No. 03-1165

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

PUBLIC CITIZEN, *et al.,*

Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION,

Respondent,

DISTRIBUTION LTL CARRIERS ASSOCIATION, INC., *et al.,*

Intervenors.

PETITIONERS' OPPOSITION TO MOTIONS FOR STAY OF THE MANDATE FILED BY THE FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION AND INTERVENORS AMERICAN TRUCKING ASSOCIATIONS, INC., DISTRIBUTION AND LTL CARRIERS ASSOCIATION, AND TRUCKLOAD CARRIER ASSOCIATION

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INTRODUCTION

Both respondent Federal Motor Carrier Safety Administration ("FMCSA" or "agency") and the trucking industry intervenors have moved for an indefinite stay of this Court's mandate during proceedings on remand, a stay that likely would remain in effect for years while the agency conducts a new rulemaking and promulgates a new final rule governing truck drivers' hours of service. What FMCSA and the intervenors seek is unprecedented in this Court, contrary to this Court's local rules, and not justified on the facts.

FMCSA has developed no plan of action and proposes no end-date, but instead asks the Court to stay the mandate "pending the determination by the agency as to what steps it will take in response to the Court's judgment." FMCSA Motion 1. Alternatively, FMCSA requests a six-month stay of the mandate, not to allow time for a transition back to the old hours-of-service ("HOS") rules pending issuance of a new rule, but so that the agency can assess "the length of time that might be required to promulgate a new or revised rule, and to develop an orderly process for the administration and enforcement of HOS requirements . . . ." *Id.* at 12. FMCSA proposes to provide a status report after 90 days or (more likely) file another motion to extend the stay. *Id.* The intervenors are more forthright, requesting an open-ended and indefinite stay of the mandate until a new rule is issued by FMCSA and goes into effect, Intervenors' Motion 1, a process intervenors concede will "require further studies, the issuance of a notice of proposed rulemaking, *at least* one period for the receipt and consideration of comments, the issuance of a final rule, and a period for transition to and implementation of a new final rule." *Id.* at 1 n.1 (emphasis added). That rulemaking process, if conducted thoroughly and properly, will take, under the best of

circumstances, 3 to 4 years to complete.[1]

This Court's four-part test for granting a stay rests on the assumption that the moving party desires to preserve the status quo *pending further review* of the Court's decision, not that the party will seek an indeterminate postponement of the consequences of an adverse court decision it does not intend to contest further. The period for filing a petition for rehearing in this case has elapsed with no party seeking rehearing. Neither FMCSA nor the intervenors represent that they are even considering filing a petition for certiorari. Although a few statements have appeared in *dicta* in this Court's opinions suggesting that an agency may request a stay of a ruling striking down agency action pending proceedings on remand, petitioners' counsel have been unable to identify any case in which the Court has actually issued such a stay, and the moving parties have cited none. More importantly, these *dicta* are predicated on the rationale that the Court should *routinely* vacate unlawful agency regulations to create an incentive for the agency to act swiftly and to avoid the very kind of open-ended and ill-defined remand requested here.

Although FMCSA and the intervenors style their motions as seeking a stay of the mandate, that is not what they really want. A true stay of the mandate would keep this case in a state of suspended animation, with no vacatur of the challenged (and invalidated) HOS rules and no remand to the agency to conduct another rulemaking. Yet, as required by this Court's ruling, FMCSA intends to conduct further proceedings on remand during the requested stay. Thus, the relief the movants actually seek, without saying so directly, is a change in the remedy ordered by this Court.

There is no justification for such a change in remedy. Although FMCSA and the intervenors

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[1] In the ICC Termination Act of 1995, Congress provided the agency slightly more than three years to revise the HOS rules. *See* Pub. L. 104-88, 109 Stat. 803, 958, § 408 (Dec. 29, 1995) (49 U.S.C. § 31136 note). The agency took more than 7 years to issue the final rule.

complain that reverting to the old HOS rules for the next few years during proceedings on remand will be inconvenient, disruptive, and expensive, they have failed to establish either irreparable harm or that the claimed injuries to the trucking industry or short-term wrinkles in state enforcement outweigh the costs and significant risks inherent in keeping the new, unlawful rules. The HOS rules struck down by the Court allow an additional hour of consecutive driving and nearly 30 percent more hours of weekly driving than the rules they replaced. Because the agency never analyzed, much less justified, these substantial increases in daily and weekly driving hours from the standpoints of either highway safety or the health of the truck drivers, this Court cannot assume—contrary to common sense and the "conceded and documented ill effects from the increase," *Public Citizen v. FMCSA,* 374 F.3d 1209, 1218 (D.C. Cir. 2004)—that it would be safe and healthy for already fatigued drivers to drive these additional hours for the next several years (or, for that matter, any interim period) while FMCSA decides what actions are necessary to revise the HOS rules and then conducts another rulemaking.

FMCSA AND THE INTERVENORS HAVE FAILED TO MAKE AN ADEQUATE SHOWING IN SUPPORT OF THEIR REQUESTS FOR A STAY OF THE MANDATE.

A. Vacatur and Remand are the Appropriate Remedies.

As noted above, although their motions are styled as requests for a stay, what the moving parties actually seek is a remand without vacatur. Petitioners respectfully submit that this Court's determination to vacate the new HOS rules and remand for further proceedings reflects a considered judgment consistent with the Court's precedents. "The decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n,* 988 F.2d 146, 150-51 (D.C. Cir. 1993)

(quoting *International Union, UMW v. Federal Mine Safety & Health Admin.,* 920 F.2d 960, 967 (D.C. Cir. 1990)). Here, the Court recognized that the new HOS rules were "arbitrary and capricious" not because the agency simply omitted an explanation or merely failed to cite grounds for new HOS rules that might otherwise have been saved, *American Bioscience, Inc. v. Thompson,* 269 F.3d 1077, 1086 (D.C. Cir. 2001); *e.g., Checkosky v. SEC,* 23 F.3d 452, 454 (D.C. Cir. 1994) (remanding to the SEC for more adequate explanation), but because FMCSA "wholly failed" to comply with the specific statutory requirement that it consider the impact of the rules on the health of drivers—a "single objection . . . sufficient to establish an arbitrary-and-capricious decision requiring vacatur of the rule." 374 F.3d at 1216. Moreover, in the interest of judicial economy, the Court's opinion went on to address four other obvious flaws in the new rules that independently would render the regulations arbitrary and capricious if not corrected by the agency on remand. *See id.* at 1217-23. Where, as here, "an agency so clearly violates the APA," this Court vacates and "remand[s] for the agency to start again." *Sugar Cane Growers Coop. of Florida v. Veneman,* 289 F.3d 89, 97 (D.C. Cir. 2002). That is precisely what the Court did here.

