under the 2003/2005 rule that they can safely drive longer consecutive hours, but still cites *no* research supporting its assumption that increasing off-duty time from 8 to 10 hours compensates for greater fatigue and crash risk from longer driving hours. Indeed, as NIOSH demonstrated, lengthy work hours mean *less* sleep. 2000 NIOSH 3 (“[S]leep amounts progressively decrease over a series of consecutive work shifts longer than the normal 8-hour workday.”) (citing Rosa studies, 1997-2350-822, -823, -824, -22637). Moreover, “[u]p to five consecutive 12/14-hour shifts . . . creates the potential for excessive fatigue even when 8 hours of sleep per day are obtained.” *Id.*

Without evidence that drivers can safely drive 11 consecutive hours even with 10 hours off-duty, FMCSA relied on Hanowski’s preliminary findings that drivers under the 2003 rule averaged 6.28 hours of daily sleep, supposedly 1 hour more than under the pre-2003 rules. 70 FR 49993, 50003. Yet FMCSA admits that “approximately 6 hours of sleep” produces impaired performance and alertness. *Id.* 50015-16. Recognizing that studies “generally found poorer performance levels when sleep is restricted,” FMCSA cited several findings “that even a relatively small reduction in average nighttime sleep duration (*i.e.*, approximately 6 hours of sleep) resulted in measurably decremented performance.” *Id.* 50015. Many drivers do not even receive that more restorative “nighttime” sleep. And FMCSA recognized findings that “an average individual who obtains 6 hours of sleep could demonstrate significantly degraded waking performance and alertness,” *id.*, and that “the negative effects on waking performance and alertness . . . are cumulative and increase over time.” *Id.* 50016; *accord* TRB 144.

Accordingly, FMCSA has declared repeatedly that each driver should have “8 consecutive hours of uninterrupted sleep every day,” 70 FR 3346; 68 FR 22469; 65 FR 25554—what this Court called “the conceded central premise of the HOS regulations.” 374 F.3d at 1219. Nevertheless, FMCSA lowered its sights in

2005 to match the amount of sleep that post-2003 findings showed drivers were *actually* obtaining, selectively choosing varying sleep amounts that supposedly suffice—sometimes 7-8 hours, *e.g.*, 70 FR 49980, 49992, 50015, and sometimes 6-8 hours. *E.g., id.* 49983, 50016. FMCSA ultimately declared that 6.28 hours was “within normal ranges consistent with a healthy lifestyle and is a vast improvement over previous sleep findings.” *Id.* 49983, 49991. It cited *no* research demonstrating that 6.28 hours’ sleep is sufficient to enable truckers to drive safely for 11 hours.

The consequences of a 2-hour sleep loss can be dire. NTSB found truckers in fatigue-related crashes obtained 6.9 hours sleep in the 24 hours before the crash—2.4 hours less than drivers in non-fatigue-related crashes. *Id.* 50015; 1995 NTSB 24, 26, 51 (1997-2350-239). The Walter Reed sleep-dose study found that 7 hours in bed (6.28 hours’ sleep) “resulted in measurably decremented performance” on psychomotor vigilance tests (“PVT”) throughout the 7-day testing period. Balkin ES-8, 5-7 to 5-8 (2000) (1997-2350-2010); *see also* Van Dongen 117, 119-20 (2003) (2004-19608-2072) (lodged) (6 hours’ sleep yielded “significant cumulative, dose-dependent deficits in cognitive performance on all tasks”).

Given evidence that FMCSA is not even achieving its goal of 8 hours’ sleep

(which would not, in any event, support longer driving hours), it is irrational for the agency to add an 11th driving hour.

3. Crash-Risk Studies. FMCSA did not repudiate its finding, emphasized by this Court, that “performance begins to degrade after the 8th hour on duty and increases geometrically during the 10th and 11th hours.” 374 F.3d at 1218 (quoting 68 FR 22471). Instead, citing preliminary 2005 research findings, FMCSA attempted to manufacture uncertainty regarding the risk difference between the 10th and 11th driving hours, 70 FR 49993, 49999, 50011, when overwhelming evidence reveals no such uncertainty and that driving in *either* hour is unsafe.

Two of the three new studies directly contradict FMCSA’s position. The TIFA data (Campbell) and Jovanis showed *steep increases in risk* in the 11th driving hour compared to the 10th and even more when compared to earlier driving hours. The TIFA data (comprising 50,000+ fatal truck crashes, 2005 RIA 44) reflected a sharp risk increase after 8 hours, with the percentage of fatigue-related fatal crashes more than doubling from the 10th to 11th hours. *Id.* 45; *see also* Campbell 12. Crash risk was greatly elevated in *both* hours 10 and 11 compared to early driving hours—with risk in the 10th hour 4.5 times higher and in the 11th hour nearly 10 times higher than driving in the first hour. *Id.*; *see*

supra p. 18. Jovanis, which relied on a large dataset of 231 crashes and 462 controls, “found a pattern of increased crash risk associated with hours driving, particularly in the 9th, 10th, and 11th hours,” Jovanis 2, 4, with risk escalating non-linearly after the 6th hour and the 11th-hour risk three times higher than the 1st hour. *Id.* 7, 9. FMCSA conceded that both studies found substantially higher risk in the 11th driving hour. 70 FR 49997-98, 50010.

Only Hanowski’s 82-driver study found no significant difference between the 10th and 11th driving hours. 70 FR 49997, 50010; Hanowski 9. But that study involved a small sample size and included incomplete 11-hour periods, Hanowski 3, obscuring the distinction between 10- and 11-hour driving shifts. It also provided no information about how the seemingly high numbers of critical incidents in hours 10 and 11 (28 in the 10th hour and 25 in the 11th) compared with levels after fewer hours. *Id.* 4. Thus, Hanowski provides no yardstick for estimating relative risk and, at best, may support only the proposition that crash risk is quite high for drivers in *both* hours.

Research showing elevated crash risks accompanying longer driving hours is nothing new. In 2003, FMCSA correctly concluded that risk rose exponentially after 8 hours of driving. Its 1999 literature review recognized that “[n]umerous studies have documented performance and alertness decrements after periods of

driving far shorter than 13 or even 10 hours.” DOT, *Annotated Literature Review* 12 (1999) (1997-2350-956) (“DOT Literature Review”). Yet in 2005, FMCSA disregarded most research pre-dating the 2003 rule, implicitly abandoning, without “reasoned analysis,” its previous recognition that risk increases sharply after 8 hours’ driving. *Ramaprakash v. FAA*, 346 F.3d 1121, 1124 (D.C. Cir. 2003).

Furthermore, even if FMCSA were right that the research could be called “conflicting” or “inconclusive,” raising driving limits would *still* be indefensible. FMCSA’s mandates to “reduc[e] fatigue-related incidents and increas[e] driver alertness,” 49 U.S.C. § 31136 note, to “consider the assignment and maintenance of safety as the highest priority,” *id.* § 113(b), and to ensure that truckers’ responsibilities “do not impair their ability to operate the vehicles safely,” *id.* § 31136(a)(2), along with the APA presumption against policy changes unjustified by the record, *State Farm*, 463 U.S. at 42-43, require that FMCSA resolve doubts in favor of safety.

C. 34-Hour Restart

In the 2005 rule, FMCSA finally acknowledged the staggering increase in weekly driving and working hours facilitated by the restart, 70 FR 50021; *see also* Public Citizen Comments 11 (600+ more driving hours annually), but did not address whether these additional hours would exacerbate cumulative fatigue or

whether near-abolition of weekly limits would be safe. FMCSA's insistence that the 34-hour restart serves as a "safety net" or "benefit" affording most truckers two nights' recovery sleep each week is nonsense. 70 FR 50023, 50038-39, 50041. The restart provides no benefit to drivers; it simply allows drivers *who have run out of weekly hours* to resume driving *sooner* than under the pre-2003 rule, and it does not provide the two consecutive nights off-duty FMCSA itself determined drivers need to recover from heavy workloads, sleep deprivation, and nightdriving.

1. Cumulative Fatigue. FMCSA's silence regarding the safety of 77/88 driving hours or 84/98 duty hours over 7/8 days is understandable, given the record. The factors likely responsible for increased fatigue on long-haul trips "are longer hours driving, driving at night (circadian component), and longer cumulative work weeks." Campbell 6 (2005) (2004-19608-2116); *see also id.* 1. In 1990, FMCSA conceded that "research has noted a cumulative fatigue effect after several successive days of driving operations." 1990 FHWA 6; *e.g.*, Harris & Mackie ix (1997-2350-272) (finding "cumulative effect" on drivers' alertness "due to several successive days on duty"). The 2000 NPRM cited studies evidencing increased crash risk with long driving times over two or more days per week. 65 FR 25556; *e.g.*, Jovanis 34, 41 (1991) (1997-2350-872); TRB 171 (discussing

Jovanis). Jovanis’s 2005 study likewise found, as FMCSA recognized, “a pattern of increased crash risk associated with hours driving, particularly in . . . *multi-day driving*.” 70 FR 49997-98, 50010 (emphasis added); Jovanis 2, 8 (2005). Yet FMCSA disregarded Jovanis’s latest finding, as well as warnings from its own Expert Panel and NIOSH that an 84-hour work week is excessive. Expert Panel 22; 2000 NIOSH 2; 2005 NIOSH 2 (re-adopting 2000 comments). No evidence supports the safety of such monumental hours for drivers operating heavy machinery carrying 40 tons of freight at highway speeds.

The combination of long weekly and daily hours exacerbates crash risk. One on-the-road study found most instances of “extreme drowsiness” were experienced by single drivers on the second or third shift of a multi-day drive, concluding that “the combination of long driving times and multiple days . . . provide the greatest concern.” Dingus vi, 187 (2002) (1997-2350-23301). NIOSH’s literature review found deteriorating performance in workers when 12-hour shifts were combined with 40+ hour work weeks. Caruso iv, 27 (2004-19608-1856); *see also* 2005 IIHS 5.

The 34-hour restart legalizes practices FMCSA previously found unsafe. The 2000 NPRM noted disapprovingly that 25% of drivers reported working at least 75 hours in the previous 7 days. 65 FR 25558; *see also* PRE 4-5. Yet that

schedule fits easily within the 2003/2005 rule. The huge weekly driving/working increases remain “an important aspect of the problem,” *Public Citizen*, 374 F.3d at 1222, that FMCSA steadfastly and irrationally refuses to address.

2. Need for Two Consecutive Nights Off-Duty. FMCSA cited a few studies to suggest a conflict regarding whether a weekly off-duty period of 34 (or even 24) hours is adequate recovery time, 70 FR 49994-95—none of which addressed recovery periods for truckers driving 77/88 hours or working 84/98 hours every 7/8 days. Again, its effort to generate ambiguity is undermined by countervailing research, as well as by its 1990s assessment that a 24-hour restart had not been shown to be safe. 58 FR 6937, 6938 (1993); *accord* DOT Literature Review 96.

For example, Wylie’s study of truckers in real-world conditions found “no objective evidence of driver recovery of performance” after 36 hours off-duty or even after 48 hours. Wylie vii, 25-26 (1997) (1997-2350-592). FMCSA dismissed these findings, however, because the study involved a “small subject sample” of 25 drivers, 70 FR 49994, 50024, although *all* studies cited by FMCSA regarding the restart involved small samples, with O’Neill 2, 16 (1999) (1997-2350-880) involving only 10 truckers driving simulators. Another crash-data study found that 24 and perhaps 48 hours’ recovery was insufficient. Park 14

(2005) (2004-19608-1998). FMCSA rejected those findings, too, as “not persuasive.” 70 FR 50024. The agency cited Balkin (2000) (1997-2350-2010), 70 FR 49994, to imply that a short recovery period might suffice, yet Balkin found that performance in the 7-hours-in-bed group was consistently reduced across the 7-day study period and that even after *three nights’* recovery sleep, driver performance on the PVT did not return to baseline levels. Balkin 5-7 to 5-8; *accord* Belenky 10 (2003) (2004-19608-2024) (lodged); TRB 144.

