L. Kent Kunce
NTSP Chairperson
220 N. Meridian, Room 982
Indianapolis, IN 46204
Phone 317 265-5914
Fax 317 265-7480
kent.kunce@ameritech.com

December 8, 2000

Docket Clerk
Attn: Docket Clerk FMCSA-97-2350
U.S. DOT Dockets
Department of Transportation
400 7th Street, S.W., Room PL-401
Washington, DC 20590-0001

RE: **DOCKET NO. FMCSA-97-2350, HOURS OF SERVICE OF DRIVERS; DRIVER REST AND SLEEP FOR SAFE OPERATIONS**

Dear Sir or Madam:

The National Telecommunications Safety Panel (NTSP) submits these comments in response to the Notice of Proposed Rulemaking issued by the Federal Motor Carrier Safety Administration (FMCSA) on May 2, 2000, 65 Fed. Reg. 25540. This is a joint response that has been agreed upon by NTSP, representing the major telecommunications companies in the United States, including Ameritech, BellSouth, Cincinnati Bell, GTE, Lucent Technologies, WorldCom, Pacific Bell, Qwest, SNET, Sprint, SBC, US WEST, and Verizon. We collectively provide the following comments on the proposed rule. NTSP appreciates the opportunity to comment on the Federal Motor Carrier Safety Administration's proposed modifications to its Hours of Service (HOS) of Drivers Program.

The National Telecommunications Safety Panel (NTSP) serves as a forum for the exchange of safety information and safety "best practices" within the telecommunication industry. The member telecommunications companies have had significant experience in fleet management and driver safety in its twenty years of existence. Consequently, we feel that we are in a unique position to comment on the nature of the driving duties performed by technicians within the telecommunication industry, as well as the safety record of such drivers.

The NTSP understands the need to assure that drivers of regulated vehicles do not operate these vehicles when they have had inadequate rest. However, NTSP believes that many of the proposed changes to the hours of service regulations would cause substantial hardship upon the telecommunication industry and other regulated companies without providing any additional assurance that drivers will be well rested.

These hardships are likely to adversely impact the industry's ability to provide uninterrupted telephone service on a daily basis, as well as during emergency situations when telephone service may be most crucial. As a result, NTSP recommends that the FMCSA modify the final regulations as discussed in the following pages.

The National Telecommunications Safety Panel again thanks you for providing it the opportunity to comment upon this very important rulemaking. If you have any questions concerning this submission or if you desire any further information, please contact me at 317 265-5914 or Patricia W. Murphy at 252-264-5702.

Sincerely yours,

_____

L. Kent Kunce

pwm
attachment

cc: Chuck Slagle, NTSP Vice Chairperson
Patricia W. Murphy, NTSP Sub-Committee Chairperson

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SCIENTIFIC LITERATURE

The proposed amendments rest almost entirely on scientific literature relating exclusively to long-haul drivers. Those studies cannot support the regulation of telecommunication industry; indeed they show such regulation is unwarranted.

The fundamental flaw in applying this rule to the telecommunication industry and other utilities has been recognized by the Agency: "Most of the studies of driver fatigue as a factor in commercial motor vehicle (CMV) crash involvement concentrate on long distance operations." Yet because "the perceived and documented contribution of driver fatigue to CMV safety is likely to be very much a function of the type of operation, the type of roads driven, and . . . the type of vehicle driven . . .." These studies tell little if anything about the fatigue-related safety risk posed by utility vehicle drivers.[1] Simply, the Agency has no evidence to establish a connection between utility vehicle drivers and fatigue-related accidents. Evidence that long-haul drivers—who drive long routes, often at night, for many hours at a time, over monotonous stretches of road—are at heightened risk of fatigue-related accidents is insufficient to regulate public utility technicians who share none of these high-risk characteristics.

Public utility workers are members of highly trained technical crews who do not operate vehicles for extended periods of time and are not exposed to the rigors of professional driving. Public utility vehicles are not used to haul or deliver products, but are operated for short distances to transport technicians and the specialized equipment they need to perform repair and maintenance activities. The driving component of the technicians' workday is truly incidental to their job of repairing, installing, and maintaining telecommunications equipment. The discussion that follows

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[1] Deborah M. Freund, *An Annotated Literature Review Relating to Proposed Revisions to the Hours-of-Service Regulation for Commercial Motor Vehicle Drivers*, Office of Motor Carrier Safety, at 29 (1999).
The Agency is not alone in recognizing this problem. *See, e.g.*, C. Abrams, et al., *Commercial Motor Vehicle Driver Fatigue, Alertness, and Countermeasures Survey*, Washington, DC: Federal Highway Administration, at 3 (1997) ("Care should be taken in extrapolating the data reported here to other segments of the commercial driver population. The drivers chosen to participate were those driving loaded tractor-trailers . . . who had driven at least 60,000 miles within the last year, who had been on the road for at least 24 hours . . .").

clarifies the risk factors for fatigue and fatigue-related accidents identified in the studies relied on by the Agency are not present for public utility workers:

***Driving Time**:* According to the Agency, "risk increases with time driven."[2] Jones and Stein found, for example, that "the risk of involvement in a multiple vehicle crash is highest for those drivers who have spent more than eight hours behind the wheel."[3] Another study confirmed that "[c]rash involvement increase[d] significantly after about 8 driving hours worked from the last 10 hour rest period."[4] There is even some evidence of "a slight increase in the risk of fatigue-related crashes at 5 hours."[5]

Telecommunication technicians fall far outside these parameters. Their average trip is approximately 30 to 60 minutes. They usually make more than one trip a day, but rarely are behind the wheel more than five hours in total. Of all users of commercial motor vehicles, their driving time is among the briefest. As opposed to long-haul drivers who spend all or virtually all their working time behind the wheel, telecommunication technicians dedicate less than 20% of their time to driving on average. This amount of driving is a third less than the driving time attributed by the Agency to the drivers it regards as presenting the lowest risk—the "Type 5"[6] drivers with which telecommunication technicians would usually be placed.