In order to seek reconsideration of the remedy ordered by this Court, the proper procedure would have been for FMCSA and the intervenors to have filed petitions for rehearing asking the Court to reconsider that aspect of its ruling—not to request a stay of the Court's mandate.[2]

B. The Four Applicable Factors Weigh Heavily Against Granting a Stay.

Even accepting the motions as proper requests for a stay of the mandate, the movants have

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[2] The movants' styling of their motions has significant consequences. Had FMCSA and the intervenors filed petitions for rehearing, they would have been limited to 15-page briefs without affidavits, petitioners would not have been required to respond absent an order from the Court directing them to do so, and amicus briefs would have been expressly prohibited except by invitation of the Court. *See* Fed. R. App. P. 35(b) & (e); D.C. Cir. R. 35(f).

fallen woefully short in justifying the Court's exercise of such "an extraordinary remedy." *Cuomo v. United States Nuclear Regulatory Comm'n,* 772 F.2d 972, 978 (D.C. Cir. 1985). None of the four factors governing the issuance of a stay, *see Washington Metropolitan Area Transit Commission,* 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. Federal Power Commission,* 259 F.2d 921, 925 (D.C. Cir. 1958), favors granting a stay—much less the open-ended, indefinite stay that FMCSA and the trucking industry urge.

1. The Likelihood of Success on the Merits

FMCSA and the intervenors have made no showing whatsoever on the likelihood of success on the merits of any appeal because they apparently will not seek further review. Neither movant has filed a petition for rehearing. Neither represents that it is considering seeking certiorari. Neither assigns any error to the Court's July 16, 2004 ruling.

The Court's test for issuing stays governs the situation when the moving party seeks to preserve the status quo pending further review of the Court's decision—not when the movant has decided not to contest the Court's decision further and seeks only to avoid the consequences of the adverse court ruling. *See, e.g., Wisconsin Gas Co. v. Federal Energy Regulatory Comm'n,* 758 F.2d 669, 673 (D.C. Cir. 1985); *Cuomo,* 772 F.2d at 973; *Holiday Tours,* 559 F.2d at 843; *Virginia Petroleum,* 259 F.2d at 925; *cf. United States v. Microsoft Corp.,* 2001 WL 931170 (D.C. Cir. Aug. 17, 2001) (request for stay pending petition for certiorari). As FMCSA puts it, "the 'likelihood of success' factor does not readily adapt to a situation such as this one, in which the Court already has issued a ruling invalidating the current rule." FMCSA Motion 6-7. This factor does not "adapt" to this "situation" because the agency and intervenors are not entitled to a stay of the mandate when

they have no intention of seeking further review.[3]

The intervenors cite Judge Randolph's recent concurring opinion in *Honeywell International, Inc. v. EPA,* 374 F.3d 1363, 1375 (D.C. Cir. 2004), to demonstrate that a stay of the mandate may be appropriate in circumstances in which a rule has been vacated by this Court (apparently without regard to the movants' inability to demonstrate a substantial case on the merits of an appeal). Intervenors' Motion 2. The discussion in Judge Randolph's opinion of the availability of a stay pending remand proceedings was *dicta*. The Court vacated the EPA's rule in question because it found that the Clean Air Act itself, rather than the APA, compelled vacatur, *see id.* at 1373-74 (Sentelle, J., writing for the Court), and Judge Randolph's separate opinion discussed the possibility that the Court could grant a stay during remand only in the abstract. As noted above, petitioners have found no case in which this Court has actually granted a stay of an order vacating an unlawful agency rule during proceedings on remand, and FMCSA and the intervenors have cited none.

More importantly, however, the moving parties' request runs counter to the very rationale undergirding Judge Randolph's opinion. His *Honeywell* opinion represents another sally in his long-running debate with other judges on this Court over whether it is *ever* appropriate for the Court to remand and not vacate an agency rule that violates the APA. *Compare Checkosky,* 23 F.3d at 462-

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[3] The issue is not whether the old rules or the new (invalidated) rules are more likely to survive a new rulemaking on remand, *see* FMCSA Motion 7; Intervenors' Motion 4, because, under this Court's decision, a new, *third* set of rules will ultimately emerge that will safeguard drivers' health, promote highway safety, and otherwise satisfy the agency's statutory mandates. FMCSA and the intervenors make no serious effort to show that the two aspects of the new rules that increase the risks to both highway safety and the physical condition of drivers in comparison to the old rules—the increase from 10 to 11 consecutive driving hours and the massive increase in weekly driving hours attributable to the 34-hour restart provision—will survive a new rulemaking, especially given the doubts this Court expressed regarding the rationality of either increase. Of course, we also expect FMCSA to revisit other aspects of the new rules, such as their failure to abolish the sleeper-berth exception or require EOBRs, that led the Court to harbor "grave doubts" regarding the rules' ability to survive arbitrary-and-capricious review. *See* 374 F.3d at 1219-22.