Most tellingly, FMCSA cited Smiley & Heslegrave’s comprehensive literature review on weekly recovery periods, 70 FR 50024, but did not disclose the authors’ conclusion—that, “although the available research is sparse, *it is sufficient to raise concerns about a 36-hour reset that would allow drivers to accumulate up to 92 hours on-duty within a seven-day period, particularly for night driving.*” Smiley & Heslegrave vii, 14 (1997) (emphasis added) (1997-2350-593). FMCSA’s own Expert Panel emphasized (at 30-31) that a 36-hour recovery period suffices *only* if it *guarantees* two consecutive nights (including midnight-6 a.m.) off-duty. The 34-hour restart does not.

Despite its effort to sow confusion, FMCSA reaffirmed its pronouncement in the 2000 NPRM, 65 FR 25555-56, 25558, that studies show drivers need two consecutive nights off-duty to recover from cumulative fatigue and sleep debt. 70

FR 50021, 50023; *see also id.* 49995, 50016-17. However, only a driver beginning his 34-hour off-duty period at night would obtain two consecutive nights' sleep. FMCSA claims that 80% of drivers would begin their 34-hour off-duty period at night, *id.* 49995, 50017, 50023, and thus, that the restart would provide a "majority" of drivers two nights of 8 hours' sleep. *Id.* 49980, 49995, 50017, 50021, 50039.

FMCSA's pronouncement that 80% of truckers are daytime drivers rests on a misreading of a driver survey, Campbell & Belzer 115 (2000) (1997-2350-1136). FMCSA stated that "22 percent of CMV drivers work between the hours of [midnight] and 6 a.m.," 70 FR 49990—hence its conclusion that 78-80% of drivers are daytime drivers. *See also id.* 49993, 50017, 50023. *But that is not what that driver survey said.* It actually said that *the average driver* spends nearly 22% of his time driving between midnight and 6 a.m. Campbell & Belzer 115. That could mean that *all* drivers spend 22% of their time driving during those night hours. FMCSA has no support for its assertion that only 20% of truckers drive at night, and the record suggests the actual figure is far higher. *See* McCart xii, 21, 23 (1997) (1997-2350-882) (79.2% of long-distance drivers have driving schedules that include midnight-dawn hours). And even if "only" 20% of drivers drove at night, it would be indefensible to deny them the two nights' recovery

necessary for safe driving.

FMCSA touts the 34-hour restart for other reasons. It claims the restart gives drivers more time at home, 70 FR 50001-02, 50022, even though the restart *shortens* required weekly off-duty time for the hardest-working drivers, Appendix A-1 to A-2, and has no effect on drivers who do not reach their weekly limits early. Remarkably, FMCSA relied primarily on an OOIDA survey in which drivers were asked “Do you get more time at home under the new HOS regs regime?” While 20% said yes, 77% said no. *Id.* 50001, 50025. More telling, the survey neglected to ask whether the 77% who said “no” were getting *less* time at home under the new rule. OOIDA Question 13 (2004-19608-2092). Indeed, FMCSA acknowledged drivers’ complaints about spending 34 hours at truck stops, whereas “[a]t least the old way, a driver could get home for a day or two. This way, the dispatcher can keep a driver out for a long time.” *Id.* 50017.

FMCSA also lauded the restart for allowing truckers to resume work at approximately the same time each day. *Id.* 50024, 50039. In fact, only a driver rotating 14/10 shifts would resume work after 34 hours off at the same time his previous shift began. According to FMCSA itself, drivers are more likely to drive 10-11 hours than to work 14, 2005 RIA 19; drivers rarely work 14-hour shifts, FMCSA Survey 2; and 60% of truckload drivers follow random schedules. 70 FR

50049. Therefore, drivers using a 34-hour restart will not generally resume work at the same time as their previous shift.

D. 2005 RIA

FMCSA relies on its cost-benefit analysis to show that if the 11th hour were eliminated, productivity losses would dwarf benefits, *id.* 49981, 50000, 50012, and that the 34-hour restart is preferable to longer weekly off-duty periods. *Id.* 50046, 50048; 2005 RIA 73.

Congress did not direct FMCSA to increase industry profits, as the 2003 and 2005 rules do, 70 FR 50058, 50064, but to improve highway safety while protecting driver health. The 2003/2005 rule's enormous addition to driver workloads is not without costs, but the 2005 RIA treats them as a non-factor, rigging the cost-benefit balance. Leaving aside the health impact for Part II, *infra*, FMCSA's RIA disregarded entirely the safety consequences of longer weekly driving hours and took account of longer daily driving hours in only a trivial way.

1. This Court criticized FMCSA's reliance on the Walter Reed SPM because it "assume[d], dubiously, that time spent driving is equally fatiguing as time spent resting." *Public Citizen*, 374 F.3d at 1218. "In other words, the model disregarded the effects of 'time on task,'" rendering FMCSA's reliance on it "of questionable value." *Id.* at 1219.

In the 2005 RIA, FMCSA selected the FAST/SAFTE model, which is based on the SPM, 2005 RIA 48-49, and like the SPM, does not account for time-on-task effects. *Id.* 42, 49-50; 70 FR 50045, 50052; 2003 RIA 8-22; 68 FR 22497.

FMCSA then separately generated “TOT multipliers,” allegedly from the TIFA data, to apply to the modified model’s outputs to account for the elevated risk of longer driving hours. 70 FR 50045, 50052. FMCSA did not disclose this new approach in the 2005 NPRM, but waited for the final rule, thereby violating the APA. “[T]echnical studies and data” upon which an agency relies “must be revealed for public evaluation.” *Chamber of Commerce*, 443 F.3d at 899 (citation omitted). An agency may not change methodology without notice and comment. *Id.* at 900; *see also Air Transport Ass’n v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999); *Sierra Club v. Costle*, 657 F.2d 298, 334 (D.C. Cir. 1981).

Moreover, the RIA announced that eliminating the 11th hour of driving would cost industry \$586 million per year. 2005 RIA 74. That figure is unexplained, as best counsel can discern. Because the agency did not reveal the data on which it based this figure for “public evaluation,” *Chamber of Commerce*, 443 F.3d at 899, the cost-benefit analysis of eliminating the 11th hour must fail.

Because the public had no opportunity to refute either the 2005 RIA’s methodology in using TOT multipliers or its cost estimate for eliminating the 11th

hour, the Court should refuse to consider the RIA. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 541 (D.C. Cir. 1983).

2. The 2005 RIA's data manipulation cried out for public examination. First, in using the FAST/SAFTE model, FMCSA continued to rely on a model that ignored the "exact effect that the agency attempted to use it to justify." 374 F.3d at 1219; *see also United States Air Tour Ass'n v. FAA*, 298 F.3d 997, 1018 (D.C. Cir. 2002). The agency provides no basis for its attempt to save its inapposite model by jury-rigging TOT multipliers to raise the risks the model generates. FMCSA furnishes no reason to assume that a valid modification can be constructed simply by applying risks derived from a single crash dataset to outputs from the FAST/SAFTE model, which measures only sleep restriction, *not* the effects of longer daily and weekly driving.

Second, FMCSA's TOT multipliers are worthless and its methodology conclusory and misleading. FMCSA claimed that it would "err[] on the side of caution" and use the TIFA data to develop the most "conservative estimates" of crash risk. 70 FR 49981; *see also id.* 49999-50000. Although FMCSA contends its TOT multipliers were based on TIFA data, *id.* 50012, 50045, 50052, they were not. Instead, FMCSA altered the data to generate relatively small increases for longer driving hours and a trivial risk difference between the 10th and 11th hours.

2005 RIA 59-61.

As described above, *supra* p. 18, TIFA data showed that the risk of fatal-crash involvement *more than doubled* from the 10th hour to the 11th (9.6% versus 4.4%). *Id.* 45. The RIA’s TOT crash-risk multiplier for the 11th hour was 2.46—*only 30% higher* than the 1.89 multiplier for the 10th hour. 2005 RIA 61 (Exh. 5-14). The RIA achieved this substantial lowering of the 11th-hour risk increase through two poorly explained maneuvers.

FMCSA’s first move was to derive a curve and corresponding cubic polynomial equation, *id.* 59, from the TIFA percentage risk datapoints shown at RIA 45. Campbell had combined fatal crashes that occurred after drivers drove 13 or more hours into a “13+” hours category. *Id.*; Campbell 12. Without explanation, the RIA graphed that last datapoint at nearly 17 hours driving, which significantly flattened the curve’s shape, altering the equation and lowering the 11th-hour risk. RIA 59 (Exh. 5-12). The actual risk at 11 hours from the TIFA data is plotted noticeably above the curve, leading FMCSA to declare, without justification, that “the 11th hour may be an outlier.” *Id.*

There is no credible explanation for FMCSA’s choice to derive an artificial curve *approximating* the TIFA data rather than relying on the actual data. The effect of plotting the last datapoint at 17 hours is illustrated by comparing the

curve at RIA 59 with a hypothetical curve created the same way, but with the last datapoint plotted at 13 hours. *See* Appendix A-3. The actual TIFA risk at 11 hours nearly fits the new curve, demonstrating the manipulability of FMCSA’s statistical technique.

The RIA then took the hourly risk numbers generated by the equation and computed a risk increase “relative to average driving hours.” 2005 RIA 61 (Exh. 5-14). In other words, “driving in the 11th hour entails a fatigue-related crash risk that is about 2.5 times as great as the average *for the entire 11 hour trip.*” *Id.* 76 (emphasis added). No justification for comparing the risk increase at 11 hours to the average risk over the entire 11-hour trip is offered, but the effect is to diminish the increase by dividing the heightened risk at the 11th hour by an average that *includes* that heightened 11th-hour risk.

These maneuvers diminished the 10-to-11-hour risk increase to a small fraction of its original TIFA size and shrank the risk increases at 8 or more hours. In hour 8, when FMCSA admits crash risk is elevated, the RIA used a trivial multiplier of 1.09—as if there were no safety downside to driving for 8 hours, *id.* 61 (Exh. 5-14)—proof alone of the misleading nature of FMCSA’s TOT multipliers. This Court should accord no deference to a “scientific model” that does not bear a “rational relationship to the characteristics of the data to which it is

applied,” *City of Waukesha v. EPA*, 320 F.3d 228, 248 (D.C. Cir. 2003) (citations omitted); *accord Costle*, 657 F.2d at 333, or is “so oversimplified that the agency’s conclusions from it are unreasonable.” *Small Refiner*, 705 F.2d at 535.

The 2005 RIA applied the multipliers to crash risk outputs from the FAST/SAFTE model and “calibrated” them against the “base case”—its assumption in the 2003 RIA that, under the 2003 rule, 7% of truck crashes would be fatigue-related, a reduction from the purported 8.15% fatigue level of the pre-2003 rules. 2005 RIA 43, 61-62; 70 FR 50052; 2003 RIA 8-30 to 8-33. Yet FMCSA derived the 7% figure in the 2003 RIA using the model the Court criticized for assuming away time-on-task effects. 374 F.3d at 1218-19.

3. The RIA also ignored cumulative fatigue from increased weekly driving and working hours allowed by the 34-hour restart. TIFA data contains no information, such as hours worked in the past week, to assess cumulative fatigue’s role in fatal crashes, 2005 RIA 44; Campbell 1, 6. The RIA’s comparison of the 34-, 44-, and 58-hour restarts was not based on how many more weekly *driving* hours they facilitated, but solely on the amount and timing of sleep. 2005 RIA 49-50, 54-55. Yet, as the Court observed for time-on-task effects, “the model’s assumption” that cumulative fatigue effects “are nil is implausible,” and FMCSA has no justification “for *disregarding* the effect entirely.” 374 F.3d at 1219.