***Driving Distance**:* The Department recognizes an important relationship between driving distance and fatigue, noting, "[L]ocal drivers are less likely to be involved in a fatigue-related crash than long-haul drivers."[7] The Agency cites statistics that "long-haul trucks are involved in about 67 percent of all fatigue-related truck crashes."[8] One recent study cited in the preamble concluded that trip distance was significantly related to the likelihood of a fatigue-related crash, finding that fatigue was a causal factor in only 0.4% of trucks making trips of less than 50 miles and 3% of trucks traveling 50 miles or more.[9]

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[2] 65 Fed. Reg. 25546.

[3] I. Jones. & H. Stein, *Effect of Driver Hours of Service on Tractor-Trailer Crash Involvement.* Arlington, VA: Insurance Institute for Highway Safety, at 12 (1987).

[4] W.J. Frith, *A Case Control Study of Heavy Vehicle Drivers' Working Time and Safety*, Victoria, Australia, Proceedings, 17th Australian Road Research Board Conference, Part 5, at 20 (1994).

[5] 65 Fed. Reg. 25546.

[6] The proposed rule defines "Type 5" operations as those "in which driving is incidental to other primary work activities . . . , the driver returns to his/her normal work reporting location and is released from work within 15 consecutive hours after beginning work. . ., [and] driving duties do not exceed 5 hours in a workday . . ." 49 C.F.R. §394.121(5) (proposed). While this description captures the duties and working hours of the majority of drivers in the telecommunications industry, statements by the Agency in the rulemaking make it plain that telecommunication technicians are not the type of drivers the Agency intends to cover with even the relatively relaxed constraints applied to "Type 5" drivers. The Agency describes "Type 5" drivers as "typically spend[ing] . . . one-third . . . of their on-duty hours behind the wheel." 65 Fed. Reg. 25559. As will be described in detail, telecommunication technicians dedicate substantially less than a third of their time to driving and it is inappropriate for them to be classified alongside drivers who spend so much more time on the road.

[7] *Id.*

[8] *Id.*

[9] Dawn L. Massie, et al., *Short-Haul Trucks and Driver Fatigue*, Washington DC: Federal Highway Administration, at vii (1997).

The telecommunication industry's service delivery system is designed around the use of central dispatch offices, the location of which is governed by population density in metropolitan areas, and by distance in rural areas. NTSP estimates that the majority of telecommunication technicians drive one (1) hour or less between work locations, where they park and exit the vehicle to perform other tasks.

Night Driving: The Department of Transportation reports that time of day also is a crucial risk factor for fatigue-related accidents; it identifies a peak in fatigue in the pre-dawn hours of 4:00 am to 6:00 am.[10] In the study that is the crux of the Agency's scientific analysis, Wylie et al. concluded, "The strongest and most consistent factor influencing driver fatigue and alertness . . . was time of day."[11] Drowsiness, according to Wylie and his co-authors, "was markedly greater during night driving than during daytime driving. Peak drowsiness occurred during the 8 hours from late evening until dawn."[12] Others have concluded similarly. Simon Folkard recently reported that "accident risk . . . is clearly highest in the early hours of the morning."[13] Akerstedt found that "alertness and performance show a time of day pattern with a maximum in the late afternoon and a trough in the early morning around 0500h[,]."[14] Rosa and Bonnet have discovered that "declines in alertness . . . [are] most apparent at night when lowered circadian arousal potentates fatigues resulting from hours of work."[15] One 1997 report found that 38.6% of all fatigue-related fatal crashes occur between 4:00 am and 7:00 am and that "fatigue . . . [is] nearly four times more likely to be coded at night than during the day."[16]

Unlike long-haul drivers, who frequently are on the road during late night and early morning hours, telecommunication technicians do the majority of their driving between the hours of 7:00 am and 7:00 pm. They seldom are on the road during the dangerous pre-dawn hours.

Environment/ Stimuli*:* The evidence in this rulemaking establishes a relationship between monotony and fatigue. This monotony is a function of both the task being performed[17] and the environment it is performed in: drivers who perform the same, unvarying task for hour after hour over stretches of barren and unstimulating highway are at heightened risk for fatigue-related incidents. At least one group of researchers has concluded, "[T]he monotony of the driving environment . . . [is] the *main* causal factor in driving fatigue accidents . . ."[18] "Monotonous road

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[10] 65 Fed. Reg. 25546.

[11] C.D. Wylie, et al., *Commercial Motor Vehicle Driver Fatigue and Alertness Study*, Washington, DC: Federal Highway Administration, at ES-8 (1996) (emphasis added).

[12] *Id.*

[13] Simon Folkard, *Black Times: Temporal Determinants of Transport Safety*, 29 (4) Accident Analysis and Prevention 417, 418 (1997).

[14] T. Akerstedt, *Readily Available Countermeasures Against Operator Fatigue*, in Managing Fatigue in Transportation, Rockville, MD: Government Institutes, Inc., at 106 (1997).

[15] Roger R. Rosa. & Michael H. Bonnet, *Performance and Alertness on 8h and 12h Rotating Shifts at a Natural Gas Utility*, 36 (10) Ergonomics 1177, 1191 (1993).

[16] Massie, *supra* note 9, at 22.

[17] S*ee supra*, at "**SCIENTIFIC LITERATURE**" second paragraph and at "***Driving Time***".

[18] Wylie, *supra* note 11, at 2-24 (citing Lisper et al. (1971)).

conditions can clearly be expected to have an adverse fatiguing effect on a driver's attention processes."[19]

Unlike long-haul drivers—who commonly drive "on limited-access highways such as the Interstate network, tollways, and expressways with higher posted speed limits, less traffic, and a more uniform (and barren) visual environment"[20]—telecommunication drivers often are in stop-and-go local traffic with stimuli such as stop lights, stop signs, and railroad crossings. (These conditions also limit the speeds at which technicians drive, further reducing the likelihood and impact of accidents).