66 (Silberman, J., concurring) (appropriate for Court to remand to permit an agency to provide a fuller justification for its actions), *with id.* at 490-93 (Randolph, J., dissenting in relevant part) (remand without vacatur violates the APA). In Judge Randolph's view, this Court's practice in certain circumstances of remanding without vacating a challenged agency action should be scrapped altogether because of the risk that an indefinite remand without vacatur will remove the incentive for an agency to act quickly after the Court has ruled. As Judge Randolph explained: "Remanding without vacating is in effect granting an indefinite stay of the effectiveness of the court's decision." *Honeywell,* 374 F.3d at 1375; *see also Checkosky,* 23 F.3d at 493 ("Agencies must conform their actions to the APA.") (Randolph, J., dissenting). By contrast, Judge Randolph reasoned, "the existence of a stay with *time limits,* rather than an open-ended remand without vacatur, will give the agency an incentive to act promptly; when we simply remand, the agency has no such incentive." *Honeywell,* 374 F.3d at 1375 (emphasis added). Thus, even under Judge Randolph's view, FMCSA would not be entitled to an open-ended remand without vacatur of the unlawful new rules.

Because the agency and the trucking industry have made no showing on the first factor of the four-part test for a stay, the Court need not consider the remaining factors. *See Taylor v. Resolution Trust Corp.,* 56 F.3d 1497, 1507 (D.C. Cir. 1995).

2. Irreparable Harm

Intervenors argue that the trucking industry will sustain irreparable harm if an indefinite stay is not granted until new rules are issued and implemented because of the cost, disruption, and inconvenience associated with a transition back to the old rules on an interim basis. FMCSA, by contrast, contends that enforcement of the old federal HOS rules will suffer if this Court declines to stay the mandate because of the time lag that accompanies adoption and enforcement of the federal regulations by the states after the federal rules change.

The trucking industry's rationale for a stay need not detain this Court long. Economic losses and time and energy spent in the absence of a stay are not sufficient to justify a stay and are easily outweighed by the risks to highway safety and the physical condition of the drivers presented by unanalyzed, unjustified, and significant increases to the hours that drivers are permitted to drive. By contrast, FMCSA's concern about the impact of vacatur of the new rules on HOS enforcement by state roadside inspectors is superficially more colorable, but ultimately fails as well to justify a stay, given the speculativeness of the adverse impact on enforcement, the likely brevity of the transition period needed to allow states to enforce the reinstated old HOS federal rules (in contrast to the indefinite period during which the unsafe new rules would remain in effect if an open-ended stay were issued), the enforcement flexibility built into the regulatory scheme, and the number of enforcement weapons in the agency's own arsenal.

a. Alleged Irreparable Harm to the Trucking Industry

The intervenors claim that a transition back to the old rules will impose huge costs upon the trucking industry to retrain drivers and make changes in information systems—costs that the industry will have to incur again when the new final rule is issued after proceedings on remand. Intervenors' Motion 8-10.[4]

Although the trucking industry will have to assume additional expenses to switch back to the old rules, such costs and the need to expend additional time and resources to make changes to

[4] Intervenors also claim that if a stay is not granted, the old rules would have to go into effect "immediately" and that "instantaneous conversion" to the old HOS rules is not possible. Intervenors' Motion 5. Under the Court's rules, however, there is no such "instantaneous conversion" to the old rules. FMCSA and trucking industry have already had more than 52 days since the Court's July 16 decision to prepare for its consequences, and, as discussed below, the federal regulatory scheme itself provides ample flexibility for states to implement changes to track the federal rules.

reinstate the old HOS rules do not rise to the level of irreparable harm. As this Court has recognized: "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Virginia Petroleum,* 259 F.2d at 925. "Economic loss does not, in and of itself, constitute irreparable harm." *Randolph-Sheppard Vendors of America v. Weinberger,* 795 F.2d 90, 108 (D.C. Cir. 1986). Even if substantial and unrecoupable, retraining and retooling expenses that would accompany the transition back to the old HOS rules are simply a cost of doing business in a highly regulated industry—much like litigation expenses, which this Court and the Supreme Court have recognized do not constitute irreparable injury. *FTC v. Standard Oil Co. of California,* 449 U.S. 232, 244 (1980); *see also Cities of Anaheim & Riverside, California v. FERC,* 692 F.2d 773, 779 (D.C. Cir. 1982) (prospective monetary loss is not irreparable harm, and the cities' resulting competition costs are analogous to litigation expenses, which do not give rise to irreparable injury).

Although the Court need go no further in evaluating the trucking industry's alleged irreparable harm, it is worth noting that the industry's claimed costs are both exaggerated and relatively small when weighed against the risks and costs inherent in retaining the new rules on remand. First, the new HOS rules have been in effect only since January 4, 2004, 49 C.F.R. § 395.0(b), and have been enforced only since March 4, 2004 (only 19 weeks before the Court's ruling). Paden Aff. ¶ 12; *see also* U.S. Department of Transportation, *Enforcement of New Hours-of-Service Rules Begins Today; Truck Driver Education to Continue* (Mar. 4, 2004) (announcing that state officials are being asked to begin enforcement of the new HOS rules starting on March 4, 2004), *available at* http://www.dot.gov/affairs/fmcsa0304.htm. After decades of following the old rules, it strains belief that the cost and practical difficulties of transitioning back to those rules on a temporary basis would be anywhere near comparable to the cost of the switch to the brand-new

(invalidated) HOS rules in the first instance. *Compare* Osterberg Aff. ¶¶ 7-8 (estimating Schneider National's costs of reverting to the old rules at $1,884,250—only one third of the $5,632,000 in costs to prepare for the transition to the new rules), *with* Frey Aff. ¶ 7 (Werner Enterprises incurred nearly $2 million in transition costs in 2003 to switch to the new rules and estimates same costs to switch back); Glasebrook Aff. ¶¶ 11-14 (Yellow Roadway's prediction of $2 million in costs to revert to old rules based on costs in transitioning to the new rules). The intervenors argue that "[a]fter 60 years operating under one HOS rule, the industry could be forced to operate under three different rules in a two-year-period." Intervenors' Motion 10 (quoting Glasbrook Aff. ¶ 10). Yet the regulations to which the industry and enforcement officials would temporarily return after a few short months under the new (invalidated) rules are the very ones that were in effect for all those decades. Moreover, new drivers, as well as new state roadside inspectors, are always coming on board. It makes no sense to train them to follow unlawful HOS rules already struck down by the Court. The sooner the temporary reversion to the old rules, the better.[5]

Even taken on their own terms, the industry transition costs predicted by the intervenors are relatively modest for an industry generating more than $610 billion in gross revenues, Osiecki Aff. ¶ 4, and given that the estimates included in industry affidavits come from the largest motor carriers in the country, with tens of thousands of employees.[6] More importantly, the economic costs

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[5] The intervenors cite the existence of several thousand new drivers allegedly unfamiliar with the old HOS rules, Intervenors' Motion 6-7, but their numbers pale in comparison to the 3.1 million truck drivers, Osiecki Aff. ¶ 4, or 6.4 million drivers, Paden Aff. ¶ 7, subject to federal HOS rules who will be familiar with the old rules. Likewise, the vast majority of state roadside inspectors are already well versed in the former HOS rules. Thus, a stay will only exacerbate the situation as more new drivers and state enforcement officials become trained under rules this Court has already found arbitrary and capricious.