II. THE 2003/2005 RULE IS CONTRARY TO LAW AND ARBITRARY AND CAPRICIOUS IN FAILING TO “ENSURE” PROTECTION OF DRIVERS’ HEALTH.

MCSA requires that FMCSA regulations “[a]t a minimum . . . shall ensure that . . . the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators.” 49 U.S.C. § 31136(a)(4).

Merriam-Webster’s Dictionary defines “ensure” as “to make sure, certain, or safe: GUARANTEE.” www.m-w.com/dictionary/ensure. The agency must also “consider, to the extent practicable and consistent with the purposes of this chapter—costs and benefits.” 49 U.S.C. § 31136(c)(2); *see also id.* § 31502(d).

In adopting a rule that substantially increases maximum allowable daily and weekly driving and on-duty hours—without even *estimating* the health costs associated with those increases—FMCSA failed to satisfy either statutory directive, rendering the 2003/2005 rule contrary to law and arbitrary and capricious. *See Nextwave Personal Communications, Inc. v. FCC*, 254 F.3d 130, 149 (D.C. Cir. 2001); *Motor Vehicle Mfrs. Ass’n v. Ruckelshaus*, 719 F.2d 1159, 1164 (D.C. Cir. 1983).

FMCSA commissioned TRB to review literature relating to trucker health issues. TRB found that—

Lung cancer is likely caused by exposure to [DE] and the longer that exposure lasts the more likely it is that a cancer will develop. Though the evidence linking this exposure to bladder cancer is less robust than that to lung cancer, it remains likely that there is such a relationship and that it is governed by a positive dose-response curve.

There is some evidence that cardiovascular disease is caused in part by truck driving and its risk increases with the duration of this activity and the disruption of the sleep cycle.

Based on exposure assessments, noise-induced hearing loss could well be a result of a working lifetime as a driver. . . .

. . . . There are several studies available . . . that contain objective evidence of vertebral pathology related to an occupation as a professional driver. In conclusion, the available data support the hypothesis that there is likely a causative relationship between professional driving and a variety of vertebral disorders as well as LBP [lower back pain] syndrome.

TRB 8, 49. While praising the “nationally known health and fatigue experts” who performed the literature review, 70 FR 50036, FMCSA never mentions TRB’s findings. Although the 2003/2005 rule increases drivers’ exposure to various health hazards by allowing them to drive/work far more hours than under the pre-2003 rule, FMCSA concludes that the rule “does not have a deleterious effect on the physical condition of drivers.” *Id.* 49981. The agency’s determination fails to satisfy MCSA’s mandate, is contrary to a massive body of scientific/medical research, and, given TRB’s findings, “is so implausible” that it cannot “be ascribed to a difference in view or the product of agency expertise.” *State Farm*, 463 U.S.

at 43.

A. Lung Cancer

TRB found numerous studies reporting significant associations between lung cancer and DE exposure from truck driving. TRB 10; *see supra* pp. 23-26. The extensive epidemiological evidence impelled both EPA and MSHA to reduce DE exposures. 66 FR 5002 (2001); 66 FR 5706 (2001); 66 FR 5526 (2001). FMCSA, too, concluded that “[s]tudies show a causal relationship between exposure to DE and lung cancer.” 70 FR 49985, 50036.

But instead of seriously considering whether longer driving and working hours would increase truckers’ lung-cancer risk, FMCSA cited EPA’s failure to “develop a quantitative dose-response cancer risk,” *id.* 49985, and claimed FMCSA “could not include this factor in any cost/benefit analysis for any regulatory change it wished to consider.” *Id.* 49986.

Although EPA could not confidently estimate cancer-unit risk, it relied on “numerous epidemiologic studies” to select a relative risk of 1.4 as a reasonable estimate. EPA HAD 8-11, 8-13, 9-22. “This risk means that the workers faced an extra risk 40% higher than the 5% background lifetime lung cancer risk in the U.S. population” and that “DE-exposed workers would have an excess risk of 2% . . . (i.e., to develop lung cancer) due to occupational exposure to DE.” *Id.* 8-14.

Despite lacking a dose-response curve, EPA managed to conduct a comprehensive cost-benefit analysis for its regulation. 66 FR 5105-08.

FMCSA noted that the 1990 and 1998 Steenland studies (2004-19608-2067, -2068) (lodged)—among “the best works to date on DE, lung cancer, and truck driving,” 70 FR 49986—predicted that the truck drivers studied would have a lifetime *excess* risk of lung cancer of 1-2%. Instead of grasping the magnitude of that risk, FMCSA noted that “[t]he difference between 1 percent and 2 percent is obviously quite large,” but that without a dose/response curve, “greater precision [is] impossible.” *Id.* Even a 1% lifetime excess risk for lung cancer is *10 times greater* than the 1/1,000 excess risk that generally triggers regulation by the Occupational Safety and Health Administration (“OSHA”). Steenland 227 (1998); *e.g.*, 65 FR 68262, 68269 (2000) (OSHA rule, citing *Industrial Union Dep’t v. American Petroleum Inst.*, 448 U.S. 607 (1980)).

Unlike OSHA’s statute discussed in *Industrial Union*, 448 U.S. at 655, FMCSA’s organic statute has no “significant risk” threshold activating its protective obligations. MCSA requires FMCSA to “*ensure*”—or guarantee—that its rules have no “deleterious effect” on driver health. “[T]he human evidence for potential carcinogenicity for DE is . . . strong.” EPA HAD 7-139. “Where the harm envisaged is cancer, courts have recognized the need for action based upon

lower standards of proof than otherwise applicable.” *Environmental Defense Fund v. EPA*, 598 F.2d 62, 88 (D.C. Cir. 1978). In any event, if FMCSA has doubts about whether a rule adversely affects driver health, MCSA’s mandate compels the agency to stay its hand.

Without even discussing TRB’s finding that “[l]ung cancer is likely caused by DE exposure and the longer the exposure lasts the more likely it is that a cancer will develop,” TRB 8, 49, 123, FMCSA dismissed out-of-hand the possibility of reducing drivers’ DE exposure by curtailing driving and on-duty time. 70 FR 49986. Because “there is no dose-response curve for DE,” FMCSA “could not be sure that a given reduction would produce a clear benefit.” Besides, FMCSA stated that no limit was necessary, given that drivers supposedly are not driving more under the 2003/2005 rule. *Id.*

FMCSA’s contradictory stance regarding whether drivers are *actually* driving the hours permitted by the rule is addressed above. Moreover, as the Court observed for longer driving hours, uncertainty about the magnitude of drivers’ elevated DE exposure risk is no justification for disregarding the effect entirely. 374 F.3d at 1219.

Finally, FMCSA hides behind EPA’s new standards, which are projected to lower pollutant emissions over the long-term, despite increased diesel use. 70 FR

49985. But EPA’s projections are for overall mobile-source emissions, *not* exposure levels for occupationally-exposed workers, such as truckers. As EPA itself explained: “[D]ifferent population subgroups could potentially receive higher or lower exposure to DE. The highest exposed are clearly occupational subgroups whose job brings them very close to DE sources, *such as diesel engine vehicle drivers . . .*” EPA HAD 9-26 (emphasis added). Moreover, emission reductions will be gradual, *see* 66 FR 5105 (benefits from emission reductions lower before 2030 “because the compliant heavy-duty fleet will not be fully phased in”), whereas the 2003/2005 rule permits truckers to drive 600 more hours annually *now*. Public Citizen Comments 11. FMCSA has no support for assuming that the EPA rule will significantly diminish drivers’ lung-cancer risk from DE exposure in the near-term.

B. Hearing Loss/Back Disorders

FMCSA’s treatment of driver hearing loss and back disorders was particularly egregious. The agency cited 1997 and 1998 studies showing that truckers’ exposure to noise levels approached (and sometimes exceeded) the FMCSA/OSHA 90-dBA limits. 70 FR 49987; *see supra* pp. 26-27. It cited ATA’s claim that modern trucks produce lower noise levels, but no independent research or other evidence supporting it. 70 FR 49987. According to FMCSA,

truck noise levels “should not result in significant hearing loss over a lifetime of on-the-job exposure, even if drivers drove the maximum hours allowed by this final rule” because “the noise levels documented have not been shown to exceed OSHA or FMCSA standards.” *Id.* That assertion is incorrect, given that Seshagiri found 10.7% of long-haul drivers were exposed to noise levels exceeding 90 dBA. Seshagiri 210 (1998) (2004-19608-100) (lodged); *see also* TRB 25.

In any event, FMCSA provides no basis for contending that noise levels as high as 89 dBA (and even higher), to which drivers may be exposed for *well over 8 hours*, do not endanger truckers’ hearing. It overlooked that OSHA’s regulation (which does not govern truckers) mandates a hearing conservation program, including monitoring and other protections, for workers exposed to 85 dBA for eight hours. 29 C.F.R. § 1910.95(c). FMCSA ignored TRB’s citation to the American College of Occupational and Environmental Medicine’s 2002 statement that “the risk of noise-induced hearing loss is considered to increase significantly with chronic exposures above 85 dBA for an 8-hr. time-weighted average (TWA),” TRB 11, and similar assessments. *E.g.*, National Institutes of Health Consensus Development Conference Statement (1990) (85 dBA for 8 hours per day produces permanent hearing loss), <http://consensus.nih.gov/1990/1990NoiseHearingLoss076html.htm>. FMCSA did not mention TRB’s findings

that “[b]ased on exposure assessments, noise-induced hearing loss could well be a result of a working lifetime as a driver,” TRB 8, and “[a]dditional hours on the job will affect the long-term hearing acuity of drivers.” *Id.* 25.

FMCSA’s treatment of truckers’ serious back disorders, especially LBP, was nearly as cavalier. In 2004, drivers suffered the third highest total musculoskeletal disorders among U.S. workers. *See supra* p. 4. FMCSA sidestepped the problem by debating whether WBV alone causes drivers’ back problems.

Compelling evidence links WBV to truckers’ back disorders. AHAS cited extensive research documenting the effects of occupational WBV, AHAS Comments 22 & nn. 37-39 (2005) (2004-19608-1745) (“2005 AHAS”), including NIOSH’s 590-page review assessing WBV’s deleterious effects, as well as harm from other work, including lifting. That NIOSH study, ignored by FMCSA, contained findings directly applicable to truckers, concluding that “[t]here is strong evidence of a positive association between exposure to WBV and back disorder.” Bernard, *Musculoskeletal Disorders and Workplace Factors* 6-33 (1997), www.cdc.gov/niosh/pdfs/97-141.pdf. Yet FMCSA’s “best judgment” was that “WBV does not pose a significant health risk to CMV drivers.” 70 FR 49988.

FMCSA relied on Teschke’s 1999 literature review in observing that back

pain has many risk factors, “mak[ing] it difficult to isolate the effects of WBV, or even to conclude that WBV is the cause of lower back pain.” *Id.* But many of the factors cited by Teschke 7-8 (2004-19608-2001) (*e.g.*, working postures, repeated lifting and heavy labor, previous back pain, stress-related factors including job satisfaction and control, body condition, and weight) *are highly associated with truck driving.*

FMCSA’s driver health mandate is implicated whether driver back problems are caused by WBV, sitting in one position for a long time, loading/unloading, or some combination. *E.g.*, Pope 7 (1998) (2004-19608-99) (lodged) (discussing LBP’s multiple causes); Miyamoto 186 (2000) (2004-19608-2049) (lodged) (same). Tellingly, FMCSA disregarded Teschke’s findings that 39 of 40 studies on driving and equipment-operating professions found elevated risks of back disorders; in 12 of the 13 best-designed studies, relative risk exceeded 2.0. Teschke 10. FMCSA noted that studies found that truck vibration approached the International Standards Organization (“ISO”) risk threshold, but “did not consistently exceed the threshold.” 70 FR 49988. Teschke’s “thorough review,” *id.*, found, however, that 22 of 25 studies observed vibration levels exceeding the ISO 8-hour standard, and only 7 reported average levels for individual vehicles below the standard. Teschke 14.

