

**SCHEDULED FOR ARGUMENT ON APRIL 15, 2004**

**No. 03-1165**

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

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PUBLIC CITIZEN, INC., CITIZENS FOR RELIABLE AND SAFE HIGHWAYS,  
AND PARENTS AGAINST TIRED TRUCKERS,

Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION,

Respondent,

AMERICAN TRUCKING ASSOCIATIONS, INC., DISTRIBUTION AND LTL  
CARRIERS ASSOCIATION, AND TRUCKLOAD CARRIERS ASSOCIATION,

Intervenors.

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On Petition For Review of a Final Rule  
Issued by the Federal Motor Carrier Safety Administration

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**FINAL BRIEF FOR THE INTERVENORS  
IN SUPPORT OF RESPONDENT**

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Robert Digges, Jr.  
Vice President & Deputy Chief Counsel  
AMERICAN TRUCKING ASSOCIATIONS,  
INC.  
2200 Mill Road  
Alexandria, VA 22314

Erika Z. Jones  
Adam C. Sloane  
David M. Gossett  
MAYER, BROWN, ROWE & MAW LLP  
1909 K Street, NW  
Washington, DC 20006  
tel (202) 263-3000  
fax (202) 263-3300

*Counsel for Intervenors*

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **(A) Parties and Amici.**

All parties, intervenors, and amici appearing before this Court are listed in the Certificate included with Respondent's brief.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the intervenors state that the American Trucking Associations, Inc. ("ATA"), a District of Columbia non-profit corporation, is the national trade association of the trucking industry. ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Its membership includes approximately 2,000 direct dues-paying member trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 34,000 companies and every size, type and class of motor carrier operation. The Distribution and LTL Carriers Association ("DLTLCA") is a national trade association composed of for-hire motor carriers that transport predominantly less-than-truckload shipments; it is an affiliate of the ATA. The Truckload Carriers Association ("TCA") is the only national trade association whose sole focus is the truckload segment of the motor carrier industry; it also is an affiliate of the ATA. None of the intervenors has a parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

**(B) Rulings Under Review.**

References to the rulings at issue appear in the Certificate included with Respondent's brief.

**(C) Related Cases.**

Intervenors are unaware of any related cases except for those listed in Respondent's brief.

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## GLOSSARY

ATA	American Trucking Associations, Inc.
CMV	Commercial Motor Vehicle
DLTLCA	Distribution and LTL Carriers Association
DOT	Department of Transportation
EOBRs	Electronic On-Board Recorders
FHWA	Federal Highway Administration
FMCSA	Federal Motor Carrier Safety Administration
HOS	Hours of Service
IIHS	Insurance Institute for Highway Safety
NERA	National Economic Research Associates
NPRM	Notice of Proposed Rulemaking
NTSB	National Transportation Safety Board
OOIDA	Owner Operators Independent Drivers Association
PATT	Petitioner Parents Against Tired Truckers
RIA	Regulatory Impact Analysis, FMCSA-1997-2350-23302, § 8-7
RODS	Records Of Duty Status
TCA	Truckload Carriers Association

## STATUTES AND REGULATIONS

All applicable statutes and regulations are included in the addendum to petitioners' brief.

## INTRODUCTION

For the trucking industry, the safety of its drivers and other employees, its customers, and the traveling public is a top priority in meeting America's freight-movement needs. Thus, the intervenors support safety rules that reflect sound science, advance public safety, and meet the needs of the American economy.<sup>1</sup>

There is no dispute that driver fatigue can be a safety issue, and is the cause of a number of fatal crashes involving trucks on the nation's roads. Thus, when the Federal Motor Carrier Safety Administration ("FMCSA" or "agency") proposed modifying its Hours of Service ("HOS") rules to reduce the incidence of driver fatigue and improve the safety of our roadways,<sup>2</sup> each of the intervenors was actively involved in the rulemaking proceeding, submitting extensive written comments and participating in Roundtables and other meetings with the agency.<sup>3</sup>

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<sup>1</sup> The intervenors are described in the Certificate as to Parties, Rulings, and Related Cases on page i, *supra*.

<sup>2</sup> See Advanced Notice of Proposed Rulemaking, 61 Fed. Reg. 57,252 (1996) (JA1); Notice of Proposed Rulemaking, 65 Fed. Reg. 25,540 (2000) (JA921).

<sup>3</sup> ATA's main written comments are in the docket at JA1547 (hereinafter "ATA Comments"). Other ATA comments are at FMCSA-1997-2350-921, FMCSA-1997-2350-1102, FMCSA-1997-2350-1175, FMCSA-1997-2350-1311, FMCSA-1997-2350-1809, FMCSA-1997-2350-16135, FMCSA-1997-2350-18230,

The more than 53,000 comments submitted during the HOS rulemaking, including over 700 oral comments at eight public hearings,<sup>4</sup> demonstrate what an immensely complicated task changing the HOS rules proved to be. The agency had to weigh a wide range of risks and benefits against the background of evolving and uncertain science, uncertainty about the real-world effects of different possible final rules, and uncertainty about the consequences for an industry that employs 9.7 million people, has annual revenues of \$486 billion, and has profound effects upon the entire national economy.<sup>5</sup>

In its brief, the FMCSA has persuasively demonstrated that petitioners' specific challenges to the HOS Final Rule are meritless, and that the petition for review therefore must be denied. Rather than reiterate these arguments in this brief (*cf.* D.C. CIR. R. 28(e)(2)), intervenors will instead focus on a number of overarching flaws in petitioners' attacks. Petitioners misleadingly portray the HOS

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FMCSA-1997-2350-18523, FMCSA-1997-2350-20019, FMCSA-1997-2350-20104, FMCSA-1997-2350-20995, FMCSA-1997-2350-21160, FMCSA-1997-2350-21297, FMCSA-1997-2350-22421 & FMCSA-1997-2350-23213. DLTCA's comments are in the docket at FMCSA-1997-2350-486, FMCSA-1997-2350-22421 & FMCSA-1997-2350-23288. TCA's comments are in the docket at FMCSA-1997-2350-501, FMCSA-1997-2350-836, FMCSA-1997-2350-22269 & FMCSA-1997-2350-23388.

<sup>4</sup> See Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations; Final Rule ("Final Rule"), 68 Fed. Reg. 22,456, 22,458 (Apr. 16, 2003) (JA1781, JA1784).

<sup>5</sup> See JA1806 (1998 estimates).

rulemaking task as simple, and selectively cite science to support their argument that the final rule is flawed. But when the Rule is considered in light of the difficult issues confronting the agency and the rulemaking record *as a whole*, it is manifest that petitioners' arguments for why the rule is arbitrary and capricious are without merit.<sup>6</sup>

### SUMMARY OF ARGUMENT

The FMCSA's task in this rulemaking was to develop a new HOS rule that improved commercial motor vehicle ("CMV") safety while weighing the costs and benefits of possible alternatives. The agency's Final Rule fulfilled this complex obligation, and is not arbitrary or capricious.