[6] For example, Yellow Roadway, one of the nation's largest less-than-truckload carriers, with more than 30,000 drivers, estimates $2 million to transition back to the previous HOS rules, Glasebrook

that supposedly will accompany a reversion to the former HOS rules are dwarfed by the safety and health risks entailed by the retention of the new (invalidated) rules for the next several years. According to FMCSA's analysis, the cost *per crash* of a large truck is $3,419,202, if the crash involves a fatality, and $217,005, if the crash involves an injury. FMCSA, *Cost of Large Truck- and Bus-Involved Crashes,* Table 1 (2001), *available at* http://www.fmcsa.dot.gov/pdfs/AB01-005.pdf. Thus, from a highway safety standpoint alone, a *single* fatality that results from the fact that under the new, invalidated rules truck drivers can now drive 11 (instead of 10) hours straight, 77 hours (instead of 60 hours) in 7 days, and 88 hours (instead of 70 hours) in 8 days, will cost the public significantly more in pure monetary terms (aside from the tragic loss of life) than the transition expenses that will be borne by any of the largest motor carriers.[7] And, of course, the record reflects *nothing* about the additional costs and burdens imposed by the new rules in terms of adverse, possibly irreparable, health effects on truck drivers because the agency did not consider that

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Aff. ¶ 11, a tiny fraction of its total assets of nearly $3.5 billion, operating revenues of over $3 billion, and comprehensive annual income over $53 million. Yellow Roadway Corporation, 2003 Annual Report, *at* http://www.yellowroadway.com. J.B. Hunt, one of the nation's largest truckload carriers with more than 11,000 power units and 45,000 trailers and containers, similarly estimates $2 million in costs to revert to the old rules, Woodruff Aff. ¶ 7—also an insignificant percentage of the company's nearly $2.5 billion in operating revenues, $1.3 billion in total assets, and over $95 million in net annual earnings. J.B. Hunt, 2003 Annual Report, *at* http://ww2.jbhunt.com/APPL/NewsroomRedesign.nsf/Financials?OpenPage.

[7] Intervenors also attempt to rely on a survey of the nation's largest trucking companies, prepared specifically for this litigation, to estimate aggregate industry costs to revert to the old HOS rules, as well as to show that the new rules present no safety risk. Intervenors' Motion 9, 11-12. The Court should assign no weight to the results of this so-called survey, which the intervenors did not append to their motion. The ATA expressly invited motor carriers to complete the survey to "enable ATA to more effectively demonstrate to the court potential safety and cost implications of transitioning back to the old rules." http://www.truckline.com/safetynet/regulatory/04_hosbulletininfo.html. Given ATA's express urging of carriers to respond to the survey to show that transitioning back to the old HOS rules would be costly, the anecdotal survey responses from a self-selected sector of the trucking industry, as summarized in the Osiecki Affidavit, are not only hearsay, but lack credibility and objectivity.

statutorily mandated factor "in the slightest." 374 F.3d at 1216.

b. Alleged Harm to Enforcement of Federal HOS Requirements

FMCSA contends that an extended stay of the mandate is necessary because state enforcement authorities need time to adjust their rules to conform to the new federal requirements. Absent a stay, the agency argues, disparate state and federal requirements governing truckers' hours of service will co-exist, creating substantial confusion and undermining uniform enforcement. FMCSA Motion 4-5, 7-10; Intervenors' Motion 1, 17-18.

To receive federal funds through the Motor Carrier Safety Assistance Program ("MCSAP"), states must ensure that their laws are compatible with federal safety regulations for interstate trucking. 49 U.S.C. §§ 31102, 31141; 49 C.F.R. §§ 350.211(1), 350.213(l), 350.331, 350.333, 350.335, 355.21, 355.25. According to FMCSA, 21 jurisdictions incorporate FMCSA regulations by reference (thus making corresponding changes to their state laws automatically), 24 jurisdictions require a change in regulations through an administrative process, and only 6 states require action by the state legislature. FMCSA claims that all but 2 of the jurisdictions requiring affirmative action have adopted the new federal HOS regulations, that it will take time for those states that already amended their statutes or regulations to track the new federal HOS requirements to revert to the former rules, and that some states might choose not to amend their laws at all, but instead await the issuance of a replacement rule. FMCSA Motion 4-5, 9-10; Paden Aff. ¶¶ 10, 13-14.

Although plausible on the surface, these concerns are both overstated and speculative, as well as based on vague, incomplete, and inaccurate information. Although it is the agency's burden to justify a stay, FMCSA provides no details regarding which states require changes to their statutes or regulations and which states have not adopted the new (invalidated) federal HOS rules, making it difficult for either petitioners or this Court to verify the accuracy of its claims. But from what we

do know, the agency's claim is not accurate. It appears that, as of early September 2004, at least 4 states have not yet formally amended their laws to adopt the current federal HOS rules. *See* Alaska Admin. Code tit. 13, § 05.020; Cal. Code Regs. tit. 13, § 1212.5; Kan. Admin. Regs. § 82-4-3; N.Y. Comp. Codes R. & Regs. tit. 17, § 824.3.[8] That California is one of the states that has not yet adopted the new federal HOS rules seriously undercuts the strength of the agency's argument. This single state accounts for nearly 10 percent of all commercial motor vehicle miles traveled in the United States. *See* Adjusted Vehicle-Miles Traveled (VMT) for Commercial Motor Vehicles, *available at* http://ai.volpe.dot.gov/CrashProfile/ vmtreport5.asp ("VMT List"). Indeed, the fact that a stay would effectively require California to bear the burden of formally adopting rules already found arbitrary and capricious by this Court is a powerful reason to *deny* a stay.