Additionally, in contrast to long-haul drivers, whose work consists of hour after hour of driving—interrupted perhaps, only by infrequent short stints of loading and unloading—telecommunication technicians frequently change tasks. The majority of a technician's workday is spent performing the tasks required to install, maintain, and repair a telecommunications network. These tasks are occasionally interrupted by the short intervals of driving needed for the technician to get from one site to the next. The monotony suffered by long-haul drivers is thus not a factor for telecommunication technicians.[21]

In fact, the task changes required of telecommunication technicians actually heighten their state of alertness. Task rotation is frequently recommended as a means of reducing fatigue. "The central nervous system is built to increase activation through amplification of (change in) sensory input. Repetition of the same stimulus will cause habituation, that is, a reduction and eventual cessation of the activation response. However, small variations in the characteristics of the stimulus . . . will cause the arousal to reappear. Novel and sudden stimuli will always evoke arousal responses, so called 'orienting reflexes.'"[22] Akerstedt concludes that "alertness may be protected through increasing the level of stimulation in the work situation . . . [which] may be accomplished through changing work tasks."[23] Consistent with this, Wylie et al. found that "drowsiness . . . returns to zero near the midpoint of a [long] trip; at [which] time drivers are in and near a major city . . ."[24] At least one study showed an initial improvement in driver response after performing loading and unloading activities. The authors noted this was probably the result of "a short-term invigorating effect on vigilance and response time associated with . . . a break in driving routine."[25],[26],[27]

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[19] *Id.*

[20] Freund, *supra* note 1, at 29.

[21] The non-driving work of telecommunication technicians generally consists of wiring up switches: A telephone's service can be described as two parallel wires or fibers connected together as a pair. A single cable may contain as many as 3,600 pairs of wire, meaning that 3,600 phones may be serviced by it. If a single cable is cut, it requires 7,200 wires to be spliced together. The time required to restore these critical services can range from one hour to several days. Though the tasks require technical expertise, they are neither physically nor intellectually fatiguing in and of themselves.

[22] T. Akerstedt, *supra* note 14, at 107 (emphasis added, internal citations omitted).

[23] *Id.* at 112 (emphasis added).

[24] Wylie, *supra* note 11, at 4-117.

[25] T.R. O'Neill, *Effects of Operating Practices on Driver Alertness*, Washington, DC: Federal Highway Administration, at 29 (1999) (emphasis added).

[26] That any boost in alertness attributable to a task change may be temporary is irrelevant for telecommunications service technicians since their 30 to 60 minute trips are so short and (relatively) stimulating that alertness is not likely to dissipate during the trip.

[27] The very terminology used by the Agency to refer to time spent on-duty—"time on task"—is itself suggestive that time spent performing one monotonous task is the important factor in terms of predicting fatigue.

When driving, telecommunication technicians are on average never more than 30 to 60 minutes away from their last change in tasks. There is simply no evidence that someone who is on the road not more than 30 or 45 or 60 minutes is at serious risk of suddenly falling asleep or otherwise having a fatigue-related accident.

Vehicle Type: Another risk factor identified by the Agency is vehicle type. The Department notes in the preamble, "[T]ruck body type is a good proxy for predicting fatigue."[28] Combination vehicles were "involved in four-fifths of all fatigue-involved fatal crashes . . ." between 1991 and 1996, according to the Agency.[29] Whereas most long-haul drivers drive tractor-trailer combinations, telecommunication technicians usually operate "local single-unit" vehicles. It is worth noting also that the combination vehicles driven by the long-haul drivers, "because of their articulation and larger mass relative to other vehicles, are more prone to crashes with more severe outcomes" than are the vehicles driven by technicians.[30]

Time spent driving, driving distance, time of day, monotony and vehicle type are the factors identified repeatedly in the preamble and throughout the literature as critical to determining the risk of a fatigue-related accident. The literature suggests it is the combination of these factors that makes long-haul drivers susceptible to fatigue-related accidents.[31] Utility technicians fall within the low-risk group for each risk factor identified, and certainly are not exposed to the potentially dangerous combination of risk factors that affect long-haul drivers and that are the reason this rule has been proposed.

PUBLIC UTILITY EXEMPTION

Because of the characteristics of utility technicians' work identified in the preceding section and the great differences between this work and the work of long-haul truck drivers, full exemption for the public utility industry is appropriate and perhaps statutorily compelled.

The Department has only the limited rulemaking authority granted it by Congress. With respect to private motor carriers like public utilities,[32] the Department's authority is restricted to hours of service rules that are "*needed* to promote safety of operations."[33] The first part of these comments made clear that the Agency's own evidence does not justify regulating the hours of utility service technicians. The Agency may have established that long-haul drivers run a risk of fatigue-related

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[28]65 Fed. Reg. 25547.

[29]65 Fed. Reg. 25546-47.

[30]Freund, *supra* note 1, at 29.

[31]*See, e.g.*, Wylie, *supra* note 11, at 2-19 (finding that it is the "combination of long-term driving and circadian depressions in arousal [present during nighttime driving] that constitute a significant risk to highway safety."); F.F. Saccomanno, et al., *Effect of Driver Fatigue on Commercial Vehicle Accidents*, in F. Saccomanno and J. Shortreed (Eds.), Truck Safety: Perception and Reality, Waterloo, Ontario, Institute for Risk Research, University of Waterloo, at 170-71 (1996) (concluding that long distance driving, long hours of driving (more than 9.5) without rest and night driving were significantly related to the rate of fatigue-related truck accidents).

[32]The statute defines a motor private carrier as one that "transports [in interstate commerce] property by motor vehicle when . . . the person is the owner, lessee, or bailee of the property being transported; and the property is being transported . . . to further a commercial enterprise." 49 U.S.C. §31501(2); 49 U.S.C. §13102(13).