In particular, the agency – unlike petitioners – realized that the question how to improve safety is much more complicated than merely mandating that truck drivers operate CMVs for fewer hours each day or each week. Rather, any

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<sup>6</sup> Intervenor do not believe that the Final Rule is perfect. In fact, on grounds unrelated to petitioners' challenges TCA submitted a letter in support of Wal-Mart Stores, Inc.'s Petition for Reconsideration (*see* JA1849), and ATA has petitioned the agency to modify the rule to allow drivers to extend the 14-hour on-duty period for one two-or-more-hour period spent in a sleeper-berth, if the driver then obtains a full 10-hour off-duty period. (ATA's Petition was filed with the FMCSA on November 3, 2003; it has not yet been docketed.) As ATA explained in its Petition, the new rule *discourages* drivers from taking naps. *See id.* at 6. The agency has indicated that the Petition "raise[s] genuine issues in need of resolution" (*see* FMCSA, *Hours of Service Enforcement Policy* (MC-EC), at 1 (Nov. 23, 2003)), and presumably will issue an NPRM addressing that Petition shortly. However, as we discuss in this brief, the attacks on the final rule raised by the petitioners in this litigation are baseless.

proposed revision of the HOS rule must be evaluated not only in terms of its effects on driver fatigue but also on its other safety-related effects, such as whether it would increase the risk posed by increased numbers of inexperienced truck drivers on the road and increased daytime truck traffic.

The FMCSA also understood that it had to address the costs and benefits of its options. For example, by some estimates the draft rule contained in the NPRM would have cost the industry an additional *\$110 billion* over ten years (*see* ATA Comments, at JA1605) – despite having at best a marginal effect on traffic safety. Similarly, in the final rule the agency acknowledged that HOS rules must not eliminate the operational flexibility that is crucial in the trucking industry.

Thus, the Final Rule is a marked improvement not only over the 1962 rules it replaced, but also over the draft rule contained in the NPRM.

## ARGUMENT

### **I. PETITIONERS' CHALLENGES ARE BASED ON AN INCOMPLETE PRESENTATION OF BOTH THE RECORD BEFORE THE AGENCY AND THE FACTORS THE AGENCY HAD TO CONSIDER IN PROMULGATING THE FINAL RULE.**

#### **A. The Agency Appropriately Balanced Many Safety Factors Beyond Driver Fatigue In Crafting The HOS Final Rule.**

By far the most misleading aspect of petitioners' argument is their single-minded focus on driver fatigue. Throughout their brief, they repeatedly castigate the agency for making choices that were not designed solely to maximize the possibility that all truck drivers will sleep at least 8 hours every night. *See, e.g.,* Pet.

Br. 22, 34, 39.

The question before the agency, however, was *not* simply how to maximize drivers' opportunity for sleep. Rather, the agency's task was to craft a final rule that, while paying attention to the costs and benefits of various options, improved overall commercial motor vehicle *safety*.

The distinction between sleep and safety is not merely semantic. Petitioners themselves point out that the FMCSA is statutorily required to treat *safety* as its “[h]ighest [p]riority.” 49 U.S.C. § 113(b). *See* Pet. Br. 14. Of course, no one disputes that having overly fatigued truck drivers on the road can create a safety hazard.<sup>7</sup> But as the agency recognized in the Final Rule, having inexperienced truck drivers on the road is also a safety risk. Similarly, promulgating a rule that would mandate that more truck driving occur during daylight hours would also be a safety risk. A fatigue-reducing rule that exacerbates these undesired outcomes would not improve safety; the Final Rule appropriately balances these different safety concerns.

1. In response to the NPRM, industry representatives pointed out that “the proposed rules would cause a dramatic increase in the number of young, inexperienced drivers on the road” – because decreasing hours of service will require

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<sup>7</sup> However, as we discuss below, the agency initially overestimated the magnitude of the safety risk from driver fatigue. *See* 68 Fed. Reg. at 22,497 (JA1823); pages 9-13, *infra*.

hiring more drivers – “creating even greater risks of accidents.” 68 Fed. Reg. at 22,483 (JA1809) (citing Minnesota Trucking Association Comments, at JA1172). *See also* FMCSA, *Roundtable II*, at 125 (JA1264) (Greyhound representative Jack Haugslund explaining that “[o]bviously, our new drivers have more accidents than the senior drivers”); ATA Comments, at JA1568-69 (summarizing three studies finding that inexperienced drivers are at higher risk of being involved in an accident than more experienced drivers, with estimates of that increased risk ranging from 1.27-3.0 times greater risk, and calculating that the HOS Rule contained in the NPRM would have led to between 8,700 and 13,000 *additional* crashes when compared to the older HOS Rule).

The agency’s review of the scientific literature supported this concern. For example, a study published by petitioners’ *amicus* IIHS found that there are “higher relative risks associated with \* \* \* young (under 30) compared with older drivers.” *See* DOT, *An Annotated Literature Review Relating to Proposed Revisions to the Hours-of-Service Regulation for Commercial Motor Vehicle Drivers*, at JA905 (1999) (discussing Jones & Stein, *Effect of Driver Hours of Service on Tractor-Trailer Crash Involvement* (IIHS 1987)). Similarly, a study in Australia found younger drivers to be involved in a greater number of accidents than older drivers. *Id.* at JA906 (citing Frith, *A Case Control Study of Heavy Vehicle Drivers’ Working Time and Safety* (1994)).

Thus, the agency explained in the Final Rule that “changes in the number of relatively inexperienced drivers in the industry” affect safety because “these drivers *tend to have somewhat higher accident rates than the average driver*, even over [a] fairly long time horizon.” 68 Fed. Reg. at 22,494 (JA1820) (citing Regulatory Impact Analysis (“RIA”), § 8-7, at JA1726-29 (emphasis added). In other words, “the need to hire many more drivers in response to [changed HOS rules] would cause increases in crashes over the ten-year time horizon of [the RIA analysis], and those additional crashes would counterbalance” decreases in fatigue-related crashes. 68 Fed. Reg. at 22,497 (JA1823). Therefore, in considering the safety impact of an HOS rule it was incumbent on the agency to take into account the safety implications of any aspect of that rule that would lead to more inexperienced truck drivers on the road. Unlike petitioners, the agency accounted for this safety factor in promulgating the Final Rule.