The agency's arguments about the confusion and disruption that supposedly will follow if the states are required to revert to the former HOS rules likewise fall flat. Not every state required to amend its statutes or regulations to conform to the new federal rules did so by January 4, 2004. Several states did not amend their regulations until well after that adoption date. Arizona, whose VMT for trucks ranks in the top ten, *see* VMT List, did not amend its regulations until June 8, 2004. *See* Ariz. Admin. Reg. R17-5-202, *at* http://www.azsos.gov/Rules_and_Regulations.htm. Neither FMCSA nor the intervenors have made any showing that "chaos" or disparate standards reigned in these states during the interval between January 4, 2004, when the new HOS regulations went into effect, and the dates that the states amended their laws and regulations.

In fact, no such confusion ensued because the new HOS rules were well publicized; motor

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[8] Petitioners obtained this information by consulting Westlaw and publicly available sources. *See, e.g.,* 26 N.Y. St. Reg., Issue 22, Rule Making Activities, at 23 (June 2, 2004) (notice of proposed rulemaking on HOS rules) (subsequent issues reflect no adoption as of yet). Public Citizen staff also verified the information by checking with state enforcement officials.

carriers were independently required to follow the federal rules for interstate trucking, 49 C.F.R. § 390.3; and states took various steps to ensure effective enforcement of HOS rules during the transition period. For example, Alaska, which had not adopted the new HOS rules by January 4, 2004, put into effect a plan to refer interstate violations of the new rules to FMCSA. *See* States Citing the New Hours-of-Service (HOS) Regulations, *available at* http://www.fmcsa.dot.gov/espa%C3%B1ol/english/pdfs/rev_hos_map.pdf ("FMCSA Map"), attached hereto as Exhibit 1. California, too, has not yet amended its regulations, yet its Office of Truck Services has posted the new federal HOS rules on its website, http://www.dot.ca.gov/hq/traffops/trucks, links readers to FMCSA's website for more information, *see id.,* and has adopted the interim measure of citing truckers only if they violate both the old and new interstate driving limits, even though the new relaxed limits have not yet been codified into state law. FMCSA Map. In other states in which a regulatory change is necessary to re-adopt the old rules, the process was (and can again be) expedited through the issuance of emergency orders adopting new federal rules pending completion of the formal administrative process. *See, e.g.,* Order Authorizing Modifications to 17 NYCRR Part 824 to Ensure Consistency with the New Federal Hours of Service (N.Y. Dep't of Transp.) (Dec. 4, 2003), attached hereto as Exhibit 2. In short, the states have ample means to implement and enforce the old, reinstated federal HOS rules once the new (invalidated) rules are vacated.

Significantly, the federal regulatory scheme expressly anticipates and tolerates time lags before states amend their laws to track changes in federal safety regulations. FMCSA's regulations ordinarily allow states up to three years to amend their laws or regulations to make them compatible with federal motor carrier safety regulations, 49 C.F.R. §§ 350.331(d), 350.335(b), although the agency apparently has the discretion to set an earlier deadline. 49 C.F.R. Part 355, Appx. A, State Determinations ¶ 3. Thus, there is no need for this Court to issue a stay of the mandate, because the

flexibility the movants seek is already built into the system.

FMCSA contends that states will lack the incentive to amend their statutes and regulations swiftly (if at all) after the Court's mandate issues and the new federal HOS rules are vacated. FMCSA Motion 10. Its fears are unsupported. Not only must all states participating in the MCSAP review their laws and submit plans annually to FMCSA that contain certifications that their safety rules and regulations are compatible with the federal rules, 49 C.F.R. §§ 350.211, 350.213(l), 350.331, 355.21, 355.23, 355.25; *see also id.* § 350.105 (defining compatibility), but they have every incentive to adopt federal safety regulations as quickly as possible to avoid the risk of disparate enforcement and to satisfy the trucking industry, which likewise has a strong interest in uniform HOS enforcement. *See, e.g.,* Letter from ATA President to Executive Director of Commercial Vehicle Safety Alliance ("CVSA") (Dec. 18, 2003) (asking CVSA to urge its member jurisdictions to ensure "a smooth and uniform implementation during the coming months regarding enforcement at the state level"), *link available at* http://www.truckline.com/safetynet/regulatory/04_hosbulletininfo.html. As FMCSA admits, despite the 3-year period for amendment allowed them, "[s]tates typically adopt [a] new [federal] rule as soon as possible when it is safety related . . . ." Paden Aff. ¶ 16.

Equally important, FMCSA shortchanges its own significant enforcement authority not only to issue "orders . . . on commercial motor vehicle safety," 49 U.S.C. § 31102(a), but to declare unenforceable state HOS laws and regulations regarding interstate trucking that adopt the invalidated federal rules and are therefore less stringent for motor carriers (with respect to daily and weekly driving hours) than the old reinstated federal HOS rules. 49 U.S.C. § 31141; 49 C.F.R. § 350.333 (enforcement of less stringent state HOS rules governing interstate trucking prohibited); Paden Aff. ¶ 9 (for trucks operating in interstate commerce, "compatible" state regulations must be identical

to federal standards). FMCSA's partnership with the states in enforcing the HOS and other safety regulations, coupled with its ultimate authority to preempt incompatible state laws, allows it to lead in the commercial vehicle safety arena with an iron fist in a velvet glove. Thus, for example, the agency had authority when the new rules went into effect in January 2004 to declare a 60-day grace period in enforcement and to ask the states to follow suit. *See* page 9, *supra*.[9] There is every reason to believe that when the new HOS rules are vacated and the old rules reinstated, FMCSA and the states will work together cooperatively to make the transition as rapid and as smooth as possible. The agency's assertion that, without a stay, "the federal/state enforcement partnership will be destroyed," FMCSA Motion 10, lacks any basis in reality.