[33]49 U.S.C. §3152(b)(2) (emphases added).

accidents. However, that does not translate to justification for regulating the hours of telecommunication technicians whose exposure to risk factors for fatigue-related accidents is markedly lower for every known factor.[34]

The Agency attempts to justify the application of the long-haul literature to utility workers by saying it "could find no research studies showing these drivers do not suffer from fatigue, do not need sleep daily, and have fewer fatigue related crashes than other truck and bus drivers subject to FMCSA jurisdiction."[35] That reasoning is flawed for a number of reasons. First, and most obviously, the Agency has identified the elements of long haul driving that it claims cause accidents; those elements are absent for utility service work. The burden falls to the Agency to establish a safety "need" for regulating such a large class of workers as telecommunications technicians; the obvious inapplicability of the evidence generally relies on means it has not met that burden.

Second, the Agency's attempt to equate the risks posed by long-haul drivers and telecommunication technicians is belied by the rule's proposed classification scheme. The Agency recognized that "[o]n a per-mile basis, long-haul trucks were almost 20 times more likely to be involved in a fatigue-related crash[,]"[36] and accordingly developed a regulatory scheme that places restrictions on long-haul drivers that generally are more severe than those placed on other drivers of commercial motor vehicles. The evidence that caused the Agency to view "Type 5" drivers as a distinct and less dangerous class compels it to acknowledge that the long-haul studies do not indicate the safety risk of "Type 5" drivers.

Finally, the Agency errs in its premise that the evidence does not show those who drive less to be less at risk for fatigue-related accidents. The evidence in the docket directly relating to short-haul and utility vehicle drivers strongly suggests that these drivers do not pose fatigue-related dangers to the public. One study, based on eleven focus groups held in eight cities in five states, attempted "to gain an understanding, from the local/short haul drivers' (L/SH) perspective, of the general safety concerns related to the short-haul trucking industry and specifically, the degree to which fatigue plays a role."[37] Fatigue was only the fifth highest-ranked safety issue identified by the short-haul drivers.[38],[39] Fatigue wasn't even raised by the drivers in 64% of the focus group sessions.[40] The participants repeatedly expressed a belief that fatigue was a much greater concern for long-haul drivers—noting "several reasons why fatigue is not as critical an issue in L/SH as it

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[34]The 1996 Bowen study of utility vehicle accidents falls far short of evidence showing that coverage is "needed" for safe operations. (49 U.S.C. § 3152(b)(2)). Bowen found no direct relationship between hours on duty and accident frequency—finding that "[a]ccidents are seen to be most frequent in the 3rd and 4th hours and the 7th and 8th hours of a tour." V. Bowen, *Utility Vehicle Study*, Richmond, VA, University of Richmond (1996) (emphasis added). He also found that accident rates, "somewhat unexpectedly . . . decreas[ed] following the 9th hour of a tour." *Id.* Finally—Bowen admitted that the conclusions he drew regarding the risk posed by cumulative hours on duty within an eight-day period were "tentative"—based on only 1,731 reported hours of driving.

[35]65 Fed. Reg. 25553 (emphasis added).

[36]65 Fed. Reg. 25546.

[37]R.J. Hanowski, et al., *Impact of Local/Short Haul Operations on Driver Fatigue, Task 1: Focus Group Summary and Analysis*, Washington, DC: Federal Highway Administration, at ii (1998).

[38]*Id.*

[39]It is important to note that this study included short-range drivers who, unlike service technicians, make trips between 50 and 100 miles from their home station. The focus groups also included drivers who spend substantially more than 11% of each workday performing driving tasks.

[40]Hanowski, *supra* note 37, at 71 (emphasis added).

is in long-haul. For example, unlike long-haul drivers, L/SH drivers typically work during daylight hours, have work breaks that interrupt their driving, end their shift at their home base, and sleep in their own beds at night."[41] The study authors concluded that "when it comes to fatigue, L/SH drivers are more like workers of non-driving professions where fatigue may not result from their work . . .."[42] The beliefs of the short-haul drivers in the Hanowski study are supported by the 1997 Massie report that only 0.4% of short-haul (<50 miles) drivers involved in fatal accidents were coded as fatigued, compared to 3% of long-haul drivers.[43]

The Agency also states, "Since the research indicates increased safety risks after 12 hours of duty in almost every occupation, the FMCSA believes that allowing drivers who primarily do work other than driving should be limited in their driving tasks to protect the public."[44] This statement is insupportable. The Agency's claim that 12 hours on-duty poses a risk in "almost every occupation" is an exaggeration. The studies it cites are limited to two occupations—long haul, full-time drivers and industrial workers.[45] Not a single one of the ten studies relied on by the Agency examines utility service drivers, and extrapolation from the Agency's limited data is unwarranted.

Further, the Agency's studies do not unequivocally establish that 12 hours on duty, irrespective of other factors, poses an increased safety risk, as the Agency suggests. Roger Rosa, lead author of three of the studies the Agency relies on for this point, found that time of day worked and the physically demanding nature of the industrial jobs studied could have affected his findings of fatigue after 12 hours on-duty.[46] Rosa acknowledged that his findings were inconsistent with earlier studies—including a 1983 study by Peacock et al. that "reported improved subjective alertness, sleep, and cardiovascular fitness in police officers after a switch from 8h to 12h shifts, and no effect on [critical flicker fusion frequency] or grammatical reasoning performance"; and a study concluding that 12-hour shifts had no adverse impact on standard nursing-care jobs.[47]

An examination of the docket in this rulemaking further demonstrates that many researchers have been unable to find a link between time on-duty and fatigue or fatigue-related complications. Simon Folkard studied accident risk as a function of time on-duty and found "the opposite trend to that which would be predicted"—namely "that risk decreased by nearly 30% from the first 4 hours to the second 4 hours on duty."[48] A 1994 study of heavy vehicle drivers in New Zealand concluded that neither on-duty hours since the driver's last 24 hour off duty period, nor on-duty hours since the driver's last 10 hour off duty period were significantly related to crash risk.[49] A study conducted as recently as 1999 concluded "that simple time on task is not a uniformly effective determinant of performance. . . . [I]n a typical day . . . shift, the difference between a 10 or 12 hour duty day and a 14-hour day is negligible."[50]

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[41] *Id.* at v.