2. Similarly, in the Final Rule the agency noted that the safety effects of any HOS rule include the safety consequences of restricting nighttime driving. *See* 68 Fed. Reg. at 22,472-73; 22,478 (JA1798; 1804).<sup>8</sup> Thus, in issuing the Final

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<sup>8</sup> As the agency recognized, there would also be negative *non*-safety effects of a rule mandating that more driving occur during daylight hours. “Comment after comment stated how requiring two consecutive nights off would create havoc on the already overcrowded highways in the daylight hours.” 68 Fed. Reg. at 22,477 (JA1803). *See, e.g.*, Commonwealth of Pennsylvania Comment, at JA1523 (ob-

Rule the agency explained that even in the NPRM “it [had] not acced[ed] to the Expert Panel’s recommendation on limiting nighttime driving” (*id.* at 22,478 (JA1804)), and acknowledged that prior to issuing the NPRM it had not done “enough research into the safety consequences of shifting considerable nighttime truck traffic to the daytime.” *id.* at 22492 (JA1818).

The record reflects that these safety consequences may be very significant. For example, one major carrier explained that its operating experience and research showed that the period between midnight and 6 am is “the company’s lowest period for DOT collisions per million miles traveled.” J.B. Hunt Transport Inc. Comment, at JA1480. In fact, J.B. Hunt demonstrated that its accident rate per mile between midnight and 6 am was **33% lower** per mile than its accident rate between 6 am and noon, and its fatality rate between midnight and 6 am was **84% lower** per mile than its fatality rate between 6 am and noon. JA1482. Taking into account the percentage of driving that occurred at night, J.B. Hunt calculated that a rule requiring it to shift all midnight-to-6-am driving to the 6-am-to-noon period would **increase its total fatality rate by 29%! See *id.***

This is true because other countervailing factors more than outweigh the fact that fatigue-related accidents are more likely at night. Thus, “[i]f [nighttime driv-

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jecting to rule restricting nighttime driving because such a rule would limit the amount of highway construction that could be performed during low-use hours).

ers] are forced to drive during other times of day they will be at greater risk of being involved in a collision *caused by the mistakes of other motorists.*” JA1480 (emphasis added).<sup>9</sup> As Robert Pentracosta, a representative of Con-Way Transportation Services, explained during one of the agency’s Roundtables, the period between midnight and 6 am is “the safest period of time” for truck drivers, “because they are *not sharing the road with a lot of traffic.* \* \* \* [O]ur research \* \* \* show[s] that that is the least likely time that our company is involved in an accident.” *Roundtable II, supra*, at JA1259 (emphasis added); *see also* JA1269 (Landstar representative Joe Beacom explaining that while 13% of its miles are driven at night, no more than 8% of its accidents occur at night).

In sum, the Record shows that there are very important safety factors that caution against any rule that would reduce the percentage of truck driving that occurs at night, when there are many fewer vehicles on the road. The agency’s Final Rule appropriately accounted for this factor, too.

3. Finally, the safety consequences of any modification to the HOS rule depend on how frequently fatigue is a contributing cause of accidents. But as the agency acknowledged in the Final Rule (*see* 68 Fed. Reg. at 22,497 (JA1823)), its

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<sup>9</sup> J.B. Hunt noted that a DOT study found that most accidents involving trucks and other vehicles were caused by the behaviors of the driver of the *other* vehicle. *See also* FMCSA, *Large Truck Crash Facts 2001* (2003) (FMCSA-RI-02-011) (finding that more than two-thirds of truck accidents are caused by the other driver).

initial estimates of the scope of this problem were vastly exaggerated.

In the NPRM, the agency estimated that 15% of all truck-involved fatal accidents are “fatigue-relevant.” *See* 65 Fed. Reg. at 25,546 (JA928). The agency arrived at that number by combining the 4.5% of accidents in which the agency cited fatigue as the primary causal factor with an estimate of 10.5% of accidents in which the agency believed mental lapses related to fatigue were a contributing factor in causing the accident. *Id.* The agency did not explain how it arrived at the 10.5% number.

This estimate of the percentage of truck accidents that are fatigue-related was grossly in excess of the estimates in any study or scientific analysis in the agency’s Record. In fact, the agency’s own most recent study had shown fatigue to be a factor in only 1.1% of all types of truck accidents, and in 2.8-6.1% of fatal truck accidents.<sup>10</sup> *See* FHWA, *Crash Problem Size Assessment Update: Large Truck Crashes Related Primarily to Driver Fatigue*, at JA713 (1999). Importantly, that same study concluded that “[a]t present there is no basis for estimating \* \* \*

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<sup>10</sup> Petitioners misrepresent this study as being about a “lower bound” of fatigue-caused incidents. *See* Pet. Brief 9. In fact, the 2.8-6.1% figure was derived by multiplying the percentage of police reports that cite fatigue by either 1.4 or 3.1, to reflect the perceived conservative nature of such police data. *See* FHWA, *Crash Problem Size Assessment Update: Large Truck Crashes Related Primarily to Driver Fatigue*, at JA713 (1999). Thus, the 2.8-6.1% range was presented as a *realistic* estimate of the percentage of accidents that are fatigue-related, not a “lower bound.”

the *contributing* role that fatigue may play in [mental lapses and errors] resulting in crashes.” JA714 (emphasis in original).

The results of this agency study are consistent with other available research. See, e.g., Treat, *et al.*, *Indiana Tri-Level Study of the Causes of Traffic Accidents: Final Report Volume I: Causal Factor Tabulations and Assessments* (1979) (cited in the NPRM, at 65 Fed. Reg. 25,545 (JA927)) (fatigue was a certain or probable factor in 2% of studied accidents); 68 Fed. Reg. at 22,483 (JA1809) (noting National Safety Council estimate that 2-5% of truck accidents are fatigue related).<sup>11</sup>

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<sup>11</sup> Petitioners rely heavily on two NTSB studies of fatigue as a factor in large truck crashes, but fail to acknowledge the nonrepresentativeness of one of the studies, and completely misrepresent the findings of the other. NTSB’s fatal-to-the-truck-driver study did indeed find 31% of such crashes to be fatigue-related (*see* Pet. Br. 9), but these type of accidents constitute a very small percentage of all truck accidents, representing only one in every 676 large truck accidents of any severity levels and one in seven large truck fatal accidents. FHWA, *Crash Problem Size Assessment Update: Large Truck Crashes Related Primarily to Driver Fatigue*, at Table 1 (1999) (JA711). The non-representativeness of the 31% statistic is further demonstrated by the fact that police-reported fatigue rates in these accidents are nearly 30 times those of large truck accidents in general. *Id.* at Table 2 (JA713). The petitioners point to a second NTSB study that found that 58% of 107 single-vehicle truck crashes were fatigue related. *See* Pet. Brief 9. But petitioners misrepresent the nature of that study’s conclusion. The study was not based on a statistically representative sample of all single-vehicle crashes. To the contrary, the study *intentionally* selected a sample of accidents that would have a high incidence of fatigue, explaining that “[b]ecause the purpose of the Board’s study was to examine the factors that affect driver fatigue and not the statistical incidence of fatigue, the Board specifically selected truck accidents that were likely to include fatigue-related accidents.” *See* NTSB, *Factors That Affect Fatigue In Heavy Truck Accidents*, at JA45 (1996). Thus, the 58% figure reflects the study’s design; it is not an estimate of incidence of fatigue in that type of crash.