3. Harm to Others and the Public Interest

Even if this Court finds that the moving parties have shown harm, that harm is significantly outweighed by the substantial safety risks, costs, and potential for loss of life and limb inherent in indefinitely retaining a rule that, as this Court recognized, authorized significantly longer driving hours without justification or analysis. And, in contrast to the alleged injury claimed by FMCSA and the intervenors, who protest the expense and inconvenience of reverting to the old rules on an interim basis, truck drivers face the very real risk of suffering permanent and irreparable damage to their health if the new rules remain in effect.

The intervenors attempt to allay concern over the new rules' adverse impact on drivers and the public by contending that, regardless of what studies the agency did or did not rely on in its preamble to the final rule, the new rules are safer than the old. Intervenors' Motion 11-17. This

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[9] Apart from enforcement of the HOS rules by state roadside inspectors, FMCSA has considerable enforcement tools of its own, including the power to impose civil penalties, issue compliance orders or injunctions, abate imminent hazards, and impose other sanctions, *see* 49 C.F.R. Part 386, as well as the authority to put drivers out of service. 49 C.F.R. § 395.13.

Court should reject this effort by industry to relitigate the merits of the case. The Court has already explained that the increase in driving hours cannot be justified simply because the new rules increased the minimum amount of off-duty time from 8 to 10 hours (while maintaining the sleeper-berth exception, which permits the required rest to be taken in two short segments), and decreased driving-eligible on-duty time from 15 to 14 hours. 374 F.3d at 1217-19. The new rules did not founder merely because FMCSA failed to cite supporting studies in the final rule. *Compare* Intervenors' Motion 16.[10] As this Court already has ruled, the agency's failure to consider the effect of the new rules on truck drivers' health "permeated the entire rulemaking process," 374 F.3d at 1217, and its justifications for increasing driving hours, given the "conceded and documented ill effects from the increase," *id.* at 1218, were "dubious," "doubtful," and of "questionable" rationality. *Id.* at 1218-19, 1223.[11]

FMCSA admits that "it is far too early to make a definitive statement regarding the safety effects of the current rule," but states nonetheless that "some preliminary data suggests that accident

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[10] As petitioners explained in their Final Reply Brief (at 14-15), the proposition that on-duty hours in general (and not just driving hours) contribute to a driver's fatigue, *see* Intervenors' Motion 16 (citing Vespa, J.A. 597), is unexceptionable, but beside the point, as the final rule did not reduce total on-duty hours. Moreover, FMCSA's failure to cite the study by Wylie, J.A. 284, in the final rule (cited by Intervenors at 16), was likely deliberate, given the degree to which the study was discredited by the agency's peer-review panel. *See* Final Reply Brief for Petitioners 18-19. The intervenors also note that a number of states allow 12 hours of consecutive driving time for *intrastate* trips, Intervenors' Motion 16, but cite no research showing the safety of those longer hours, as there is none. To the contrary, FMCSA itself recognized in its literature review, J.A. 899, that the states with the highest numbers of fatal-outcome truck crashes—California, Florida, and Texas—are also those with the longest intrastate driving hours.

[11] Intervenors cite a statement from the National Sleep Foundation critical of the old rules, Intervenors' Motion 16-17, but that statement discussed only the benefits of providing drivers longer periods for sleep, not the dangers of expanded driving hours or total weekly duty hours. Moreover, the NSF "recommend[ed] that the hours of service regulations be improved for driver and public safety." http://sleepfoundation.org/PressArchives/NSFstatement1.cfm.

rates in some circumstances may have decreased." FMCSA Motion 10-11. This so-called "preliminary data" does not come from Department of Transportation statistics or analysis, but from anecdotal reports from the trucking industry suggesting that accident rates in the few short months the new rules have been in effect are comparable to, or slightly lower than, the rates over the same period in 2003. *See* Intervenors' Motion 11-13. These self-selected accounts covering such a brief period of time are meaningless; moreover, any number of variables having nothing to do with truckers' hours of service, including statistical variations and extraneous factors, such as weather, can account for slight differences in crash rates over a few-month period. *See also* note 7, *supra.*

Petitioners concede that our goal is to improve upon the old HOS rules. What we ultimately seek is a new, third set of rules that will advance highway safety, promote drivers' health, and fulfill the agency's statutory mandates. Petitioners' views on the old rules are beside the point, however, because the new rules are much worse. *See* Final Brief for Petitioners 35, 42-54, 60-64; Final Reply Brief for Petitioners 13-25, 28-31. Because of the serious threat to truck drivers and the general public alike posed by tired drivers driving dramatically longer hours without any assurance that those longer driving hours are safe and will not have an adverse impact on drivers, the requested stay presents a substantial risk of harm to truck drivers and other highway users and is contrary to the public interest. In establishing FMCSA in 1999 to promote motor carrier safety, Congress directed the agency to "consider the assignment and maintenance of safety as the highest priority." 49 U.S.C. § 113(b). The agency has ignored that mandate. The public interest requires observance of the rule of law by federal agencies. It is not in the public interest to perpetuate a regulation that this Court has determined violates federal law and is so fundamentally flawed as to be arbitrary and capricious.

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

Tellingly, FMCSA and the intervenors wholly ignore the Court's rules, which do not contemplate an indefinite stay of the Court's mandates, but ordinarily limit such stays to 90 days, a period specifically designed to allow parties time to seek certiorari, *see* D.C. Cir. R. 41(a)(2), which the moving parties apparently do not contemplate. For the reasons set forth above, no stay of the mandate of any duration is warranted. But if this Court is inclined to grant a stay, the stay should not exceed a brief, defined period of no more than 90 days, and the Court should make it clear that the stay is finite and intended only to give states time to prepare for enforcement of the old, reinstated HOS rules, and not to allow FMCSA and the intervenors to gear up to file status reports and requests for an indefinite stay—or a series of stays—at the end of the 90-day period.