[42] *Id.* (emphasis added).

[43] Massie, *supra* note 9, at 21.

[44] 65 Fed. Reg. 25587.

[45] 65 Fed. Reg. 25556.

[46] Rosa, *supra* note 15, at 1184-85, 1192.

[47] *Id.*

[48] Folkard, *supra* note 13, at 426.

[49] Frith, *supra* note 4, at 20.

[50] O'Neill, *supra* note 25, at 40.

Within the telecommunication industry, experience demonstrates no rise in accident rates when time on duty is increased. In the past the telecommunication industry has worked technicians extra hours pursuant to the emergency exemption of the current hours of service rules, but has experienced no increased accident rate. Similarly, there is no significant difference in our Department of Transportation (DOT) accident rates in states that afford us HOS exemptions as opposed to those that do not. This is further powerful evidence that utility drivers do not present a highway safety risk sufficient to justify hours of service regulation.

To reiterate, the burden is not on the public utility industry to show that its drivers do not implicate safety concerns—the burden is on the Agency to show that they do. The Agency has failed to do that. It relies on a body of literature that is generally inapplicable to drivers outside of the long-haul context. The little evidence it has that relates more specifically to utility drivers and their driving characteristics comes much closer to negating a federal safety interest than establishing one. In short, the Agency has failed to grasp the conclusion that Congress already reached — namely, that "[t]he operation of utility service vehicles in the course of business has not been demonstrated to pose a significant safety risk for the general public."[51]

Public utility technicians should be exempt from these hours of service rules. The Agency lacks the statutory authority to do otherwise.

SUBSTANTIAL MODIFICATIONS NEEDED TO THE RULE AS PROPOSED

Even if this proposed rule legitimately could be applied to telecommunication technicians and other public utility workers, the current proposal could not reasonably be applied without substantial modifications to account for unique characteristics of the industry and its drivers' duties. The circumstances where the proposed rules are most likely to cause the industry difficulty, however, are circumstances where public safety will often demand that telecommunication drivers remain on duty notwithstanding the rules. Specifically, the telecommunication industry will bump up against the Department's rules when responding to unexpected service outages, and unusually complicated or severe outages. These may take hours or even days to repair. Interference with the industry's ability to respond in these circumstances could constitute a serious threat to public safety.

The telecommunication industry is in the business of providing essential public services, which form part of the basic information infrastructure upon which modern society relies. These services encompass everything from basic residential service to 911 police, fire and ambulance emergency service, to e-commerce applications. Increasing dependency on email, the internet, faxes and the like have increased the importance of reliable telecommunications systems.

Storms, accidents, and third-party cable cuts that interrupt telephone and other telecommunications services are nearly daily occurrences. They cannot be predicted and happen at all times of the night and day. When they occur, it is not uncommon for 911 service and other essential telecommunications services to be disrupted for a period of time, sometimes several days.

[51] H.R. Conf. Rep. No. 104-345.

Events such as these plainly demand the swiftest and most intense response possible. They are emergencies that literally implicate scores of other emergencies, as police, fire, and rescue personnel become impaired in their ability to receive and respond to calls. For this very reason, telecommunication companies are required by the Federal Communications Commission and the various state public utility commissions under which they operate, to maintain communications systems in support of public emergency response systems.

And yet, the telecommunication industry's ability to provide, maintain, and restore essential public telecommunications services already is compromised under the hours of service rules as they exist today, despite limited exceptions afforded to utility drivers. Currently the regulations provide an exemption from the HOS rules for essential public utilities when an appropriate government official formally "declares" an emergency.[52] This provision is helpful, but falls far short of providing utilities the flexibility they need to meet their public service responsibilities. In cases where there is a declared emergency—such as fires, floods, and hurricanes—telecommunication technicians are sent in as quickly as possible to respond and restore service. These workers are temporarily exempted from the rules while they perform their duties. However, because an emergency such as this draws upon so many technicians and resources, severe strains are placed on the rest of the system; we have fewer technicians than we need to maintain services elsewhere, and yet these remaining technicians—whose time must be stretched to address other demands—are not covered by the exemption and remain subject to the work-time limitations. Even at the site of the emergency, in many cases extensive work to restore service must continue well after the declared emergency is over. Technicians' hours are once again circumscribed by the rules, even though their initial task is not complete.

Further, a formally declared emergency is unusual. The standard service outage due to a storm, accident, or third-party cut will not trigger the current exemption. The telecommunication industry attempts to respond to these outages while complying with the existing hours of service rules—but doing so is often difficult. In these circumstances, we dispatch crews and equipment to restore services as quickly as possible. But technicians may have to be sent home when they are almost finished with the repair work because they have reached their limit under the hours of service limits. When this happens, the company must find a replacement technician, bring out another vehicle, and bring the replacement up to speed on the project. This is extremely costly and time consuming, particularly when the telecommunication company is busy and replacement technicians are required elsewhere.

In sum, the rules inhibit the telecommunication industry from meeting our core responsibility of maintaining an essential public service at critical times. Public service utilities must have the ability to respond immediately to service failures. They should not be placed in the untenable situation of being unable to adequately respond while waiting for an emergency to be declared.

If public utility technicians are not exempted in full from this rule, in order to accommodate the needs of both the public utility companies and the public, the current emergency exemption should be expanded so that outages of the "critical utility infrastructure"—telecommunications, telecommunication transmissions, electric, gas, water, and sanitary sewer —are per se emergencies. In the alternative, public utility service companies should be granted the authority to

[52] 49 U.S.C. §31502(e).

self-declare an emergency after they evaluate an outage and determine that public safety dictates a rapid, uninterrupted response. These changes would allow utilities to quickly and efficiently respond to all outages—minimizing any and all threats to public safety. Under either alternative, the emergency exemption should be broadened to exempt all of a company's technicians necessary to (i) respond to the emergency while (ii) performing other time-sensitive functions during the emergency. This would give utilities the flexibility needed to respond to all outages faced at one particular time.