In modifying the HOS proposal, FMCSA acknowledged that it lacked a basis for concluding that 15% of truck accidents were fatigue related, and reduced its estimate to 8.15%. *See* 68 Fed. Reg. at 22,497 (JA1823) (noting that it had “no studies to suggest that 10 percent [with fatigue as contributing factor] was correct” and that the agency “did not have a specific reason to pick 10 percent”). Over the course of the rulemaking, the FMCSA learned that the magnitude of the driver-fatigue problem was not as pervasive as it had initially thought, which of course changes the safety calculus.<sup>12</sup>

\* \* \* \* \*

In sum, *the question how to maximize “safety” is not the same as the question how to minimize driver fatigue*. While it might be relatively easy to draft a rule that would minimize driver fatigue, it is much more difficult to draft a rule that maximizes safety. Petitioners’ narrow-sighted focus on driver fatigue misses the point. Given the fact that many of their challenges *depend* on ignoring these other

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<sup>12</sup> In its comments to the agency, ATA also argued that the agency was applying its fatigue estimates to the wrong *baseline* of accident fatalities. *See* ATA Comments, at JA1560-61 (explaining that while 90% of accidents were caused by driver error, only 30% of that number was attributable to the truck driver – factors that the agency did not consider in the NPRM when estimating the number of annual fatalities that were caused by truck driver fatigue); 68 Fed. Reg. at 22,482 (JA1808). The FMCSA declined to alter its methodology on this point, making its estimation of fatigue-caused fatalities much higher than we believe actually exists and leading the agency to continue to overestimate the role of truck-driver fatigue in truck accidents.

safety factors, much of their Petition can be rejected without any further inquiry into the specific reasons for the agency's choices.

**B. In Promulgating The Final Rule The Agency Properly Weighed Costs And Benefits Besides Safety Factors.**

As we showed above, in the rulemaking proceeding the agency appropriately examined and balanced various safety considerations beyond driver fatigue. But it was *not* the agency's task to promulgate the rule that would necessarily maximize safety without regard to the economic, social, and other consequences of the decision. Rather, in crafting regulations the agency is statutorily obligated to consider the "costs and benefits" of all options (*see* 49 U.S.C. § 31136(c)(2)(A)) – including, but not limited to, direct and indirect safety effects.<sup>13</sup>

This is entirely appropriate. For example, an HOS rule that required each truck driver to drive for not more than 4 hours a day, 4 days a week, during non-rush-hour daylight hours, after a full year of driving school might produce fewer

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<sup>13</sup> Petitioners imply that the Final Rule is problematic because, under it, some drivers may in fact be able to drive more hours during a week than they would have been allowed to drive under the prior HOS Rule – and thus portions of the new Rule may produce cost-saving efficiencies. *See* Pet. Br. 47-50. But because the agency was required to take costs and benefits into account, this attack is utterly misguided. Furthermore, as we explain below (at 18-19), the substance of this attack is also incorrect; the new rules may increase the number of hours a driver may drive during a week, but they change the *scheduling* of those hours; the scientific evidence in the record does not suggest that the potential increase in total hours per week is problematic given the rules governing when drivers must be off duty.

truck-involved collisions, but would cost infinitely more than the safety benefits such a rule would generate, and would effectively shut down the American economy. Beyond that, during the course of the rulemaking the agency was presented with detailed information about the operational, practical needs of different carriers, which had to be taken into account in balancing proposals.

Thus, ATA and many others stressed to the agency that operational flexibility was critically important in the trucking industry. *See* ATA Comments, at JA1578-79 (explaining the fluid nature of motor carrier operations, the impact of waiting times at loading docks on driver schedules, and the loss of productivity and ability to service customers that would be caused by inflexible work rules). Because of the dynamics of the economy, motor carrier operations must be flexible and highly adaptable. Truckload motor carrier vehicles move from assignment to assignment with widely varying freight pick up and drop off time periods, loading and unloading waiting times, distances between loads, and lengths of haul. To accommodate the commercial imperatives of the dynamic markets they serve, motor carriers need a very high degree of operational flexibility so that customer demands may be met, equipment may be more fully utilized, and drivers' sleep needs can be properly managed. "[F]actors such as weather, delayed or rerouted rail shipments, a mechanical malfunction or a labor dispute" may lead to a delivery needing to be made on "an expedited or irregular basis." National Tank Truck

Carriers, Inc., Comments, at JA1363. Thus, as the agency acknowledged, a rigid 24-hour work/rest cycle would be “simply not practical and too inflexible to require of the industry,” and “would cause unavoidable impacts to motor carrier operations that the agency cannot justify from a safety or economic standpoint.” 68 Fed. Reg. at 22,468 (JA1794).

Similarly, as discussed below (at 30), the agency’s initial proposal to divide carriers into five categories would have caused chaos.

The “alarming shortage of suitable locations where a CMV driver may stop and rest” (Cal. Trucking Ass’n Comment, at JA1526), also had to be taken into account. Restrictive HOS rules would “have a domino effect and exacerbate the already existing shortage of truck parking in rest areas and truck stops. This will create parking on highway ramp shoulders and other less than ideal safe locations, with the concomitant increase in the number of accidents involving parked vehicles.” Schneider National Comment, at JA1514. Restrictive HOS rules might also require states to spend substantial sums in constructing new rest areas.

The agency also had to consider the myriad ways in which HOS rules affect truckers’ lives. For example, the mandatory “weekend” rule would have “substantially worsen[ed]” the “working conditions for long-haul drivers,” because it would have “extend[ed] a driver’s tour away from home in order to meet the same customer needs.” Ryder Systems Comments, at JA1546. “[T]ime off taken away

from home is time missed with families.” US Xpress, Inc. Comments, at JA1509.

Finally, the agency has to consider whether a rule would prove acceptable to the American public. Any rule that, for example, dramatically increased the number of trucks driving during daylight hours would drastically increase congestion and would surely lead to great public uproar – which might very well lead Congress to force the agency to change the rule to one that would be less disruptive. *Cf. Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 876 (2000). In fact, Congress forced the agency to delay this very rulemaking (*see* page 28, *infra*), and has statutorily exempted certain industries from many of the agency’s HOS rules. *See* 68 Fed. Reg. at 22,462 (JA1788). That is plainly a factor that the agency needs to consider in its overall analysis.

### **C. The Agency’s Final Rule Is Properly Based on Science.**

Petitioners also criticize the agency for explaining that the Final Rule was, in some respects, not “‘ideal from a scientific viewpoint.’” Pet. Br. 22 (quoting 68 Fed. Reg. at 22,468 (JA1794)). But as the trucking industry explained, the agency needed to “appl[y] that science in the real world.” 68 Fed. Reg. at 22,459 (JA1785). Agreeing with this point, the agency noted that it “sought to develop rules that were science-based” but “did not promise rules that were science-‘controlled’ to the point of being completely impractical in operational environments.” *Id.* at 22,460 (JA1786). Given all the factors the agency had to consider, it

would have been impossible for the agency to issue a rule that was scientifically “ideal” (even if the science were unequivocal, which it was not). *See* Sections I.A, I.B, *supra*.