Although some evidence on drivers' back disorders comes from questionnaire studies, 70 FR 49988, TRB observed that research contained "objective evidence of vertebral pathology related to an occupation as a professional driver" and that "available data support the hypothesis that there is likely a causative relationship between professional driving and a variety of vertebral disorders as well as LBP syndrome." TRB 8. A NIOSH study reported severe lower back injury rates highest among operators working more than 50 hours per week, with injury rates elevated 12% and severe injury rates 39%, for every 10-hour increase in weekly driving. Krause 570, 577, 579 (2004) (2004-19608-1856). Thus, longer driving hours produce more frequent and more severe back problems.

C. Adverse Effects of Longer Work Hours

FMCSA mostly ignored the "peer-reviewed research [that] suggests potential *long-term* health effects associated with repeated periods of extended duty" recognized by NIOSH. 2005 NIOSH 2. FMCSA discussed little of this vast body of scientific literature, *see* 2005 AHAS 21, 24-33; AHAS Comments 21-28 (1997) (1997-2350-499); Belzer 21-25 (2002) (2004-19608-79), despite its previous recognition that findings from shiftwork research apply to truck driving. DOT Literature Review 108 (1997-2350-956).

The research FMCSA did acknowledge should have set off alarms. FMCSA cited a finding that weekly work time exceeding 60 hours increased two-fold the risk of acute myocardial infarction (“AMI”). 70 FR 49989; Liu 447, 449 (2004) (2004-19608-2047) (lodged).⁹ FMCSA also cited a study finding a reported elevated need for recovery among employees working 9-10 hours/day, 40+ hours/week, or frequent overtime. 70 FR 49989; Jansen 670-78 (2003) (2004-19608-2044) (lodged).

But FMCSA ignored the import of these studies, moving on to the NIOSH literature review, Caruso (2004) (2004-19608-1856), which it found “[p]articularly useful.” 70 FR 49989. As FMCSA acknowledged, NIOSH’s review “generally concluded that long work hours appear to be associated with poorer health, increased injury rates, more illnesses, or increased mortality.” *Id.*

NIOSH found that individuals working long hours generally have greater risk of unhealthy weight gain, increased alcohol use, increased smoking, increased health complaints, increased injuries while working, poorer neuropsychological performance, reduced vigilance on task measures, reduced cognitive function, reduced overall job performance, slower work, and decreased alertness and increased fatigue, *particularly in the 9th to 12th hours of work.*

Id. (emphasis added). NIOSH—unlike FMCSA—also addressed the *combined*

⁹ Similarly, though not mentioned by FMCSA, TRB (at 24) cited Sokejima (1998), which found elevated AMI risk with daily work exceeding 11 hours.

effects of long daily and weekly hours, finding “[a] pattern of deteriorating performance on psychophysiological tests as well as injuries while working long hours . . . observed across study findings, *particularly with very long shifts and when 12-hour shifts combined with more than 40 hours of work a week.*” Caruso iv, 27 (emphasis added). In 16 of 22 studies, NIOSH found that “overtime was associated with poorer perceived general health, increased injury rates, more illnesses, or increased mortality.” *Id.*

FMCSA mischaracterized NIOSH’s findings, however. Seizing on NIOSH’s recognition that definitive statements about 8- versus 12-hour shifts were difficult because of work schedule differences, *id.*, and that additional questions remain about work-factor interactions, *id.* 30, FMCSA dismissed NIOSH’s review as “document[ing] a significant lack of data on general health effects.” 70 FR 49990. FMCSA added that research “does not show conclusively that long hours *alone* adversely affect worker health,” *id.* (emphasis added), and denied that drivers are actually working longer. *Id.* 49992, 50036. Yet again, FMCSA used research uncertainties—which usually exist—as an excuse to dismiss strong evidence that longer work hours lead to increased injuries and illnesses, when there is no room for serious debate over the matter.

FMCSA’s claim that the rule does not increase driving hours has been

refuted above. Its facile assertion that research is not conclusive that long hours *alone* adversely affect health is not only incorrect, but a non sequitur. Truckers do not suffer adverse health effects from long hours “alone,” but in conjunction with sleep deprivation, irregular schedules, and nightwork. Sleep loss, FMCSA recognized, “has been shown to have detrimental impacts on the overall health of humans.” *Id.* 49982-83 (citing various serious medical conditions); 70 FR 3344.

Many truckers are sleep-deprived not only because of intense work schedules, but because of nightdriving. FMCSA acknowledged that some truckers drive at night, but pronounced the rule “shift-neutral” with regard to driving during day or night. 70 FR 49991. But drivers maximizing driving operate on backward-rotating 21-hour schedules that promote nightdriving, and regardless, long work hours, together with irregular schedules and nightwork, exacerbate driver health problems. For example, citing “a thorough review of the literature on shift work and health,” FMCSA noted that “gastrointestinal, CVD [cardiovascular disease], and reproductive dysfunctions are more common in shift workers and that these effects may be due to rotating or fixed shifts, number of nights worked consecutively, predictability of schedule, and length of shift and starting time.” *Id.* (citing Scott (2000) (2004-19608-2062) (lodged)). These findings are consistent with TRB’s observations—again, ignored by FMCSA—that “[t]here is

some evidence that cardiovascular disease is caused in part by truck driving and its risk increases with the duration of this activity and the disruption of the sleep cycle” and that available research “documents an increase in [gastrointestinal] symptoms in drivers.” TRB 8.¹⁰

In sum, FMCSA’s “best judgment [that] there is *no evidence* that the number of work hours allowed by the HOS regulation . . . will have any negative impact on driver health,” 70 FR 49990 (emphasis added), is arbitrary and “runs counter to the evidence before the agency.” *Chemical Mfrs. Ass’n v. EPA*, 217 F.3d 861, 866 (D.C. Cir. 2000) (citation omitted).

* * *

In light of its statutory obligation to *ensure* that its rules do not have a deleterious effect on the physical condition of truck drivers, FMCSA does not have the option of turning a blind eye to the overwhelming body of medical and scientific research demonstrating that increasing legal weekly driving hours by 26-28% and work hours by 40% will be devastating to drivers’ health, while it “awaits the Godot of scientific certainty.” *Public Citizen Health Research Group v. Chao*, 314 F.3d 143, 156 (3d Cir. 2002) (citation omitted). FMCSA’s failure

¹⁰ Regarding increased gastrointestinal disorders with longer shifts and night shifts, see, *e.g.*, Rosa 114 (1991) (1997-2350-824); Rosa 1187 (1993) (1997-2350-822); Rutenfranz 335 (1976) (1997-2350-783).

“to take account of this statutory limitation on [its] authority” violates the APA.
United Mine Workers of America v. Dole, 870 F.2d 662, 673 (D.C. Cir. 1989).

CONCLUSION

The Court should vacate the rule and remand.

Dated: June 26, 2006

Respectfully submitted,

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

RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the foregoing Initial Brief for Petitioners 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 typeface, Times New Roman. As calculated by my word processing software (WordPerfect), the Brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and the D.C. Circuit Rules) contains 13,977 words.

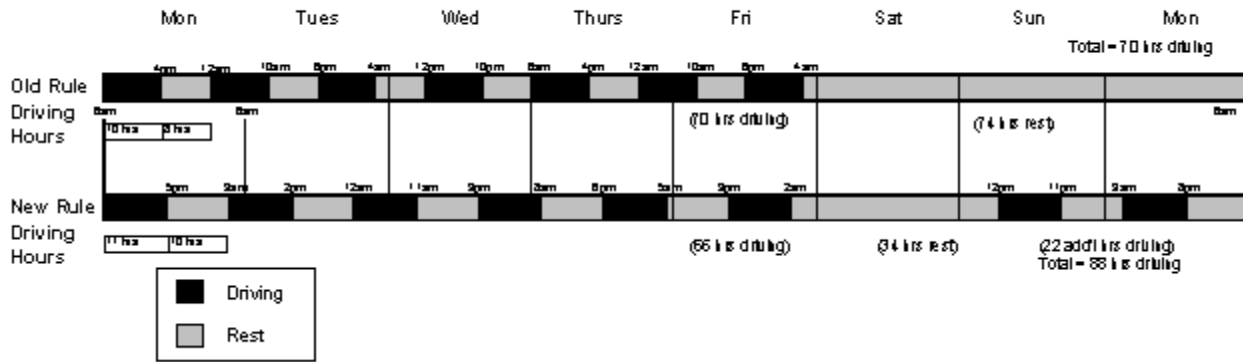
Bonnie I. Robin-Vergeer

APPENDIX A

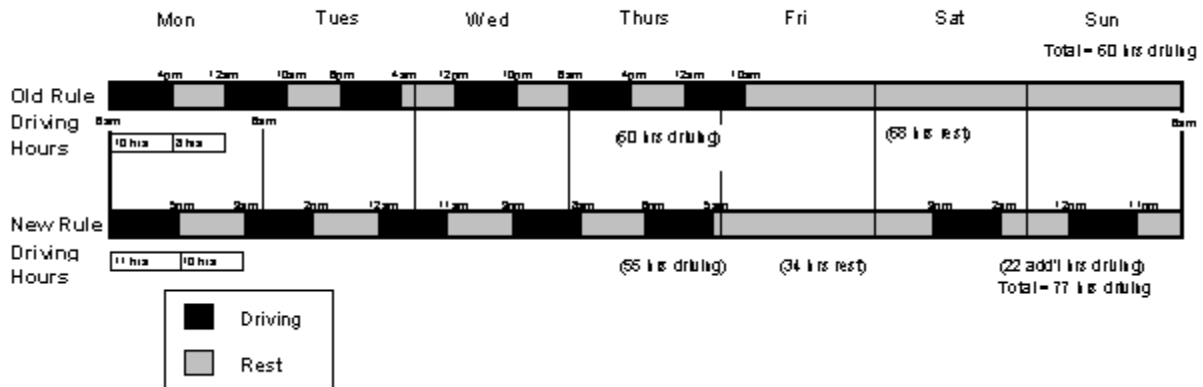
GRAPHS

Weekly Driving Hours With the 34-Hour Restart

Comparison Between Pre-2003 Rule and Final Rule for 70-Hours-in-8-Days Driving Schedule

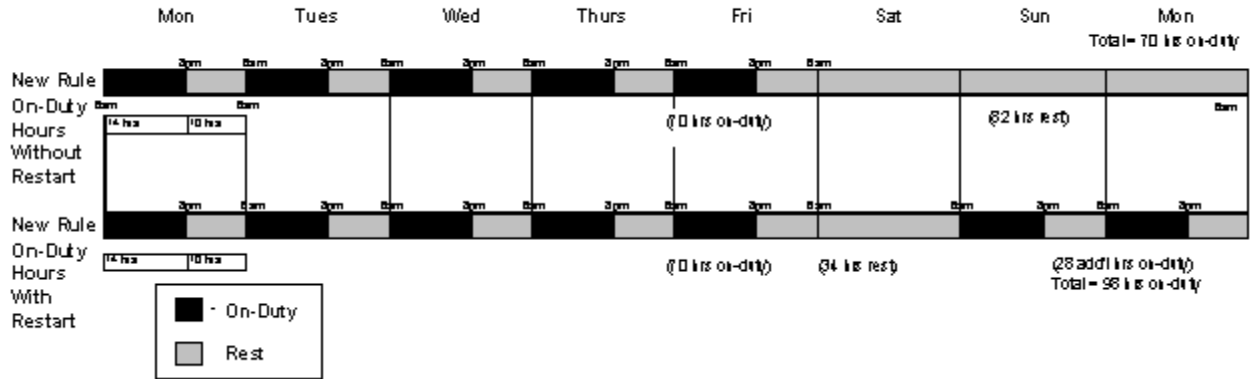


Comparison Between Pre-2003 Rule and Final Rule for 60-Hours-in-7-Days Driving Schedule