REMOVAL OF THE 24-HOUR RESTART PROVISION

The Agency has not met its burden of establishing that the 24-hour restart provision is contrary to the public interest or the safe operation of commercial motor vehicles. Accordingly, it does not have authority to remove the exception or to replace it with the proposed weekend requirement—which is itself arbitrary and capricious.

According to the National Highway Act of 1995, the Agency's regulation of utility vehicle drivers must "permit any period of 7 or 8 consecutive days to end with the beginning of an off-duty period of 24 or more consecutive hours for the purposes of determining maximum driving and on-duty time."[53] In other words, utilities are uniquely entitled to bring technicians back to work after providing them with a 24-hour break.[54] The 1995 Act represented a Congressional acknowledgement of the differences already identified between long-haul and utility drivers—namely that utility technicians do not drive as a major part of their job and need flexibility under the rules to perform utility repair services.

Under the proposed rules, this one utility exemption will be eliminated in favor of the proposed weekend rules. The proposed rule requires utilities to provide their drivers with a weekly break of at least 32 consecutive hours. This break must include two consecutive midnight to 6:00 am periods. As a result, utility technicians will have as many as three fewer hours per day in which they can repair and maintain service. The Agency proposes to replace the 24-hour restart rule with the weekend requirements on the grounds that it has "found no sleep or fatigue research that supports any of the current exceptions or exemptions."[55] The Agency misses the critical point that the burden lies with it to justify its decision to revoke the restart rule.

According to Congressional instruction in the 1995 Act, "if, at any time, as a result of a . . . [rulemaking proceeding] the . . . [Department] determines that granting . . . [the utility vehicle exemption] is not in the public interest and would have a significant adverse impact on the safety of commercial motor vehicles . . . [it] may prevent the exemption from going into effect, modify the exemption, or revoke the exemption."[56] Congress thus granted the Department the limited authority to overturn the 24-hour rule if, and only if, it found that the rule posed a significant risk to public safety. As already discussed in some detail, the Agency has not shown that any regulation of utility technicians is necessary to preserve the safety of the public—let alone

[53] P.L. 104-59, Title II, §345 (Nov. 28, 1995).

[54] For all other operations, employers can bring employees back to work only at hours predesignated to start the 7 or 8 consecutive days used to measure compliance with the rules. 49 C.F.R. § 395.2.

[55] 65 Fed. Reg. 25559.

[56] P.L. 104-59, Title II, § 345 (Nov. 28, 1995) (emphasis added).

established that the 24 hour restart provision has a significant adverse impact on highway safety.[57] The Agency has all but admitted an inability to meet the burden placed on it by Congress. During the course of this rulemaking, a representative of Annamarie Kane Associates in New Jersey asked:

> What kind of statistical data can DOT provide relative to the 24-hour restart exemption to the 70-hour rule granted to the construction, utilities and agriculture industries? Have injury or fatal accidents increased, decreased, or remained the same for these groups since implementation of this exemption?

Julie Anna Cirillo, Acting Assistant Administrator for the Agency answered:

> Motor carriers that use these three exemptions are not required to identify themselves to the Agency, and we have no reliable means of identifying them. We therefore have no statistics or even trend data, on injury or fatality rates for these carriers during the period since the exemptions were adopted.[58]

The proposed weekend provision would require public utilities to "adjust our hours of operation to conform to the requirements applicable to the type of operations". The Agency justifies the long weekend requirement on the grounds that it permits drivers to obtain "restorative sleep."[59] Yet, at the same time the Agency justifies the proposed reductions in daily hour limits on the grounds that the new rules will give drivers "time off to allow sufficient time for 7 to 8 hours of sleep" each night.[60] Why do drivers who, according to the Agency's reasoning, are getting sufficient sleep each and every night of the week need a weekend for "restorative" or catch-up sleep.

The weekend provision is particularly puzzling when considered in light of the Agency's recognition that technicians may engage in physically draining, fatigue-producing activities, such as "volunteer work or National Guard / Reserve duty . . . or . . . roofing a friends home" during the required weekend.[61] It is at least conceivable that drivers will return from mandated weekends more fatigued, due to the strenuous activities engaged in during the extended time off, than they would have been had they continued to work their regular hours or had a more moderate 24 hour period off.

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[57] *See supra 55*.

[58] Reponses to Questions Posed at Hearings Held on May 31, June 1, June 16, June 26, June 27, and July 7, 2000, Letter to Ms. Annamarie Kane (Sept. 5, 2000) (emphasis added).

[59] 65 Fed. Reg. 25558.

[60] *Id.*

[61] 65 Fed. Reg. 25583.

DEPARTMENT OF TRANSPORTATION AUTHORITY

The Department of Transportation is acting well beyond the scope of its authority to regulate commercial vehicles and their impact on highway safety. The FMCSA has statutory authority to regulate workers' hours only insofar as the hours worked may affect the driver's ability to safely operate a commercial motor vehicle. The proposed regulatory regime regulates working hours—period—and makes no allowance for times when a worker's hours will not affect the safe operation of a commercial vehicle. For example, according to the FMCSA's interpretation expressed at a recent hearing, the daily limit would apply to a "driver" even on those workdays when the driver is a mere passenger in a regulated vehicle. (Driver is defined very broadly under the Agency's regulations – as evident in the fact that a telecommunication technician who usually drives less than five (5) hours a day could nonetheless be a "driver" under Agency regulations.) Additionally, consider the following example:

> A telecommunication company calls a technician in to work at 12:00 am on a Friday. At 11:00 am the technician is called to perform a repair that will take him approximately thirteen hours to complete. The technician completes the job at midnight on Saturday after a 24-hour shift. The supervisor must retrieve the employee and take him/her back to the facility. The supervisor must also make arrangements to retrieve the vehicle. The technician does not return to work until noon the following Monday. The 24 hours the technician worked on Friday would have absolutely no relation to the safe operation of a commercial motor vehicle—since the technician would not drive after his shift and he could undoubtedly make up for any lost sleep during the 36 hours before he returned to work. Yet this arrangement would be prohibited by the proposed rules.