That said, it is important not to lose sight of the fact that the Final Rule was heavily based on science. For example, the main change the agency made in the new HOS Final Rule was to mandate that drivers receive a minimum break of 10 hours between tours of duty, rather than the 8 hours that were required under the prior rule. The evidence before the agency showed that this change would greatly increase the likelihood that drivers get an adequate amount of sleep on a regular basis. For example, a major FMCSA-sponsored experimental study found very significant differences in alertness and performance between truck drivers sleeping five hours versus those sleeping seven hours, which are amounts of sleep likely to be similar to what the average driver would obtain under the old and new HOS rules. *See Balkin et al., Effects of Sleep Schedules on Commercial Motor Vehicle Driver Performance*, at, e.g., JA1068-69 (2000).<sup>14</sup>

Similarly, the agency’s decision not to impose the “weekend” provision contained in the NPRM, but instead to allow drivers to “restart” their weekly clocks by

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<sup>14</sup> According to one government study, average sleep under the 8-hours-off rule was about 5 hours per break. *See Wylie et al., Commercial Motor Vehicle Driver Fatigue and Alertness Study: Project Report*, at JA287-88 (1996). By contrast, the study found, that approximately seven hours of sleep is considered the optimal amount by most drivers. *See id.*

taking a 34-hour break, was based on scientific evidence. As the agency realized after issuing the NPRM, the issue is not how many hours drivers work, but rather whether they receive sufficient daily and weekly rest. By increasing the daily off-duty requirement to 10 continuous hours, the agency has greatly reduced the possibility of chronic sleep deprivation and the development of a sleep debt during a driver's work week. *See* 68 Fed. Reg. at 22,470 (JA1796) (10 consecutive hours off duty, as compared to the old Rule's 8-hour requirement, allows adequate time for commuting, meals, and personal errands, while still allowing sufficient time for adequate daily sleep). The 34-hour weekend off-duty provision permits two full sleep cycles to recover from the fatigue of the work week. Drivers working under such a schedule will have sufficient daily and weekly rest periods. *See* O'Neill *et al.*, *Effects of Operating Practices on Commercial Driver Alertness*, at JA790 (FHWA 1999). By contrast, one major effect of the "weekend" provision contained in the NPRM would have been to move significant amounts of truck traffic to daylight hours, which, as discussed above (at 8-9), would have been detrimental to safety.

It is petitioners' challenge to the 34-hour restart provision (*see* Pet. Br. 47-54), that in fact lacks a scientific basis. Petitioners have, without acknowledging it, shifted focus from the question whether drivers receive an adequate amount of *sleep per day* to the issue of the number of hours a driver is allowed to *work per*

*week*. But petitioners cite no evidence to support the proposition that a driver who has received the mandatory 10-continuous-hour break each day needs *any* weekly break (either the “weekend” contained in the NPRM or the 34-hour restart provision contained in the final rule). Although the maximum schedule authorized under the Final Rule might leave a driver little time for hobbies or outside interests, that is neither a *fatigue* nor a *safety* factor, and not a criterion on which the agency had any reason to rely in promulgating its HOS rule.

Finally, it is worth stressing that the “science” of fatigue is not an immutable constant that the agency could simply apply without thought. Throughout its discussion of the Final Rule, the agency repeatedly noted instances where new scientific evidence had become available since the agency issued the NPRM (*see, e.g.*, 68 Fed. Reg. at 22,472, 22,477) (JA1798, 1803), or areas in which there was a lack of consensus within the scientific community (*see, e.g.*, *id.* at 22,464-65 (JA1790-91)). This Court owes the agency immense deference in reviewing the agency’s resolution of conflicts within this type of technical, conflicting data. *See, e.g.*, *Nat’l Wildlife Fed. v. E.P.A.*, 286 F.3d 554, 560 (D.C. Cir. 2002).

## **II. THE FINAL RULE IS A MARKED IMPROVEMENT OVER THE MAIN ALTERNATIVES AVAILABLE TO THE AGENCY.**

In considering the choices that the agency made in promulgating the HOS Final Rule, it is important to consider alternatives to which that Final Rule can be compared. *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto.*

*Ins. Co.*, 463 U.S. 29, 50-51 (1983). In the RIA and the preamble, the agency compares the final rule to options proposed by PATT (one of the petitioners) and by ATA (one of the intervenors); the agency explains at length why its Final Rule is a better policy choice than either of these more extreme options. Petitioners do not argue that the agency should have promulgated PATT's proposed rule and, despite pride of authorship, intervenors do not fault the agency for most of the choices it made that differ from those contained in ATA's proposal. Two other obvious alternatives to which the HOS Final Rule can be compared are the prior regulatory scheme (because it is the baseline) and the proposal contained in the NPRM (as it reflects the agency's first attempt to revise the HOS rules). The Final Rule is vastly superior to either of those alternatives.

**A. The HOS Final Rule Is Significantly More Protective Of Safety Than The Prior Regulatory Scheme.**

Although almost no one proposed that the FMCSA retain the 1962 HOS Rule, which was roundly acknowledged to be outdated and inadequate (*see, e.g.*, 68 Fed. Reg. at 22,458 (JA1784)), it is nonetheless worthwhile to contrast the agency's Final Rule with that prior Rule. Compared to this baseline, there is no reasonable doubt that the Final Rule will significantly improve the safety of this nation's roads.

As the petitioners and the respondent have explained at length in their briefs, the main changes made by the new rule are that it (1) increases mandatory off-duty

time to 10 hours from 8 hours (and mandates that those off-duty hours be consecutive except for sleeper berths); (2) increases the drive/rest “cycle” to 21 hours from 18 hours; (3) precludes drivers from extending on-duty hours through “breaks” during on-duty time; (4) decreases the maximum on-duty time to 14 hours from 15 hours, while increasing the maximum driving time from 10 hours to 11 hours; and (5) in the context of mandating more off-duty hours per work cycle to prevent driver fatigue, allows drivers to work for somewhat more total hours per week. There can be no question that each of these changes will have a positive effect on safety.

1. We have already explained above (at 17) that the 10-hour break provision will afford drivers the opportunity to get 7-8 hours of sleep a night. This change *alone* will largely solve the problem the agency set out to address.