If this Court gives FMCSA license to retain the unlawful rules on an indefinite basis, it will remove the incentive for the agency to move swiftly to issue a notice of proposed rulemaking and new final rule. *See Honeywell,* 374 F.3d at 1375 (Randolph, J., concurring). The new HOS rulemaking will be complex and prolonged under the best of circumstances. Unfortunately, petitioners are not operating under the best of circumstances, but are forced to contend with an agency renowned for its dilatoriness in issuing statutorily mandated regulations. Petitioners were compelled to file a petition for mandamus to compel FMCSA to issue not only its HOS rule, but several other safety regulations required by Congress. *See* Petition for a Writ of Mandamus and for Relief from Unlawfully Withheld Agency Action, No. 02-1363, filed Nov. 26, 2002 (D.C. Cir.) (listing six statutory directives to the agency to promulgate regulations governing commercial vehicle safety by specified dates that FMCSA violated). The settlement of that action led to the issuance of the new HOS rule challenged in this litigation.

Finally, an indefinite stay could threaten the quality and safety of the ultimate HOS rule that emerges after a new rulemaking is conducted. The intervenors' agenda in requesting a stay is transparent. According to the ATA: "The agency's failure to expressly consider driver health consequences seems more of a technicality than a significant flaw in the rules. It is hoped that the agency will be able to readily show that the fatigue-reducing measures in the new rules will also have a beneficial effect on driver health." ATA Special Bulletin: Hours of Service, Part II, *Federal Court Overturns New HOS Rules: ATA Interpretation* (July 16, 2004), *link available at* http://www.truckline.com/safetynet/regulatory/04_hosbulletininfo.html. The very day this Court ruled, the ATA promised to "encourage the agency to attempt to keep the new HOS rules in place beyond the initial 45 to 52 day period while it is reconsidering the HOS rules and the rationale for changes it made in the new rules." *Id.* In other words, the intervenors have pressured FMCSA to maintain the new rules struck down by the Court while the industry (and perhaps the agency) search for a rationale for keeping them. Petitioners respectfully suggest that this Court should not indulge the moving parties in their effort to generate a post hoc rationale for these flawed rules while putting the lives of drivers and the public at risk.

CONCLUSION

For the foregoing reasons, petitioners urge this Court to deny both motions for a stay.

Respectfully submitted,

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Counsel for Petitioners

Dated: September 13, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 2004, I caused one copy of the foregoing Petitioners' Opposition to Motions for Stay of the Mandate Filed by the Federal Motor Carrier Safety Administration and Intervenors American Trucking Associations, Inc., Distribution and LTL Carriers Association, and Truckload Carrier Association to be served by first-class U.S. mail, postage prepaid, and by electronic mail, on the following:

Matthew M. Collette
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Room 7212
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Erika Z. Jones
David M. Gossett
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and by first-class mail, postage prepaid on:

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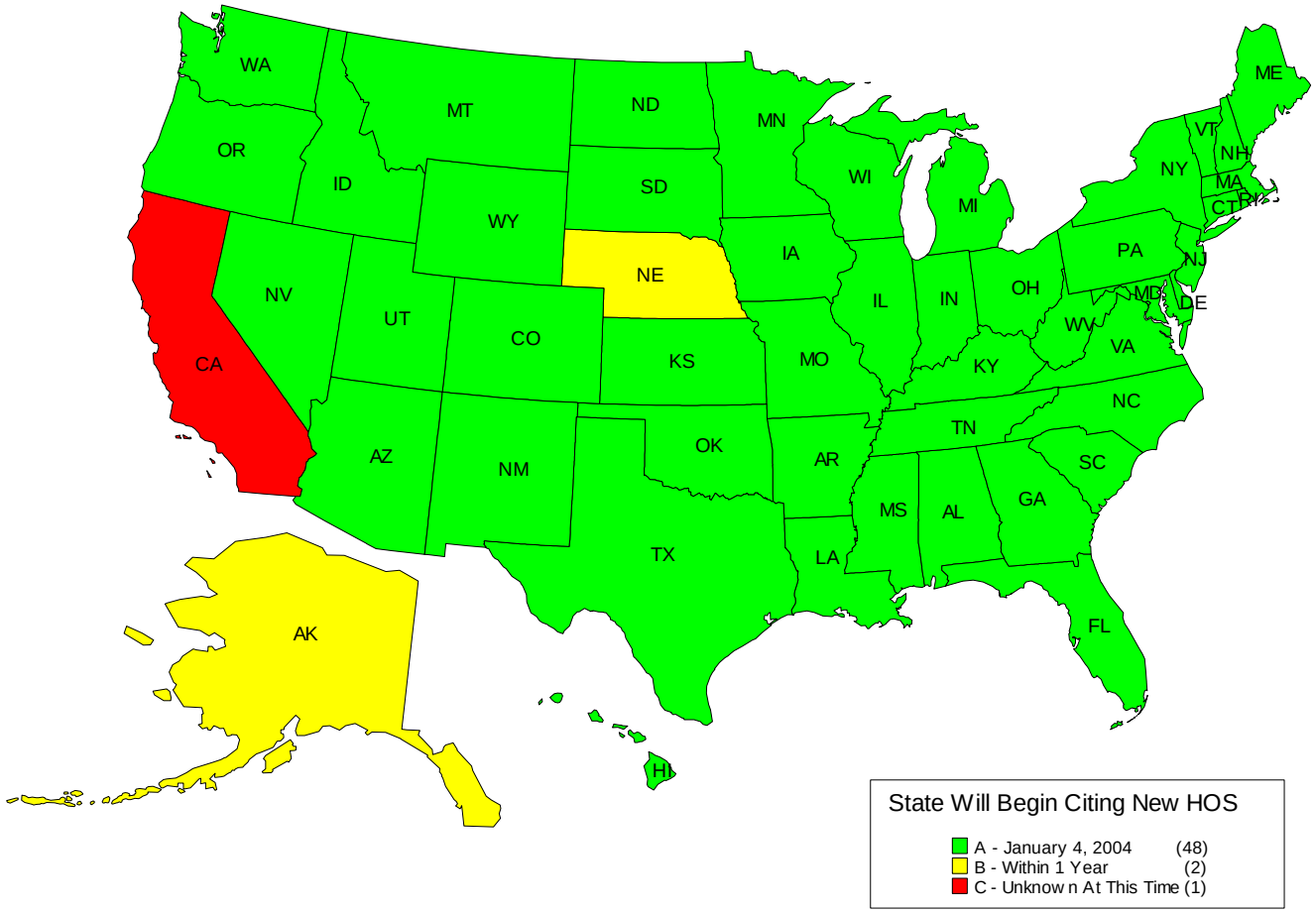
Exhibit 1