There may be days where the number of hours that a telecommunications technician works will, as a matter of logic and common sense, have no impact on the safety of commercial motor vehicle operations—such as where a technician works twenty non-driving hours the day before s/he leaves for a two-week vacation—the Agency should not be involved and employers and employees should be free to set hours without regard for Department of Transportation requirements. The fact that the proposed rule does not contain such an allowance further demonstrates how the Agency is acting well beyond the parameters of the limited authority granted to it by Congress.

FATIGUED DRIVERS

Proposed §394.131 and 395.131 is unreasonably broad and in the utility service industry in particular, poses an unnecessary threat to public safety. The current hours of service rules require drivers to cease driving if they hold a reasonable good faith belief that they cannot safely continue. Drivers are required to cease the operation of a commercial motor vehicle whenever their "ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate" the vehicle.[62] The proposed rule goes far beyond this, requiring drivers to "stop driving when . . . [they] are drowsy, ill, or have other signs of fatigue"[63]—regardless of the presence or absence of a safety implication. So, for example, a yawn or a slight case of the sniffles would be grounds for a driver to pull

[62] 49 C.F.R. §392.3.

[63] 49 C.F.R. §395.131(a) (proposed) (emphasis added).

himself off of a job under the proposed rule, regardless of the fact that he is completely able to safely operate a commercial motor vehicle. The broadness of this rule is not only beyond the scope of the Agency's limited authority to regulate commercial vehicles in the name of safety, but also allows technicians to determine at whim if they want to work a particular day or time frame. Employers, prevented from disciplining or otherwise penalizing technicians who exercise their rights under the proposed provision,[64] have no available means of punishing or preventing such behavior.

The rule should be limited in scope to mirror that of the current rule requiring illness or fatigue to rise to the level of a safety concern before an technician is allowed to declare himself/herself out of service. This would eliminate the chance that malingerers could stall employer operations a factor particularly critical in the public utility industry where every self-declaration of unfitness has the potential to negatively impact a company's ability to respond to an outage.

Finally, there is no justification for applying the self-declaration provision to public utility companies. Where drivers are closely supervised by managers who have the knowledge and ability to critique driver fitness—like they are in the public utility context—highway safety does not require that technicians have the authority to declare themselves unfit to drive. The Agency itself distinguishes between classes of operations in part on the ground that "each type of operation has characteristics that reflect a different level of daily management contact that corresponds to more or less control or supervision over the driver."[65] "The ability of management to assess the alertness and attentiveness of the driver is different in each type of operation[,]" says the Department.[66] For closely supervised telecommunication drivers, the drastic step taken by the proposed rule is unnecessary. Compared to a long-haul driver who may go days at a time without coming face to face with a supervisor—and for whom a self-declaration of unfitness may be the only available option—a fatigued or ill telecommunication technician will never be more than a short drive from a supervisor with the authority, knowledge and ability to review his complaints and to take appropriate action.

PROPOSED OFF-DUTY PROVISION

The proposed off-duty provision is unreasonably broad. The proposal prohibits employers from contacting workers in any manner during their "off duty" period. The penalty for such contact is to restart the clock so that the off-duty period must commence all over again. "Drivers frequently complain that motor carriers call them at any hour of the day and night, frequently interrupting their sleep," the Agency explains. "[R]esearch shows that drivers who are awakened during their principal sleep period are more likely to have reduced alertness."[67] The Agency relies on a single study to support this restriction.

The Agency's rationale and scientific evidence do not support the breadth of this rule. The sole basis for prohibiting any off-duty contact is the claim that such contact can interrupt sleep. But during most of the weekend, workers are not sleeping – a worker on a normal 9-5 working day can reasonably be assumed by his or her employer to be up and about in the middle of the day. The

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[64] 49 C.F.R. §395.131(b) (proposed).

[65] 65 Fed. Reg. At 25585.

[66] *Id.*

[67] 65 Fed. Reg. at 25587.

Agency has no basis for prohibiting that employer from calling the telecommunication technician during the football game on Sunday, for instance, and telling him or her when and where to report to duty on Monday.

PROPOSED DRIVING LIMIT

NTSP believes that the proposed on duty time requirement for Type 1, 2, 3, 4, and 5 drivers should **not** apply to public utility workers. The proposed regulations state that on duty time must not exceed 12 hours per day within 14 hours (two hours of rest included for Types 1, 2 and 4, and 3 hours for Type 3), totaling 60 hours or less per week. On duty time for Type 5 drivers must not exceed 13 hours per day within 15 hours (two hours of rest included), totaling 78 hours or less per week. This is a significant and unnecessary reduction from the current regulations that allow a 15-hour workday and 60 hours in seven days or 70 hours in eight days and unlimited on duty time in a non-DOT capacity.

The proposal restricts the length of time a public utility worker can drive. There is no scientific basis for that restriction. Rather, the Agency has confused the task of defining the coverage of the rule, with identifying the actual regulatory constraints it reasonably may impose.

There is no doubt that workers who drive less pose less of a highway risk and therefore warrant less scrutiny and regulation by the Federal Motor Carrier Safety Administration. At the extremes – when driving is an incidental duty usually performed in 30 to 60 minute increments totaling less than five hours a day, for instance – no regulation whatsoever is appropriate, as argued above. But that jobs requiring little driving pose relatively little highway safety risk is no basis for prohibiting workers in such jobs from ever driving long hours when exceptional events or circumstances demand it. There is no evidence that a utility worker who drives 6, 7, or 8 hours in one exceptional day poses anything approaching the threat of a tractor-trailer driver on a 12-hour run through the middle of the night when monotony is at a peak and stimulation at a minimum.