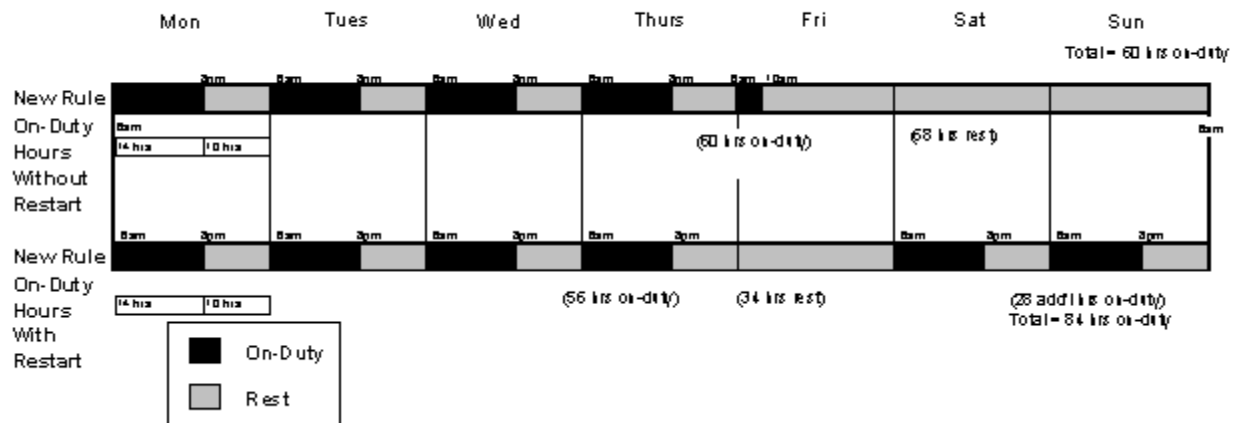


Weekly On-Duty Hours With the 34-Hour Restart

Comparison Between Final Rule With and Without 34-Hour Restart for Working Hours for 70-Hours-in-8-Days Schedule

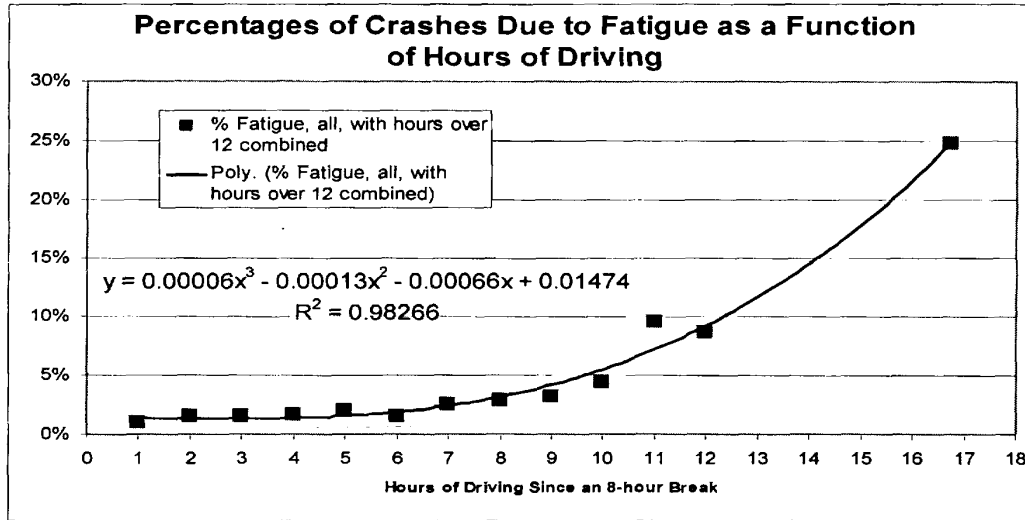


Comparison Between Final Rule With and Without 34-Hour Restart for Working Hours for 60-Hours-in-7-Days Schedule



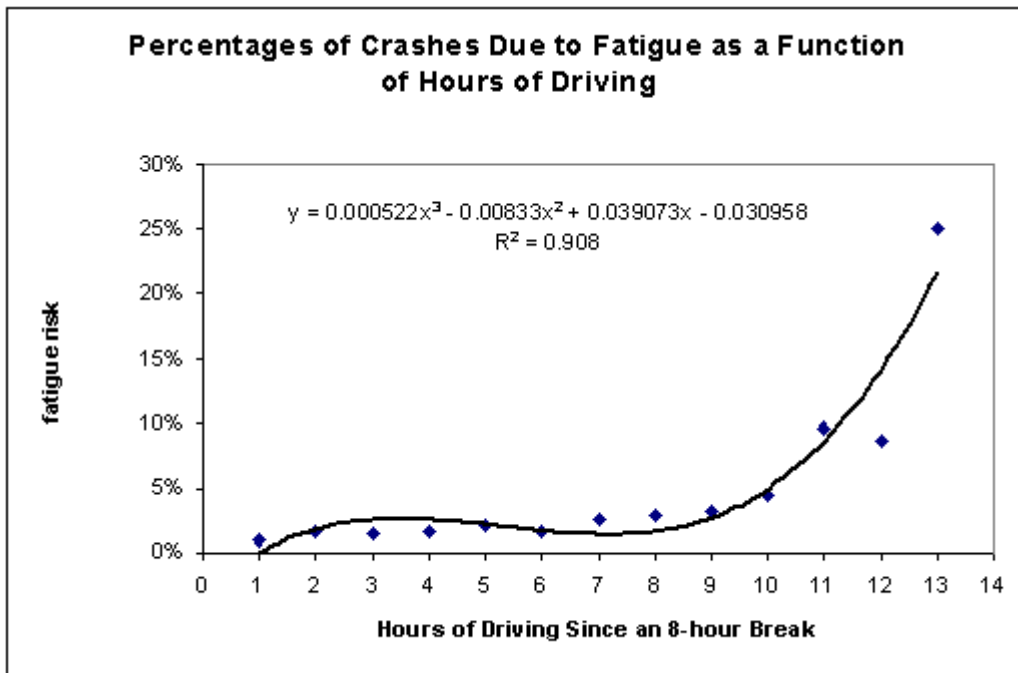
Comparison Between the Curve Used in the Regulatory Impact Analysis And an Alternative Curve

Exhibit 5-12
Crash Risk as a Function of Hours of Driving



Regulatory Impact Analysis, p. 59

Alternative Curve



APPENDIX B

STATUTES AND REGULATIONS

STATUTES AND REGULATIONS

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ICC Termination Act of 1995, Pub. L. 104-88, § 408, 109 Stat. 803, 958-59 (49 U.S.C. § 31136 note), provides:

(a) **ADVANCE NOTICE.**—The Federal Highway Administration shall issue an advance notice of proposed rulemaking dealing with a variety of fatigue-related issues pertaining to commercial motor vehicle motor vehicle safety (including 8 hours of continuous sleep after 10 hours of driving, loading and unloading operations, automated and tamper-proof recording devices, rest and recovery cycles, fatigue and stress in longer combination vehicles, fitness for duty, and other Appropriate regulatory and enforcement countermeasures for reducing fatigue-related incidents and increasing driver alertness) not later than March 1, 1996.

(b) **RULEMAKING.**—The Federal Highway Administration shall issue a notice of proposed rulemaking dealing with such issues within 1 year after issuance of the advance notice under subsection (a) is published and shall issue a final rule dealing with those issues within 2 years after the last day of such 1-year period.

Motor Carrier Safety Improvement Act of 1999, Pub. L. 106-159, § 3, 113 Stat. 1748 (1999) (42 U.S.C. § 113 note), provides:

Congress makes the following findings:

(1) The current rate, number, and severity of crashes involving motor carriers in the United States are unacceptable.

(2) The number of Federal and State commercial motor vehicle and operator inspections is insufficient and civil penalties for violators must be utilized to deter future violations.

(3) The Department of Transportation is failing to meet statutorily mandated deadlines for completing rulemaking proceedings on motor carrier safety and, in some significant safety rulemaking proceedings, including driver hours-of-service regulations, extensive periods have elapsed without progress toward resolution or implementation.

(4) Too few motor carriers undergo compliance reviews and the Department's data bases and information systems require substantial improvement to enhance the Department's ability to target inspection and enforcement resources toward the most serious safety problems and to improve States' ability to keep dangerous drivers off the roads.

(5) Additional safety inspectors and inspection facilities are needed in international border areas to ensure that commercial motor vehicles, drivers, and carriers comply with United States safety standards.

(6) The Department should rigorously avoid conflicts of interest in federally funded research.

(7) Meaningful measures to improve safety must be implemented expeditiously to prevent increases in motor carrier crashes, injuries, and fatalities.

(8) Proper use of Federal resources is essential to the Department's ability to improve its research, rulemaking, oversight, and enforcement activities related to commercial motor vehicles, operators, and carriers.

Motor Carrier Safety Improvement Act of 1999, Pub. L. 106-159, § 4, 113 Stat. 1748, (1999) (42 U.S.C. § 113 note), provides:

The purposes of this Act are—

(1) to improve the administration of the Federal motor carrier safety program and to establish a Federal Motor Carrier Safety Administration in the Department of Transportation; and

(2) to reduce the number and severity of large-truck involved crashes through more commercial motor vehicle and operator inspections and motor carrier compliance reviews, stronger enforcement measures against violators, expedited completion of rulemaking proceedings, scientifically sound research, and effective commercial driver's license testing, recordkeeping and sanctions.

49 U.S.C. § 113 (Motor Carrier Safety Improvement Act of 1999, Pub. L. 106-159, § 101, 113 Stat. 1748 (1999)), provides in relevant part:

(a) IN GENERAL.—The Federal Motor Carrier Safety Administration shall be an administration of the Department of Transportation.

(b) SAFETY AS HIGHEST PRIORITY.—In carrying out its duties, the Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation.

* * *

(f) POWERS AND DUTIES.—The Administrator shall carry out—

(1) duties and powers related to motor carriers or motor carrier safety vested in the Secretary by chapters 5, 51, 55, 57, 59, 133 through 149, 311, 313, 315, and 317 and by section 18 of the Noise Control Act of 1972 (42 U.S.C. 4917; 86 Stat. 1249–1250); except as otherwise delegated by the Secretary to any agency of the Department of Transportation other than the Federal Highway Administration, as of October 8, 1999; and

(2) additional duties and powers prescribed by the Secretary.

(g) LIMITATION ON TRANSFER OF POWERS AND DUTIES.—A duty or power specified in subsection (f)(1) may only be transferred to another part of the Department when specifically provided by law.

* * *

49 U.S.C. § 31131 (Motor Carrier Safety Act of 1984, Pub. L. 98-554, §§ 202-203, 98 Stat. 2832 (1984)), provides:

(a) **PURPOSES.**—The purposes of this subchapter are—

- (1) to promote the safe operation of commercial motor vehicles;
- (2) to minimize dangers to the health of operators of commercial motor vehicles and other employees whose employment directly affects motor carrier safety; and
- (3) to ensure increased compliance with traffic laws and with the commercial motor vehicle safety and health regulations and standards prescribed and orders issued under this chapter.