2. Although petitioners criticize the agency at length for failing to mandate that all drivers maintain a 24-hour work cycle (*see* Pet. Br. 23, 36-39), they cannot seriously dispute that a driver maintaining the 21-hour cycle (theoretically) possible under the revised rule will be less likely to be fatigued than a driver maintaining the 18-hour cycle possible under the prior rule. Although it may be true that, as petitioners stress, “FMCSA cited no evidence that a 21-hour backward-rotating cycle is safer than the prior 18-hour backward-rotating cycle” (Pet. Br. 23), an agency is not obligated to cite evidence for every blatantly obvious factual

proposition that it states. In any event there is abundant support for that proposition. See e.g., Vespa et al., *Options for Changes to Hours of Service for Commercial Vehicle Drivers*, at JA607-08 (Transport Canada 1998). Consequently, the revised HOS Rule is clearly superior to the prior rule.

Furthermore, there is little room for argument that the new rule promotes a **24-hour** work/rest cycle significantly more than the old rule did. Indeed, if a driver fully utilizes the 14-hour on-duty period of the new rule, followed by the mandated 10-hour break, he or she will be on a 24-hour cycle. There is substantial record support for the agency's finding that drivers spend significant amounts of on-duty time performing non-driving tasks, including loading, unloading, and vehicle inspections. See 68 Fed. Reg. at 22,473 (JA1799) (ATA HOS study showed an average of 2.3 hours of non-driving time in on-duty shifts averaging 11.4 hours); *id.* at 22,474 (JA1800) (OOIDA survey showing 2.4 hours per day of non-driving on-duty time); *id.* at 22,473 (JA1799) (Con-Way informed the agency that its drivers spent on average 4.5 hours in loading and unloading activities per shift). Thus, a worker attempting to maximize driving time – the fundamental precept behind petitioners' challenge – is likely to be at or very close to a 24-hour work/rest cycle.

Finally, as we discussed above FMCSA chose not to mandate a strict 24-hour work/rest cycle because it was aware of the fundamental disruption that such

a requirement would have on motor carrier operations. *See* page 14, *supra*.

3. One of the most important changes made in the Final Rule is that, unlike under the former rule, the “on-duty” period in the new HOS Rule is not tolled by “off-duty” breaks during the course of the workday. *See* 68 Fed. Reg. at 22,471, 22,492 (JA1797, 1818). Under the new rule a driver is allowed to be on duty for a maximum of 14 hours. *See id.* at 22,511 (JA1837). While under the old rule a driver was allowed to be “on duty” for a maximum of 15 hours (*see id.*), in fact a driver could legally be on the road 19 or more hours after the start of his or her work day because meal breaks and “off duty” time did not count toward the 15-hour limit. Thus, for example, the following graphic compares a legal schedule under the old rule with the requirements of the Final Rule:

Old Rule		New Rule
Task	Time Since Start of Duty Tour	
8 am – 1 pm: Driving	1	<b>14-HOUR ON-DUTY PERIOD</b>
	2	
	3	
	4	
	5	
1 pm – 3 pm: Off duty lunch break	6	
	7	
3 pm – 8 pm: On-duty non-driving time, loading, etc.	8	
	9	
	10	
	11	
	12	
8 pm – 10 pm: Off duty dinner break	13	
	14	
10 pm – 3 am: Driving	15	<b>NO DRIVING ALLOWED</b>
	16	
	17	
	18	
	19	
3 am – 8 am: Off duty (until 11 am)	20	
	21	
	22	
	23	
	24	

In other words, under the new rule a driver who goes on duty at 8 am must be off the road by 10 pm no matter how many meal breaks or off-duty times he or she accumulates. By contrast, as this example shows, under the old rule that driver could easily be on the road until 3 am the next morning.

This change will greatly reduce the risk of driver fatigue. As the agency recognized (*see* FMCSA Br. 43-45), recent research has demonstrated that it is

time on duty, rather than driving time, that is the better indication of decreased work performance. Thus, a 1998 Transport Canada study concluded that “driving duration is not a reliable indicator of decreased work performance. Work duration is more important than driving duration.” *See Vespa, supra*, at JA597. And the landmark FHWA Driver Fatigue and Alertness Study, one of the largest and most elaborate commercial driving safety studies ever conducted, found that “[h]ours of driving (time-on-task) was not a strong or consistent predictor of observed fatigue. Most notably, there was no difference in the amount (prevalence) of drowsiness observed in \* \* \* 10-hour and the 13-hour trips.” *See Wylie et al, Commercial Motor Vehicle Driver Fatigue and Alertness Study*, at JA284 (FHWA 1996); *see also*, e.g., Dinges, *An Overview of Sleeping in Accidents*, at JA903-04 (1995).<sup>15</sup>

4. Another major change between the old rule and the new Final Rule is that, while the prior rule allowed a driver to work for 15 hours (and drive for 10 hours) before being required to go off duty, the new rule allows a driver to work

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<sup>15</sup> As discussed above (at note 6), ATA has petitioned the agency to modify its rule to make one exception to the 14-hour on-duty maximum. Under ATA’s proposal, drivers who use a sleeper berth to take a nap of two hours or more (and who take a full 10-hour off-duty period at the conclusion of their workday, will be allowed to extend the 14-hour period by the length of their sleeper berth time. *See* ATA Petition, at 8-9. As ATA explained in its petition, allowing sleeper-berth naps to extend the on-duty time is fundamentally different from allowing meals or other breaks to extend that period; the current rule unintentionally discourages drivers from taking naps, despite scientific evidence that naps are extremely useful in restoring alertness. *See id.* at 9-10.

for 14 hours (and drive for 11 hours) before being required to go off duty.

Predictably, petitioners focus on the increase in allowable driving hours from 10 hours per work cycle to 11 hours per work cycle, rather than on the concomitant reduction in allowable on-duty hours from 15 hours to 14 hours. *See* Pet. Br. 42-46. But as we just discussed (at 25), recent scientific evidence demonstrates that on-duty time is more important than driving time as a predictor of fatigue. *See also* FMCSA Br. 42-45. While the science on the question of whether duty time or driving time is admittedly not uniform (compare FMCSA Br. 42-45 with Pet. Br. 17-18, 42-43), it is precisely in the resolution of these sorts of scientific disputes that this Court must defer to the expert agency.

Furthermore, in asserting that the increase from 10 to 11 hours of driving time reflects a fundamental reversal of longstanding agency policy (*see* Pet. Br. 44), petitioners are being disingenuous. As the agency noted in the Final Rule, five states (including California, Florida, Texas, and Pennsylvania) currently “allow 12 hours of driving (for intrastate trips).” *See* 68 Fed. Reg. at 22,473 (JA1799). In fact, these expanded hours are allowed *only* because the FMCSA has authorized the states to implement them (or, technically, has agreed not to cut off funding for the state’s highway administration through the Motor Carrier Safety Assistance Program, 49 C.F.R. part 350, if any variance from interstate rules falls within these guidelines). Under 49 C.F.R. § 350.341(e)(1), “State hours-of-service limitations

applied to intrastate transportation may vary to the extent of allowing \* \* \* [a] 12-hour driving limit, provided driving a CMV after having been on duty more than 16 hours is prohibited.” Thus, the FMCSA has long permitted drivers in certain instances to drive more than 10 hours during a duty period.