Telecommunication utility vehicles are used primarily, not as long haul freight carriers, but to respond to the service needs of our telecommunications customers. Telecommunication technicians perform a variety of functions, but actual, behind-the-wheel operation of a commercial motor vehicle is a very small part of the daily routine. Their jobs offer them variety, physical activity, flexibility in controlling the sequence of tasks and mobility throughout the day. Based on our collective organizational experiences within the NTSP, these factors reduce the risk of fatigue that long haul drivers face.

PROPOSED RECORDKEEPING RULES

The proposed recordkeeping rules are unjustified, unreasonable and unduly burdensome. Existing regulations exempt the majority of utility technicians from having to keep a record of duty status. Approximately 98% of the telecommunication drivers qualify as a 100 air mile radius driver under 49 C.F.R. §395.1(e). The new rule repeals the status of the 100 air mile driver and requires employers to create time and work records for each technician—records which must include daily starting and ending times for each on-duty period and the total on-duty hours for each workday and

workweek. The Agency has presented no rationale for this decision, but asserts only that the new recordkeeping rules are duplicative of existing Department of Labor ("DOL") requirements. Even accepting this as true, the real recordkeeping burden imposed by the proposed rule is neither addressed nor accounted for in the notice of proposed rulemaking and goes well beyond current DOL regulations. Public utilities will be obligated, under the new regime, to maintain records sufficient to prove to the Agency that the technicians it employs are actually "Type 5" "drivers"—and not "Type 2, 3 or 4" drivers subject to more restrictive hours limits. The telecommunication industry will have to keep adequate records, for example, to show that its drivers do not drive more than five hours per day. These requirements would result in considerable disruption to our payroll systems, employee contractual agreements and management's ability to effectively manage technicians and drivers.

Under the proposed rule, we would need systems capable of tracking each employee's actual daily driving time, on-duty time and break time in order to substantiate their status as "Type 5" drivers and to indicate if on any particular day they became a "Type 2, 3, or 4" driver. This would require wholesale changes to our current payroll systems, which generally track a driver's daily hours by simply entering the technician's name and total hours worked in that day. The proposed rule would require us to install new and costly systems capable of tracking drivers by the minute, with real-time data to be fed to each supervisor on a daily basis. The proposed rule would require us to implement a software tracking system to monitor driving times in minute increments with real time data queries being fed to each supervisor daily. The implementation of such a time tracking and payroll system would affect hundreds of thousands of technicians and would require significant resources to meet the requirements of this rule. The Agency has provided no reasoned justification for this drastic change in policy.

Further, the Agency's authority to proscribe recordkeeping and reporting requirements is coextensive with its authority to regulate hours of service.[68] And, as addressed in much detail above, the Agency will be regulating the hours worked and the records kept by utility workers who have not been shown to pose any threat to the safe operation of commercial motor vehicles.

SUMMARY

This application of the proposed hours of service rule to public utility workers, such as telecommunication technicians, is not justified by the underlying science. The proposed hours of service amendments are premised almost entirely on studies of long-haul drivers whose fatigue-related risks are attributed to long hours driving over considerable distances at late night and early morning when people are naturally predisposed to sleep and conditions are especially monotonous and devoid of stimulation. These conditions do not accurately reflect the driving conditions for telecommunication technicians, who drive only incidental to other duties and whose average trips are 30 to 60 minutes or fewer, with a total daily driving time of normally under five hours. These drivers plainly do not pose the hazards that this proposal seeks to regulate. The NTSP requests a full exemption of telecommunication technicians from these hours of service rules.

The appropriateness of an exemption for telecommunication technicians—and other utility workers—is demonstrated by the numerous difficulties that the proposal would cause the telecommunication industry and, accordingly, the millions of people who rely on it for critical services across the United States. The current rule recognizes the need to exempt workers in emergency situations but, for example, does not recognize the loss of telephone service—including

[68] 49 U.S.C. § 31133(a).

911—as an emergency. But surely it is the very definition of an emergency for a municipality's emergency services—911, police, fire department, and ambulances, for instance—to be unable to receive and respond to emergency calls. Accordingly, to the extent telecommunication technicians are not fully exempted from the rule, an exemption that enables them to respond to such emergencies while meeting other business needs is appropriate.

Congress itself already has recognized the appropriateness of treating utility workers differently than other workers who drive a far greater extent in the course of their workday, allowing a unique 24-hour "restart" period before utility workers may return to duty after a week's work.[69] According to the National Highway Act of 1995, the Agency's regulation of public utility vehicle drivers must "permit any period of 7 or 8 consecutive days to end with the beginning of an off-duty period of 24 or more consecutive hours for the purposes of determining maximum driving and on-duty time." The proposal retracts this statutory exemption without making the showing required by law. This is improper, and if a full exemption is not provided, then the statutory 24-hour restart provision for utility workers should be restored.

The rule errs in other crucial respects: the "weekend" requirement of the proposed rule presupposes a need for "restorative" sleep, but there is no need for restorative sleep for people who receive sufficient sleep during the workweek, which this rule is intended to achieve. And, the rule's prohibition on employers communicating with workers on the weekend—even for a minute or two or during the middle of the day—will seriously interfere with business operations yet has no basis in science or law.

The rule's requirement that workers cease driving on the minutest sign of fatigue or illness—a yawn or sneeze, perhaps—also is improper and must be withdrawn, as must its recordkeeping requirements to the extent they are applied to telecommunication technicians.

DOT's proposed regulations inhibit our mission to provide the critical systems that protect the general public. The Federal Motor Carrier Safety Administration has failed to demonstrate that telecommunication technicians present a threat to the public. We contend that utility technicians are different. Utility drivers are incidental drivers. Therefore, utility drivers should be exempt from hours of service regulations.

[69] P.L. 104-59, Title II, §345 (Nov. 28, 1995).