(b) **FINDINGS.**—Congress finds—

- (1) it is in the public interest to enhance commercial motor vehicle safety and thereby reduce highway fatalities, injuries, and property damage;
- (2) improved, more uniform commercial motor vehicle safety measures and strengthened enforcement would reduce the number of fatalities and injuries and the level of property damage related to commercial motor vehicle operations;
- (3) enhanced protection of the health of commercial motor vehicle operators is in the public interest; and
- (4) interested State governments can provide valuable assistance to the United States Government in ensuring that commercial motor vehicle operations are conducted safely and healthfully.

49 U.S.C. § 31136 (Motor Carrier Safety Act of 1984, Pub. L. 98-554, § 206, 98 Stat. 2832 (1984)), provides (in part):

(a) **MINIMUM SAFETY STANDARDS.**—Subject to section 30103(a) of this title, the Secretary of Transportation shall prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles. At a minimum, the regulations shall ensure that—

(1) commercial motor vehicles are maintained, equipped, loaded, and operated safely;

(2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely;

(3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely; and

(4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators.

* * *

(c) **PROCEDURES AND CONSIDERATIONS.**—(1) A regulation under this section shall be prescribed under section 553 of title 5 (without regard to sections 556 and 557 of title 5).

(2) Before prescribing regulations under this section, the Secretary shall consider, to the extent practicable and consistent with the purposes of this chapter—

(A) costs and benefits; and

(B) State laws and regulations on commercial motor vehicle safety, to minimize their unnecessary preemption.

* * *

49 U.S.C. § 31502 (Motor Carrier Act of 1935) provides:

(a) **APPLICATION.**—This section applies to transportation—

(1) described in sections 13501 and 13502 of this title; and

(2) to the extent the transportation is in the United States and is between places in a foreign country, or between a place in a foreign country and a place in another foreign country.

(b) **MOTOR CARRIER AND PRIVATE MOTOR CARRIER REQUIREMENTS.**—The Secretary of Transportation may prescribe requirements for—

(1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and

(2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation.

(c) **MIGRANT WORKER MOTOR CARRIER REQUIREMENTS.**—The Secretary may prescribe requirements for the comfort of passengers, qualifications and maximum hours of service of operators, and safety of operation and equipment of a motor carrier of migrant workers. The requirements only apply to a carrier transporting a migrant worker—

(1) at least 75 miles; and

(2) across the boundary of a State, territory, or possession of the United States.

(d) **CONSIDERATIONS.**—Before prescribing or revising any requirement under this section, the Secretary shall consider the costs and benefits of the requirement.

49 C.F.R. § 395.3 (2002) (superseded), provides:

Maximum driving time.

(a) Except as provided in §§ 395.1(b)(1), 395.1(f), and 395.1(h), no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive:

(1) More than 10 hours following 8 consecutive hours off duty;
or

(2) For any period after having been on duty 15 hours following 8 consecutive hours off duty.

(b) No motor carrier shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive, regardless of the number of motor carriers using the driver's services, for any period after—

(1) Having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

49 C.F.R. § 395.3 (2004) (superseded), provides:

Maximum driving time for property-carrying vehicles.

Subject to the exceptions and exemptions in Sec. 395.1:

(a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle:

(1) More than 11 cumulative hours following 10 consecutive hours off duty; or

(2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of Sec. 395.1(o).

(b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after—

(1) Having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

(c)(1) Any period of 7 consecutive days may end with the beginning of any off duty period of 34 or more consecutive hours; or

(2) Any period of 8 consecutive days may end with the beginning of any off duty period of 34 or more consecutive hours.

PART 395—HOURS OF SERVICE OF DRIVERS

n 5. The authority citation for part 395 continues to read as follows:

Authority: 49 U.S.C. 504, 14122, 31133, 31136, and 31502; sec. 113, Pub. L. 103-311, 108 Stat. 1673, 1676; and 49 CFR 1.73.

n 6. Add § 395.0 to read as follows:

§ 395.0 Rescission.

Any regulations on hours of service of drivers in effect before April 28, 2003, which were amended or replaced by the final rule adopted on April 28, 2003 [69 FR 22456] are rescinded and not in effect.

n 7. Section 395.1 is amended by revising paragraphs (a)(1), (b)(1), (e), (g), (h), (j), (k), and (o) to read as follows:

§ 395.1 Scope of rules in this part.

* * * * *

(a) *General.* (1) The rules in this part apply to all motor carriers and drivers, except as provided in paragraphs (b) through (o) of this section.

* * * * *

(b) *Adverse driving conditions.* (1) Except as provided in paragraph (h)(2) of this section, a driver who encounters adverse driving conditions, as defined in § 395.2, and cannot, because of those conditions, safely complete the run within the maximum driving time permitted by §§ 395.3(a) or 395.5(a) may drive and be permitted or required to drive a commercial motor vehicle for not more than 2 additional hours in order to complete that run or to reach a place offering safety for the occupants of the commercial motor vehicle and security for the commercial motor vehicle and its cargo. However, that driver may not drive or be permitted to drive—

(i) For more than 13 hours in the aggregate following 10 consecutive hours off duty for drivers of property-carrying commercial motor vehicles;

(ii) After the end of the 14th hour since coming on duty following 10 consecutive hours off duty for drivers of property-carrying commercial motor vehicles;

(iii) For more than 12 hours in the aggregate following 8 consecutive hours

off duty for drivers of passenger-carrying commercial motor vehicles; or

(iv) After he/she has been on duty 15 hours following 8 consecutive hours off duty for drivers of passenger-carrying commercial motor vehicles.

* * * * *

(e) *Short-haul operations—(1) 100 air-mile radius driver.* A driver is exempt from the requirements of § 395.8 if:

(i) The driver operates within a 100 air-mile radius of the normal work reporting location;

(ii) The driver, except a driver-salesperson, returns to the work reporting location and is released from work within 12 consecutive hours;

(iii) (A) A property-carrying commercial motor vehicle driver has at least 10 consecutive hours off duty separating each 12 hours on duty;

(B) A passenger-carrying commercial motor vehicle driver has at least 8 consecutive hours off duty separating each 12 hours on duty;

(iv) (A) A property-carrying commercial motor vehicle driver does not exceed 11 hours maximum driving time following 10 consecutive hours off duty; or

(B) A passenger-carrying commercial motor vehicle driver does not exceed 10 hours maximum driving time following 8 consecutive hours off duty; and

(v) The motor carrier that employs the driver maintains and retains for a period of 6 months accurate and true time records showing:

(A) The time the driver reports for duty each day;

(B) The total number of hours the driver is on duty each day;

(C) The time the driver is released from duty each day; and

(D) The total time for the preceding 7 days in accordance with § 395.8(j)(2) for drivers used for the first time or intermittently.

(2) *Operators of property-carrying commercial motor vehicles not requiring a commercial driver's license.* Except as provided in this paragraph, a driver is exempt from the requirements of § 395.3 and § 395.8 and ineligible to use the provisions of § 395.1(e)(1), (g) and (o) if:

(i) The driver operates a property-carrying commercial motor vehicle for which a commercial driver's license is not required under part 383 of this subchapter;

(ii) The driver operates within a 150 air-mile radius of the location where the driver reports to and is released from work, *i.e.*, the normal work reporting location;

(iii) The driver returns to the normal work reporting location at the end of each duty tour;

(iv) The driver has at least 10 consecutive hours off duty separating each on-duty period;

(v) The driver does not drive more than 11 hours following at least 10 consecutive hours off duty;

(vi) The driver does not drive:

(A) After the 14th hour after coming on duty on 5 days of any period of 7 consecutive days; and

(B) After the 16th hour after coming on duty on 2 days of any period of 7 consecutive days;

(vii) The driver does not drive:

(A) After having been on duty for 60 hours in 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week;

(B) After having been on duty for 70 hours in 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week;

(viii) Any period of 7 or 8 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours.

(ix) The motor carrier that employs the driver maintains and retains for a period of 6 months accurate and true time records showing:

(A) The time the driver reports for duty each day;

(B) The total number of hours the driver is on duty each day;

(C) The time the driver is released from duty each day;

(D) The total time for the preceding 7 days in accordance with § 395.8(j)(2) for drivers used for the first time or intermittently.

* * * * *

(g) *Sleeper berths—(1) Property-carrying commercial motor vehicle—(i) In General.* A driver who operates a property-carrying commercial motor vehicle equipped with a sleeper berth, as defined in §§ 395.2 and 393.76 of this subchapter, (A) Must, before driving, accumulate

(1) At least 10 consecutive hours off duty;

(2) At least 10 consecutive hours of sleeper-berth time;

(3) A combination of consecutive sleeper-berth and off-duty time amounting to at least 10 hours; or

(4) The equivalent of at least 10 consecutive hours off duty if the driver does not comply with paragraph (g)(1)(i)(A)(1), (2), or (3) of this section;

(B) May not drive more than 11 hours following one of the 10-hour off-duty periods specified in paragraph (g)(1)(i)(A)(1) through (4) of this section; and

(C) May not drive after the 14th hour after coming on duty following one of

the 10-hour off-duty periods specified in paragraph (g)(1)(i)(A)(1) through (4) of this section; and

(D) Must exclude from the calculation of the 14-hour limit any sleeper berth period of at least 8 but less than 10 consecutive hours.

(i) *Specific requirements.*—The following rules apply in determining compliance with paragraph (g)(1)(i) of this section:

(A) The term "equivalent of at least 10 consecutive hours off duty" means a period of (1) At least 8 but less than 10 consecutive hours in a sleeper berth, and

(2) A separate period of at least 2 but less than 10 consecutive hours either in the sleeper berth or off duty, or any combination thereof.

(B) Calculation of the 11-hour driving limit includes all driving time; compliance must be re-calculated from the end of the first of the two periods used to comply with paragraph (g)(1)(ii)(A) of this section.

(C) Calculation of the 14-hour limit includes all time except any sleeper-berth period of at least 8 but less than 10 consecutive hours; compliance must be re-calculated from the end of the first of the two periods used to comply with the requirements of paragraph (g)(1)(ii)(A) of this section.

(2) *Specially trained driver of a specially constructed oil well servicing commercial motor vehicle at a natural gas or oil well location.* A specially trained driver who operates a commercial motor vehicle specially constructed to service natural gas or oil wells that is equipped with a sleeper berth, as defined in §§ 395.2 and 393.76 of this subchapter, or who is off duty at a natural gas or oil well location, may accumulate the equivalent of 10 consecutive hours off duty time by taking a combination of at least 10 consecutive hours of off-duty time, sleeper-berth time, or time in other sleeping accommodations at a natural gas or oil well location; or by taking two periods of rest in a sleeper berth, or other sleeping accommodation at a natural gas or oil well location, providing:

(i) Neither rest period is shorter than 2 hours;

(ii) The driving time in the period immediately before and after each rest period, when added together, does not exceed 11 hours;

(iii) The driver does not drive after the 14th hour after coming on duty following 10 hours off duty, where the 14th hour is calculated:

(A) By excluding any sleeper berth or other sleeping accommodation period of at least 2 hours which, when added to

a subsequent sleeper berth or other sleeping accommodation period, totals at least 10 hours, and

(B) By including all on-duty time, all off-duty time not spent in the sleeper berth or other sleeping accommodations, all such periods of less than 2 hours, and any period not described in paragraph (g)(2)(iii)(A) of this section; and

(iv) The driver may not return to driving subject to the normal limits under § 395.3 without taking at least 10 consecutive hours off duty, at least 10 consecutive hours in the sleeper berth or other sleeping accommodations, or a combination of at least 10 consecutive hours off duty, sleeper berth time, or time in other sleeping accommodations.