5. The final difference between the new Final Rule and the old HOS rule is that the new rule allows a driver to “restart” his weekly clock by taking a 34-hour off-duty break. *See* 68 Fed. Reg. at 22,479 (JA1805). Petitioners’ criticize this provision because it indirectly authorizes drivers to work more hours per week than they had worked under the prior rule. *See* Pet. Br. 47-50. But as we discussed above (at 18), petitioners are off base. The new rule mandates that drivers have the opportunity to obtain adequate sleep on both a daily and a weekly basis. The overall increase in potential work hours is not problematic, because it is tied to the specific daily schedule requirements discussed above.

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In sum, each and every change made in the Final Rule will improve safety as compared to the old HOS Rule.

**B. The Proposed Rule Contained In The Agency’s NPRM Was Fundamentally Flawed.**

The Final Rule not only is a marked improvement over the prior Rule, but also is dramatically better than the Rule proposed in the NPRM. As the agency acknowledged, the comments on the NPRM were so unfavorable that they “led to

expressions of Congressional concern.” *See* 68 Fed. Reg. at 22,459 (JA1785). In fact, despite a statutory mandate that the Final Rule be issued by March 1, 1999 (*see* Pub. L. No. 104-88 § 408(b), 109 Stat. 803, 958 (1995) (49 U.S.C. § 31136 note)), in reaction to the NPRM, Congress statutorily prohibited the agency from issuing any proposed rule before the end of 2001. *See* 68 Fed. Reg. at 22,459 (JA1785); Pub. L. No. 106-346.

The purpose of the rulemaking process is to allow an agency to test its facts, assumptions, and proposals against real-world circumstances. The process allows an agency to receive input from the regulated community and other affected parties to help shape its regulations. It is expected and appropriate that the proposed rule might be altered, perhaps dramatically, to reflect the information collected during the comment process. *See, e.g., Ass’n of Battery Recyclers, Inc. v. U.S. E.P.A.*, 208 F.3d 1047, 1058 (D.C. Cir. 2000).

Here, the comments submitted to the agency showed that the proposed HOS rule was based in many respects upon incorrect information, mistaken assumptions and invalid conclusions. Because the agency recognized that the proposed rule was deeply flawed in a number of areas, significant changes were made. Petitioners complain loudly about these alterations, but fail to discuss the agency’s reasons for them.

1. Industry comments submitted in response to the NPRM demonstrated

that the proposed rule unintentionally had adverse safety implications. For example, the agency’s estimate that 49,000 additional drivers would need to be hired because of the proposed rule (*see* 65 Fed. Reg. at 25,572 (JA954)) meant putting new, inexperienced drivers on the road – who would be more at risk of having an accident. *See* pages 5-7, *supra*.

Similarly, the “weekend” provision contained in the proposed rule mandated that drivers take a weekly off-duty period that included two consecutive midnight to 6 a.m. blocks of time. *See* 65 Fed. Reg. at 25,562 (JA944). “Comment after comment” to the agency explained that “requiring two consecutive nights would create havoc on the already overcrowded highways in the daylight hours” (68 Fed. Reg. at 22,477 (JA1803)), because it would shift significant amounts of driving that presently occurs at night to daytime. We explained above (at 8-9) that truck driving is safer at night than during the day. Furthermore, this proposed “weekend” was problematic also because it would lead drivers who normally work at night to shift their schedules between night and day during the course of a week. Studies have shown, however, that keeping a regular schedule is very important for minimizing fatigue. *See, e.g.*, 68 Fed. Reg. at 22,479 (JA1805); ATA Comments, at JA1566; Vespa, *supra*, at JA607-08.<sup>16</sup>

Unlike the proposed Rule, the Final Rule appropriately considered and bal-

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<sup>16</sup> As we have discussed (at 14-15), this “weekend” rule was also unworkable.

anced these various safety concerns. Thus, the Final Rule is far superior to the proposed Rule.

2. The proposed Rule was also simply unworkable. For example, it created five categories of motor carrier operation with varying HOS requirements for drivers involved in each of those categories. *See* 68 Fed. Reg. at 22,460 (JA1786).<sup>17</sup> In proposing this categorization, the agency failed to appreciate that carriers do not fit neatly within a particular category, and could operate in many or even all of the types of operations within a given week. *See id.* at 22,461 (JA1787). Commenters also objected that motor carriers and drivers would have to become familiar with five distinct sets of regulatory provisions, and become expert in switching from one scheme to another. *See, e.g.* ATA Comments, at JA1577. In fact, law enforcement agencies shared the industry’s concern that the regulations were too complex to be administered and properly enforced. *See* 68 Fed. Reg. at 22,461 (JA1787).

Similarly, the “weekend” requirement contained in the proposed Rule would have often left drivers stranded far from home, and would have made scheduling drivers unbelievably complicated. *See* pages 14-15, *supra*. The final rule, which eliminated the “weekend” requirement and imposed one, standardized set of rules

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<sup>17</sup> Two of these categories were for long haul drivers (differentiated based on the national or regional scope of their operations) and three were for various types of more localized trucking operations. *See* 68 Fed. Reg. at 22,460 (JA1786).

on all CMV drivers, can be implemented without wreaking havoc on the industry.

3. As we have already discussed (at 10-12), after reviewing the 53,000 comments submitted to it the agency agreed that it had grossly overestimated the role of fatigue in trucking accidents, and therefore had similarly overestimated the possible reduction in accidents that could be achieved through reducing driver fatigue.

Comments to the agency also pointed out that it had significantly underestimated the costs of the proposed rule. The agency initially concluded that the proposed Rule would cost approximately \$3.4 billion over the next ten years. *See* 65 Fed. Reg. at 25,581 (JA963). That additional \$3.4 billion related simply to additional driver wages for an estimated 49,000 drivers, and the costs associated with mandating EOBRs. As ATA explained in its comments on the NPRM, in estimating the costs of the proposed Rule the agency had wholly ignored several significant factors. For example, while recognizing the need for additional drivers, the agency had not factored in recruiting and training costs for those drivers, non-wage driver benefits, and supporting infrastructure and labor costs. Most surprisingly, the agency had not considered the costs associated with providing those drivers with trucks, or with the insurance, maintenance, and other costs associated with that additional equipment. *See* ATA Comments, at JA1605. ATA also explained that the agency's estimate that the new Rule would require hiring 49,000 new driv-

ers was less than a quarter of the true figure, because the agency had not factored in productivity losses caused by the regulation. *See* JA1568, 1599. In total, ATA’s analysis concluded that the cost of the regulation would be **\$110.7 billion** – or more than **32 times** the FMCSA’s original, \$3.4 billion, estimate. *See* JA1605.<sup>18</sup>

In the Final Rule, FMCSA acknowledged that it “underestimated costs in its economic analysis” (68 Fed. Reg. at 22,483 (JA1809)), but did not attempt to compute a revised cost estimate of the proposal. But notably, in the RIA the agency included the additional costs noted by ATA in analyzing the costs of alternatives that required additional drivers. *See* RIA, at JA1686-93.