States Citing the New Hours-of-Service (HOS) Regulations



Interim Activities for States Not Citing the New HOS on January 4, 2004:

Alaska - Plans to refer interstate violations of the HOS regulations to the Federal Motor Carrier Safety Administration (FMCSA) until it begins citing the new regulations in June 2004.

Nebraska - Plans to document the new HOS violations on January 4, 2004, by citing 392.3 for fatigue. The State anticipates citing the new regulations in April 2004.

California - Plans to cite drivers under the old regulations on January 4, 2004, if the driver has also violated the new driving limits. The State anticipates adopting the new HOS rules within 6-9 months.

Exhibit 2

STATE OF NEW YORK
DEPARTMENT OF TRANSPORTATION
ALBANY, NEW YORK 12232

At the Office of the Department of
Transportation in the City of Albany
on December 4, 2003

PRESENT:

Dennison P. Cottrell, Director
Passenger & Freight Safety Division

CASE 27647 - In the matter of motor carrier compliance with regulations pertaining to hours of service for drivers and motor carriers of property, pursuant to 17 NYCRR PART 824.

AUTHORIZING MODIFICATIONS TO 17 NYCRR PART 824 TO ENSURE CONSISTENCY WITH THE NEW FEDERAL HOURS OF SERVICE RULES

On April 28, 2003, the Federal Motor Carrier Safety Administration (FMCSA) issued the first significant revision to the Hours Of Service regulations in over 60 years. Subsequent technical amendments were issued on September 30, 2003 and an "Hours of Service Enforcement Policy" memorandum was issued by FMCSA dated November 25, 2003. The new regulations provide an increased opportunity for drivers to obtain necessary rest and restorative sleep, and at the same time reflect operational realities of motor carrier transportation. These new Hours of Service regulations go into effect nationally on January 4, 2004. The final rule in its entirety as well as the technical amendments and enforcement policy memo can be accessed from FMCSA's website at www.fmcsa.dot.gov.

These regulations only apply to property carriers and drivers. Passenger carriers and drivers will continue operating under the existing hours of service rules as found in 17 NYCRR 723 and 49 CFR 395.

The FMCSA requires states adopt uniform transportation safety regulations that are equivalent to the Federal Motor Carrier Safety Regulations in order to foster consistency for both interstate and intrastate transportation.

In order to promote uniform hours of service regulations for drivers and motor carriers of property in a timeframe consistent with the states adjacent to New York, it is appropriate to temporarily modify existing hours of service regulations pending completion of the formal process of amending 17 NYCRR 824, therefore it is

ORDERED:

The following motor carrier hours of service regulations are modified with respect to the interstate and intrastate transportation performed by drivers and motor carriers of property, effective at the beginning of January 4, 2004 and shall remain in effect unless otherwise ordered:

(1) Section 824.3(b)(1) and (b)(2) are temporarily modified in that 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:

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

(b)(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 outlined in paragraphs (2) or (3) of this order.

(2) Sleeper Berth Provisions: Drivers may utilize split sleeper berth periods. These drivers may accumulate the equivalent of 10 consecutive hours of off-duty time by combining 2 periods of rest in the sleeper berth, provided:

(i) Neither rest period in the sleeper berth is less than 2 hours;

(ii) The driving time before and after the first qualifying sleeper berth period and concluding at the beginning of the second qualifying sleeper berth period, when added together, does not exceed 11 hours;

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

(a) by excluding any sleeper berth period of at least 2 hours which, when added to a subsequent sleeper berth period, totals at least 10 hours, and

(b) by including all on-duty time, all off-duty time not spent in the sleeper berth, all sleeper berth periods of less than 2 hours, and any sleeper berth period not described in paragraph (2)(iii)(a); and

(iv) The driver may not return to driving subject to the normal limits outlined in paragraph (1) of this order, without taking at least 10 consecutive hours off-duty, at least 10 consecutive hours in the sleeper berth, or a combination of at least 10 consecutive hours off-duty and sleeper berth time.

(3) A property-carrying driver may extend the 14 hour limit outlined in paragraph (1) of this order if:

(i) 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;

(ii) 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

(iii) 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 paragraph (1) of this order.

(4) Section 824.3(c)(1)(i) is temporarily modified so that no motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, nor shall any driver drive for any period after having been on duty more than 60 hours in any 7 consecutive days if the employing motor carrier does not operate motor vehicles every day of the week. Any period of 7 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours.

(5) Section 824.3(c)(1)(ii) is temporarily modified so that no motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, nor shall any driver drive for any period after having been on duty more than 70 hours in any 8 consecutive days if the employing motor carrier operates motor vehicles every day of the week. Any period of 8 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours.

(6) All of the remaining provisions of Section 824 not affected by these modifications remain in effect, including Section 824.3(e) which requires that ..."no person shall drive or be required to drive a motor vehicle while such driver's ability or alertness is so impaired through fatigue, illness or any other cause so as to make it unsafe to begin or continue to drive, except in case of grave emergency where the hazard would be increased by observance of this subdivision and then only to the nearest point at which safety is ensured;..."

(7) That all regulations pertaining to Commercial Drivers' Licenses requirements and insurance requirements remain in force and effect for all motor carriers.

(8) That motor carriers that have an out-of-service order in effect, or a suspension or revocation of a New York State Certificate as a motor carrier of property, are not eligible to take advantage of the relief from the regulation that this order provides.

By the Office of Passenger & Freight Safety

Dennison P. Cottrell