(3) *Passenger-carrying commercial motor vehicles.* A driver who is driving a passenger-carrying commercial motor vehicle that is equipped with a sleeper berth, as defined in §§ 395.2 and 393.76 of this subchapter, may accumulate the equivalent of 8 consecutive hours of off-duty time by taking a combination of at least 8 consecutive hours off-duty and sleeper berth time; or by taking two periods of rest in the sleeper berth, providing:

* * * * *

(h) *State of Alaska*—(1) *Property-carrying commercial motor vehicle.* The provisions of § 395.3(a) and (b) do not apply to any driver who is driving a commercial motor vehicle in the State of Alaska. A driver who is driving a property-carrying commercial motor vehicle in the State of Alaska must not drive or be required or permitted to drive—

(i) More than 15 hours following 10 consecutive hours off duty; or

(ii) After being on duty for 20 hours or more following 10 consecutive hours off duty.

(iii) After having been on duty for 70 hours in any period of 7 consecutive days, if the motor carrier for which the driver drives does not operate every day in the week; or

(iv) After having been on duty for 80 hours in any period of 8 consecutive days, if the motor carrier for which the driver drives operates every day in the week.

(2) *Passenger-carrying commercial motor vehicle.* The provisions of § 395.5 do not apply to any driver who is driving a passenger-carrying commercial motor vehicle in the State of Alaska. A driver who is driving a passenger-carrying commercial motor vehicle in the State of Alaska must not drive or be required or permitted to drive—

(i) More than 15 hours following 8 consecutive hours off duty;

(ii) After being on duty for 20 hours or more following 8 consecutive hours off duty;

(iii) After having been on duty for 70 hours in any period of 7 consecutive days, if the motor carrier for which the driver drives does not operate every day in the week; or

(iv) After having been on duty for 80 hours in any period of 8 consecutive days, if the motor carrier for which the driver drives operates every day in the week.

(3) A driver who is driving a commercial motor vehicle in the State of Alaska and who encounters adverse driving conditions (as defined in § 395.2) may drive and be permitted or required to drive a commercial motor vehicle for the period of time needed to complete the run.

(i) After a property-carrying commercial motor vehicle driver completes the run, that driver must be off duty for at least 10 consecutive hours before he/she drives again; and

(ii) After a passenger-carrying commercial motor vehicle driver completes the run, that driver must be off duty for at least 8 consecutive hours before he/she drives again.

* * * * *

(j) *Travel time*—(1) When a property-carrying commercial motor vehicle driver at the direction of the motor carrier is traveling, but not driving or assuming any other responsibility to the carrier, such time must be counted as on-duty time unless the driver is afforded at least 10 consecutive hours off duty when arriving at destination, in which case he/she must be considered off duty for the entire period.

(2) When a passenger-carrying commercial motor vehicle driver at the direction of the motor carrier is traveling, but not driving or assuming any other responsibility to the carrier, such time must be counted as on-duty time unless the driver is afforded at least 8 consecutive hours off duty when arriving at destination, in which case he/she must be considered off duty for the entire period.

(k) *Agricultural operations.* The provisions of this part shall not apply to drivers transporting agricultural commodities or farm supplies for agricultural purposes in a State if such transportation:

(1) Is limited to an area within a 100 air-mile radius from the source of the commodities or the distribution point for the farm supplies, and

(2) Is conducted during the planting and harvesting seasons within such State, as determined by the State.

* * * * *

(c) *Property-carrying driver.* A property-carrying driver is exempt from the requirements of § 395.3(a)(2) if:

(1) The driver has returned to the driver's normal work reporting location and the carrier released the driver from duty at that location for the previous five duty tours the driver has worked;

(2) The driver has returned to the normal work reporting location and the carrier releases the driver from duty within 16 hours after coming on duty following 10 consecutive hours off duty; and

(3) The driver has not taken this exemption within the previous 6 consecutive days, except when the driver has begun a new 7- or 8-consecutive day period with the beginning of any off-duty period of 34 or more consecutive hours as allowed by § 395.3(c).

n 8. Section 395.3 is revised to read as follows:

§ 395.3 Maximum driving time for property-carrying vehicles.

Subject to the exceptions and exemptions in § 395.1:

(a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle:

(1) More than 11 cumulative hours following 10 consecutive hours off duty; or

(2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of § 395.1(o) or § 395.1(e)(2).

(b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after—

(1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

(c)(1) Any period of 7 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours; or

(2) Any period of 8 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours.

n 9. Section 395.5 is revised to read as follows:

§ 395.5 Maximum driving time for passenger-carrying vehicles.

Subject to the exceptions and exemptions in § 395.1:

(a) No motor carrier shall permit or require any driver used by it to drive a passenger-carrying commercial motor vehicle, nor shall any such driver drive a passenger-carrying commercial motor vehicle:

(1) More than 10 hours following 8 consecutive hours off duty; or

(2) For any period after having been on duty 15 hours following 8 consecutive hours off duty.

(b) No motor carrier shall permit or require a driver of a passenger-carrying commercial motor vehicle to drive, nor shall any driver drive a passenger-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after—

(1) Having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates

commercial motor vehicles every day of the week.

n 10. Section 395.13 paragraphs (c)(1)(ii) and (d)(2) are revised to read as follows:

§ 395.13 Drivers declared out of service.

* * * * *

(c) * * *

(1) * * *

(i) * * *

(ii) Require a driver who has been declared out of service for failure to prepare a record of duty status to operate a commercial motor vehicle until that driver has been off duty for the appropriate number of consecutive hours required by this part and is in compliance with this section. The appropriate consecutive hours off-duty may include sleeper berth time.

* * * * *

(d) * * *

(1) * * *

(2) No driver who has been declared out of service, for failing to prepare a record of duty status, shall operate a commercial motor vehicle until the driver has been off duty for the appropriate number of consecutive hours required by this part and is in compliance with this section.

n 11. Section 395.15(j)(2)(ii) is revised to read as follows:

§ 395.15 Automatic on-board recording devices.

* * * * *

(j) * * *

(2) * * *

(i) * * *

(ii) The motor carrier has required or permitted a driver to establish, or the driver has established, a pattern of exceeding the hours of service limitations of this part;

* * * * *

Issued on: August 16, 2005.

Annette M. Sandberg,
Administrator.

[FR Doc. 05-16498 Filed 8-19-05; 12:00 pm]

BILLING CODE 4810-EX-P

APPENDIX C

DECLARATIONS IN SUPPORT OF PETITIONERS' STANDING

DECLARATIONS IN SUPPORT OF PETITIONERS' STANDING

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UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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

Petitioners,)

v.)

No. 06-1078)

FEDERAL MOTOR CARRIER SAFETY)
ADMINISTRATION, and THE)
UNITED STATES,)

Respondents.)

DECLARATION OF JOAN CLAYBROOK

I, Joan Claybrook, declare as follows:

1. I am the president of Public Citizen. I have held this position since 1982. Prior to joining Public Citizen, I was Administrator of the National Highway Traffic Safety Administration (NHTSA) of the U.S. Department of Transportation (DOT) from 1977 to 1981. I am submitting this declaration on behalf of Public Citizen.

2. Public Citizen is a nationwide consumer advocacy organization founded in 1971 with a current membership of approximately 100,000. Many of our members drive every day and are therefore at risk of being involved in crashes with large trucks when they are on the road. Because the 2005 rule issued by the Federal Motor Carrier Safety Administration (FMCSA) allows truck drivers to drive many more hours than they could drive under the previous (pre-2003) regulation, the rule will significantly increase the risk of truck crashes, compared to the previous rule, and jeopardize the safety of our members and their families.

3. Public Citizen advocates before Congress, administrative agencies, and the courts for strong and effective health and safety regulations and has a long history of advocacy on matters related to auto and truck safety. Public Citizen works to improve highway safety by lobbying Congress to pass legislation, monitoring the Department of Transportation (DOT) to be sure it carries out the will of Congress, gathering information on auto and truck safety issues, conducting public awareness campaigns, and participating in lawsuits to force government action.

4. Since its founding, Public Citizen has been instrumental in bringing about dramatic improvements in the laws and regulations that affect auto and highway safety. Public Citizen's accomplishments in this area include waging a

successful public and legislative campaign to urge Congress to enact legislation establishing energy conservation and fuel economy standards in 1975; helping to bring about legislation to require head injury protection and air bags in all passenger vehicles in 1991, as well as limiting longer combination trucks to states in which they already could operate; and leading a group of organizations in a campaign to convince Congress to include key safety-enhancing provisions in the Transportation, Recall Enhancement, Accountability and Documentation (TREAD) Act in 2000 and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) in 2005. Additionally, in 1999, Public Citizen supported reform efforts at DOT that culminated in Congress's creation of FMCSA, the agency charged with regulating commercial motor vehicles, with safety as its preeminent statutory mission.

5. Public Citizen has been actively involved in seeking to improve highway safety by reducing truck-driver fatigue. These efforts include urging and supporting the statutory measure eventually adopted by Congress in 1995 to require DOT to revise the hours-of-service rules to reduce truck-driver fatigue; gathering scientific evidence; testifying before Congress; and publicizing the issue to raise public awareness. In 1995, Public Citizen, along with other safety groups, petitioned FMCSA's predecessor, the Federal Highway Administration (FHWA),

to require trucks to use electronic on-board recording devices to reduce the widespread violations of the hours-of-service rules.

6. In 2002, Public Citizen was among the organizations that brought a mandamus action against FMCSA to force the agency to issue long-delayed truck safety rules, including the hours-of-service regulation. Public Citizen participated in the rulemaking process that culminated in the hours-of-service rule issued by FMCSA in April 2003 and, along with other groups, filed suit to challenge that rule. The 2003 regulation failed to promote safety and to protect the health of truck drivers, as required by statute. In July 2004, the U.S. Court of Appeals for the District of Columbia Circuit vacated the 2003 regulation and remanded the matter to the agency. Public Citizen participated in the second rulemaking that followed the remand from the Court. FMCSA issued a new hours-of-service regulation in August 2005. The 2005 rule, challenged in this case, differs little from the invalidated 2003 regulation. The rules are identical in increasing the daily and weekly hours truck drivers may legally drive.

7. Effectively regulating truck drivers' hours of service decreases crashes and is vital to improving the safety of both the commercial trucking industry and of members of the public who use the nation's highways. A 1995 study by the National Transportation Safety Board (NTSB) estimated that 31 to 40

percent of truck crash fatalities are fatigue related, and NHTSA reported that, in 2004 alone, more than 5,100 deaths and 116,000 injuries occurred in connection with commercial truck crashes. More people died in truck crashes in 2004 than in 2003.

8. The 2005 hours-of-service regulation is woefully inadequate to promote safety on our nation's roads. The 2005 rule, like the 2003 rule, will not reduce driver fatigue or improve highway safety because it allows drivers to drive for 11 consecutive hours in a shift, one hour more than was allowed before the invalidated 2003 rule was promulgated. FMCSA issued this increase despite decades of research establishing that expanding the length of time a driver spends at the wheel correspondingly reduces alertness and performance. Especially disturbing is the rule's 34-hour "restart" provision, which dramatically increases the total hours that a driver may operate his rig on either a 7-day or 8-day cycle, while curtailing the weekly off-duty time that is so important and allows tired truckers to recover alertness. The 2005 rule, like the 2003 rule, also fails to ensure that the regulation's significant addition to drivers' workload will not impair their health.