In other words, the proposed Rule was justified only by grossly overestimating its benefits and grossly underestimating its costs. When properly analyzed, the costs of that proposed rule far outweighed any possible benefit created by it. By contrast, the Final Rule will lead to noticeable benefits at a reasonable cost. *See* 68 Fed. Reg. at 22,496 (JA1822).

4. Although petitioners focus on several specific differences between the proposed Rule and the Final Rule, which they assert demonstrate that the Final

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<sup>18</sup> ATA’s analysis was confirmed by an independent study conducted by National Economic Research Associates (NERA) which, using FMCSA’s estimate of 49,000 additional drivers, found the agency’s estimate to be off by \$19.1 billion. NERA concluded that the agency had underestimated driver wages and failed to properly consider the additional costs (such as equipment) identified by ATA. *See* ATA Comments, at JA1599-1605; JA1132.

Rule is flawed, these challenges are in each instance baseless.

For example, we discussed above the fact that the Final Rule promotes a 24-hour work/rest cycle, although under it a driver in certain instances can theoretically operate under a 21-hour cycle. *See* page 22, *supra*. Because the proposed Rule contained a 12-hour-on-duty/12-hour-off-duty cycle, petitioners argue that it mandated a 24-hour cycle, and is thus superior to the Final Rule. But as we discussed above (at 22), a mandatory 24-hour cycle is simply not possible given the operational realities of the trucking industry. *See also* 68 Fed. Reg. at 22,469 (JA1795); FMCSA Br. 34-35. Beyond that, petitioners are simply incorrect in asserting that the proposed Rule mandated a 24-hour cycle. Although a worker maximizing hours under that rule would have operated under a 24-hour cycle,<sup>19</sup> there was no requirement under that rule that a driver drive or otherwise work the full 12 hours of allotted time (just like there is no requirement under the Final Rule that a driver drive the full 11 hours). Accordingly, in any instance when a driver stopped working after less than 12 full hours, the proposed Rule would have resulted in a backward-rotating work cycle.

Similarly, petitioners scold the agency for not implementing the “weekend”

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<sup>19</sup> As we discussed above (at 22), given the operational realities of the trucking industry (in which drivers have a variety of non-driving obligations), under the Final Rule, too, a driver attempting to maximize his or her work schedule is likely to be operating on, or very close to, a 24-hour cycle.

provision contained in the proposed Rule (*see* Pet. Br. 52-54), but in so doing they ignore the operational realities of the trucking industry (*see* page 14-16 *supra*), as well as the scientific evidence demonstrating that the proposed weekend (a) was unnecessary, and (b) had *negative* safety implications (*see* pages 5-7, *supra*).

In its brief, the FMCSA has explained in detail why petitioners' other challenges based on differences between the proposed Rule and the Final Rule – specifically, the agency's decision to allow solo drivers to split their off-duty period if they take that off-duty time in a sleeper berth, its decision not to mandate EOBRs at this time, and the adequacy of its consideration of driver-health concerns – have no merit. *See* FMCSA Br. at 38-41, 49-55.<sup>20</sup> Rather than parrot those explanations, we will instead reiterate the main point: The FMCSA carefully analyzed various options in light of (a) a huge number of comments raising a range of points

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<sup>20</sup> With respect to EOBRs, we add only two small points to those the agency has raised. First, the requirement to count off-duty time toward the daily maximum (*see* pages 23-25, *supra*) should itself increase compliance with the HOS rules; one of the main ways in which drivers have manipulated RODS has been through the abuse of “off-duty” blocks during the workday. *See* Pet. Br. 10-11. Second, we note that the agency has announced that it “plans an expanded research initiative on EOBRs and other technologies, including evaluating alternatives for encouraging or providing incentives for their use.” *See* [http://www.fmcsa.dot.gov/Home\\_Files/hos/hos\\_faqs.asp](http://www.fmcsa.dot.gov/Home_Files/hos/hos_faqs.asp), A-12. Thus, a decision by this Court requiring the agency to reconsider its decision on EOBRs would be superfluous because the agency is already engaged in such an effort. All the agency decided in the Final Rule was not to mandate EOBRs “at this time.” *See* 68 Fed. Reg. at 22,488 (JA1814).

of view, (b) competing scientific evidence, and (c) the recognition that changes to the HOS rules could have immense unintended consequences, both as to the safety of the Nation's roads and financially on a critically important industry. The agency's choices were appropriate, and warrant this Court's deference.

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Agencies do not promulgate rules in a vacuum. In this instance, the Final Rule is a vast improvement over the alternatives. Thus, that Rule cannot be said to be arbitrary and capricious.

### CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully Submitted.

Robert Digges, Jr.  
Vice President & Deputy Chief Counsel  
AMERICAN TRUCKING ASSOCIATIONS,  
INC.  
2200 Mill Road  
Alexandria, VA 22314

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Erika Z. Jones  
Adam C. Sloane  
David M. Gossett  
MAYER, BROWN, ROWE & MAW LLP  
1909 K Street, NW  
Washington, DC 20006  
tel (202) 263-3000  
fax (202) 263-3300

*Counsel for Intervenors*

February 27, 2004

**CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(B)**

I hereby certify that – according to the word-count facility in Microsoft Word – this brief, excluding those portions omitted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), consists of 8,734 words and thus complies with Circuit Rule 32(a)(3)(B)(i).

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David M. Gossett

## CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2004, I served copies of the foregoing Initial Brief for the Intervenors in Support of Respondent by e-mail and overnight delivery on Petitioners and Respondent herein – and on the *amici* by overnight delivery – at the following addresses:

Bonnie I. Robin-Vergeer  
Brian Wolfman  
Scott L. Nelson  
Allison M. Zieve  
PUBLIC CITIZEN LITIGATION  
GROUP  
1600 20th Street, NW  
Washington, D.C. 20009

Peter D. Keisler  
Robert S. Greenspan  
Matthew M. Collette  
Tara Leigh Grove  
UNITED STATES DEPARTMENT  
OF JUSTICE  
Civil Division, Appellate Staff  
601 D Street, N.W., Room 9008  
Washington, D.C. 20530-0001

Stephen L Oesch  
Shari T. Kendall  
Michele McDowell Fields  
INSURANCE INSTITUTE FOR  
HIGHWAY SAFETY  
1005 N. Glebe Road, Suite 800  
Arlington, VA 22201

Henry M. Jasny  
ADVOCATES FOR HIGHWAY  
AND AUTO SAFETY  
750 First Street, NE Suite 901  
Washington, DC 20002

---

David M. Gossett  
Mayer, Brown, Rowe & Maw LLP  
1909 K Street, N.W.  
Washington, D.C. 20006  
(202) 263-3000