9. Public Citizen is participating in this case because we believe FMCSA's final hours-of-service rule is highly detrimental to truck safety on the

nation's highways. The 2003/2005 rules allow motor carriers to force commercial drivers to work and drive longer hours than ever before. The regulation will have a noticeable impact on the lives of our members and the general public by increasing truck crashes and the fatalities and injuries that result. Of those killed in large-truck crashes, 78 percent are someone other than the truck driver.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on June ____, 2006

Joan Claybrook

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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

Petitioners,)

v.)

No. 06-1078)

FEDERAL MOTOR CARRIER SAFETY)
ADMINISTRATION, and THE)
UNITED STATES,)

Respondents.)

DECLARATION OF NANCY H. CHASEN

I, Nancy H. Chasen, declare:

1. I am a member of Public Citizen and have been a member for several years.

2. I am generally familiar with Public Citizen's work to improve auto and highway safety, and I support Public Citizen's work on this issue.

3. My family and I travel heavily on the nation's roads and highways and frequently share those roadways with commercial trucks. I

am therefore regularly subject to the risk of death and injury that the safety, or lack of safety, of commercial trucks and their drivers pose for me and my family. One of my children lives in Chapel Hill, North Carolina, and the other lives in New York City. As a result, my family and I travel between those locations and the Washington, D.C. area, where I live, several times a year. We travel by car, along a set of highways I consider dangerous in part because of heavy commercial truck traffic. In addition, my husband and I live in a suburban area and thus regularly use the area highways and beltways in conducting our normal daily activities. My husband spends approximately one hour several times a week driving to and from work on the National Capitol Beltway, which we consider to be a hazardous road, made all the more so by unsafe trucks and truck driving.

4. I am familiar with Public Citizen's petitions challenging first the 2003 and now the 2005 hours-of-service regulation. Because it allows truck drivers to drive many more hours than they could drive under the old (pre-2003) regulation, the 2005 regulation decreases my safety on the road and the safety of my family. I am particularly concerned about the problem of driver fatigue and have informed myself about the negative effects of sleep deprivation and long hours of driving on truck drivers and the resulting risks for other drivers such as myself. The new hours-of-service regulation

increases the risk that my family members or I will be killed or injured while traveling by car on the nation's roadways.

Signed under penalty of perjury pursuant to 28 U.S.C. § 1746 on
June __, 2006 in Bethesda, Maryland.

Nancy H. Chasen

DECLARATION OF JAMES A. MCCALL

1. I, James A. McCall, submit this declaration on behalf of the International Brotherhood of Teamsters (“IBT”), a petitioner in this case. I serve as Special Counsel to the IBT and have provided legal representation to the IBT for in excess of 27 years.

2. The IBT is a labor organization with more than 1.4 million members, who are employed in virtually every job classification of work in the United States, Canada, Puerto Rico, and Guam. The IBT has tens of thousands of members who are commercial motor vehicle operators in the United States and who are required to hold a Commercial Drivers License (“CDL”). These drivers are directly regulated by the hours-of-service rule issued by the Federal Motor Carriers Safety Administration (“FMCSA”). These thousands of CDL-qualified members are employed in the freight, small package, automotive transport, construction, tank line, and port industries. In providing representation to its members, the IBT seeks to provide them superior wages, benefits, and safe and healthy working conditions.

3. As Special Counsel to the IBT, one of my primary areas of responsibility has been to represent the IBT and its transportation members in negotiations, litigation, and arbitration with employers with which it has collective bargaining agreements and in lobbying federal and state agencies to promulgate

regulations that ensure the safety of both the IBT's members and the traveling public. I assisted in establishing the IBT's legal position and submitting comments to FMCSA during the agency's 2000 and 2005 hours-of-service rulemaking proceedings, which culminated in the 2003 and 2005 final rules on hours-of-service.

4. The IBT opposed the 2003 final rule because it created unsafe driving conditions for transportation workers and the traveling public. The 2003 rule arbitrarily increased the consecutive daily hours and weekly hours that drivers could legally drive. These increases were in direct conflict with the provisions of many of the IBT's collective bargaining agreements with its represented employers. In the IBT's more than 40 years' experience, its members operate their commercial motor vehicles more safely when their driving hours are limited to 10 consecutive daily hours and 60 hours in a 7-day period, with 68 hours rest, or 70 hours in an 8-day period, with 74 hours rest.

5. Contrary to FMCSA's obligations under the Motor Carrier Safety Act of 1984, Pub. L. 98-554, 98 Stat. 2832, to protect the health of truck drivers and to ensure that the duties imposed on drivers do not impair their ability to operate their vehicles safely, and Congress's requirement in the ICC Termination Act of 1995, Pub. L. 104-88, § 408, 109 Stat. 803 (1995), that the agency reduce fatigue-

related incidents and increase driver alertness, the 2003 rule (and now, the 2005 rule) increased the daily driving limit from 10 to 11 hours and established a 34-hour restart provision, substantially increasing permissible weekly driving hours.

6. Some of the IBT's member drivers are now operating under the extended hours permitted by the 2003/2005 rules. The IBT has continued to resist efforts by other employers with which it has bargaining agreements to institute the enormous increases in daily and weekly driving hours allowed by the 2003/2005 rule. These employers claim that they are at a competitive disadvantage as a result of not being able to take advantage of the 2003/2005 rule's additional driving hours.

7. Fortunately, this Court invalidated the 2003 rule as arbitrary and capricious in that it did not consider the rule's impact on the health of the drivers. *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004). Rather than address the issues that caused this Court to conclude that the 2003 final rule failed to satisfy FMCSA's statutory duty to ensure that the rule protected the health of truck drivers, however, FMCSA attempted an end-run around the Court's mandate by lobbying Congress to codify the invalidated rule. (*E.g.*, S. Hrg. 109-196, at 18, 21). In August 2005, after failing to persuade Congress, FMCSA issued the same rule, except for a change in the sleeper-berth exception not challenged in this case.

Its justifications for extending both daily and weekly driving hours is refuted by overwhelming evidence that crash risk substantially increases during the 9th, 10th, and 11th hours, and for multi-day driving. The IBT believes that the Court should find the 2005 final rule arbitrary and capricious because FMCSA again has failed to safeguard driver health and public safety.

8. While the IBT has so far resisted the efforts of many of its members' employers to institute the increases in daily and weekly driving hours allowed by the 2003/2005 rules, it has not been able to prevent all IBT employers from operating under the new rule, and it may not be able to stem the tide if the 2005 rule is ultimately upheld in court. As the competitors of IBT employers adopt these longer hours, it will become increasingly difficult for IBT employers to resist the economic pressure to follow in their footsteps.

9. In addition, the IBT's member drivers share the roads with many unsafe truck drivers who are taking full advantage of the extended daily and weekly driving hours sanctioned by the 2003/2005 rules. Thus, the extreme additional hours allowed by the 2003/2005 rules both directly and indirectly threaten the safety and health of thousands of the IBT's members.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on June ____, 2006

James A. McCall

Declaration of Judith Lee Stone

I, Judith Lee Stone, having personal knowledge of the following facts,
declare as follows:

1. I am the President of Advocates for Highway and Auto Safety (Advocates) and I have served in that capacity for the past 16 years.
2. Advocates is an alliance of consumer, health, and safety groups, insurance companies, including insurers of both personal and commercial vehicle lines, and insurance agents organizations, working together to make America's roads safer. Toward that end, Advocates promotes the adoption of federal and state laws, policies, and programs that save lives and reduce injuries. It is in Advocates' organizational interest to support policies that make highways safer and to oppose regulations that will make our nation's roadways less safe.
3. Advocates has been actively involved in the issues of fatigued drivers and FMCSA's promulgation of hours of service (HOS) regulations and has actively participated in the rulemaking process conducted by the Federal Motor Carrier Safety Administration (FMCSA) regarding HOS rules for commercial motor vehicle operators. Advocates submitted comments on June 30, 1997, to the rulemaking record regarding the prior issuance of the HOS rules in response to the advanced notice of proposed rulemaking, and

again filed comments on December 15, 2000, in response to FMCSA's first proposed rule. Advocates subsequently filed a brief *amicus curiae* in court supporting the petitioner's challenge to that final rule. See *Public Citizen, et al., v. FMCSA*, No. 03-1165 (D.C. Cir., July 16, 2004) (Brief *amicus curiae* Advocates for Highway and Auto Safety in support of petitioners, originally filed Dec. 16, 2003). In regard to the final rule challenged in this proceeding, Advocates filed comments responding to the agency's proposed rule on March 10, 2005.

4. Advocates opposes HOS regulations that, in Advocates' assessment, are likely to increase the prevalence of fatigue among truck drivers. In addition, some of Advocates' members are insurance companies. Their financial interests will be adversely affected if truck drivers become more fatigued as a result of FMCSA's HOS rule because these companies will have to pay more claims and incur greater expenses if and when truck drivers are involved in greater numbers of crashes. See Declaration of John V. Werner.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 21, 2006

Judith Lee Stone

DECLARATION OF John V. Werner

I, John V. Werner, having personal knowledge of the following facts, declare as follows:

1. I, John V. Werner, am the Director, Technology Research Division - Strategic Resources for State Farm Insurance Companies (“State Farm”). In that position I oversee auto safety and technology research. I am responsible for planning auto safety research initiatives and identifying trends in injury and property damage payments to correlate to the level of vehicle and highway safety features. I am submitting this declaration in support of the petition for review filed by Advocates for Highway and Auto Safety.

2. State Farm is a member of the Board of Directors of Petitioner Advocates for Highway and Auto Safety.

3. Large trucks are overrepresented in fatal crashes. In 2004, the last year for which complete data are available, large trucks were involved in 12 percent of all motor vehicle fatalities, 5,169, even though large trucks are only eight (8) percent of all vehicles involved in fatal crashes and actually comprise only three (3) percent of all registered vehicles.

4. Most of the deaths that occur in multi-vehicle crashes with large trucks are passenger vehicle occupants. Of the 5,169 large truck-involved fatalities in 2004, 78 percent were occupants of another vehicle – not the large truck – 15

percent were large truck occupants, and eight (8) percent were non-occupants. In two-vehicle crashes involving just a passenger vehicle and a large truck, 98 percent of the fatalities were occupants of the passenger vehicle. In 2002, more than one-fifth of all passenger vehicle occupant deaths resulted from multi-vehicle collisions involving large trucks (Insurance Institute for Highway Safety, 2004).

State Farm is a business enterprise that insures approximately 18 per cent of passenger motor vehicles in the United States and is the largest single insurer of passenger vehicles in the United States. Insured passenger vehicle drivers involved in a crash with a large truck submit claims to State Farm. As a result, State Farm is financially responsible for paying claims associated with these crashes, as well as paying other expenses associated with handling of the claims.

5. In my professional opinion, commercial motor vehicle operators who drive while fatigued due to driving and/or working an excessive number of hours pose a greater crash risk than drivers who are not fatigued. If vehicles insured by State Farm are involved in crashes caused by commercial motor vehicle operators who are fatigued due to driving and/or working an excessive number of hours, State Farm may be liable for claims resulting from those crashes and other expenses associated with the handling of those claims.

6. Thus, payment of claims resulting from crashes caused by commercial motor vehicles operators who drive while fatigued as a result of driving and /or

working an excessive number of hours has a direct negative financial impact on State Farm.

Pursuant of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

June 14, 2006

John V. Werner,
Director Technology Research Division,
Strategic Resources,
State Farm Insurance Companies

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 26th day of June, 2006, she caused two copies each of the foregoing Initial Brief for Petitioners to be served by first-class U.S. mail, postage prepaid, 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

Stephen L. Oesch
Insurance Institute for Highway Safety
1005 N. Glebe Road, Suite 800
Arlington, VA 22201

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

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

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

Nicholas J. DiMichael
Thompson Hine LLP
1920 N Street, NW
Washington, D.C. 20033

Bonnie I. Robin-Vergeer