UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF SMALL TRUCKING COMPANIES, THE EXPEDITE ALLIANCE OF NORTH AMERICA, and AIR & EXPEDITED MOTOR CARRIERS ASSOCIATION,	)	
Petitioners,	)	**MOTION FOR EMERGENCY STAY**
v.	)	
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION,	)	
Respondent.	)	

MOTION FOR EMERGENCY STAY

1. Introduction; Relief Requested. On December 5, 2010, the Federal Motor Carrier Safety Administration ("FMCSA") currently plans to implement its "CSA-2010" rule, including public release of "BASIC" ratings for individual motor carriers.[1] Petitioners ask the Court, pursuant to Circuit Rule 18, to stay those agency actions until FMCSA has conducted a full notice-and-comment rulemaking in compliance with the Administrative Procedure Act ("APA"). The FMCSA should provide the industry and public with full disclosure of all aspects of the proposed rule, including the algorithms and other formulas the agency intends to utilize in developing carriers' BASIC grades and classifications, the

[1] See part 6.A(3) infra for explanation of the terms "BASIC" and "CSA-2010."

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sample populations used in developing the percentiles and other criteria the agency will utilize in grading carriers as to safety; and the procedures the agency will utilize, if any, to determine that alleged violations are reported accurately. The agency must provide the public an opportunity to comment on the FMCSA's proposal and must issue a decision explaining its final rule, citing to portions of the record that support the rule. The FMCSA should not be allowed to implement CSA 2010 until this process is complete. In the alternative, should this Court believe that any part of the program is not subject to the notice-and-comment provisions of the APA, it should at a minimum stay the publication of individual carriers' BASIC scores and ratings until the agency has complied with APA requirements.

2. Need for Emergency Stay. The implementation of the rule embodied in CSA 2010 and, in particular, the publication of BASIC ratings, will result in irreparable competitive and economic harm to motor carriers and freight brokers, as described in the attached declarations and affidavits. A delay will cause no harm to the agency or the public. The agency has a successful safety monitoring and enforcement program currently in effect. While the public undoubtedly has an interest in safe highways, it also has an interest in a competitive motor carrier industry, especially in these economic times.[2] A program that decreases competition, reduces jobs, and increases transportation costs, is not in the public

[2] See National Transportation Policy at 49 U.S.C. § 13101(a)(2)(I).

interest. Implementation of CSA 2010 in its current form threatens the survival of thousands of carriers, many of which are small companies in rural America.

3. **The Invalid Rule.** Petitioners move to stay the rule FMCSA made and entered in October 2010, and amended on November 18, 2010, in response to public comments it had invited in Docket No. FMCSA-2004-18898, Withdrawal of Proposed Improvements to the Motor Carrier Safety Status Measurement System (SafeStat), and Implementation of a New Carrier Safety Measurement System (CSMS). Copies of the request for comments and the final rule are attached hereto and marked Exhibit "A".

4. **Jurisdiction.** This court has jurisdiction under 49 U.S.C. § 20114(c) and 28 U.S.C. §§ 2342(3)(A) and (7).

5. **Standing.** The three organizations bringing this petition represent approximately 2,750 small privately-owned motor carriers that are part of over 150,000 similarly situated small businesses which will be directly and adversely affected by the FMCSA's announced public release of CSA 2010 data and scoring in its present format. Each of the three Petitioner associations participated in the rulemaking before the agency. As shown by the affidavits attached hereto marked Exhibit "B", Petitioner associations have standing to sue on behalf of their members because (1) at least one member of each of the associations has filed an affidavit demonstrating its standing to sue in its own right, (2) the interests the

associations seek to protect are germane to their purposes, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the action. FMCSA's failure to comply with the APA has caused concrete and particularized harm to the associations' members. The implementation of CSA 2010, scheduled for December 5, 2010,[3] will, if not stayed, cause this injury and the Court could redress the injury.

6. Grounds. The established criteria for granting a stay of agency action in this Circuit are amply satisfied, as shown next. See *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

A. The FMCSA's adoption of new rules governing its safety enforcement program without complying with APA notice and comment requirements is a clear violation of federal law, and requires that the rule be rescinded and remanded to the agency with instructions to comply with the APA.

(1) The Administrative Procedure Act ("APA").

The APA generally requires that, prior to issuing a final rule, an agency must provide both notice and an opportunity for comment to the public. 5 U.S.C. § 553(b)-(c). This requirement does not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . . ." 5 U.S.C. § 553(b)(A). A legislative rule is one that "has the force of law," while an

[3] Press Release, U.S. Dep't of Transportation, FMCSA Provides Motor Carriers an Early Look at Safety Ratings (August 16, 2010), *available* at www.fmcsa.dot.gov/about/new/news-releases/2010/news_digest_081610.aspx.

interpretive rule is "merely a clarification or explanation of an existing statute or rule" and "advise[s] the public of the agency's construction of the statutes and rules which it administers." *Guardian Fed. Sav. & Loan v. Fed. Sav. & Loan Ins. Corp.,* 589 F.2d 658, 664-65 (D.C. Cir. 1978).

This Circuit has held that a rule is legislative rather than interpretive if it meets any of four criteria, one being that it effectively amends a prior legislative rule. *Air Transport Ass'n of America, Inc. v. Federal Aviation Administration*, 291 F.3d 49, 55 (D.C. Cir. 2002); *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1112 (D.C. Cir. 1993); *Committee for Fairness v. Kemp,* 791 F.Supp. 888 (D.D.C. 1992). An action will also be deemed a substantive rule if it "puts a stamp of [agency] approval or disapproval on a given type of behavior." *Chamber of Commerce of the United States v. United States Dep't of Labor,* 174 F.3d 206, 211 (D.C. Cir. 1999) (quoting *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987)). Substantive rules "grant rights, impose obligations, or produce other significant effects on private interests." *Batterton v. Marshall,* 648 F.2d 694, 707 (D.C. Cir. 1980). As shown next, CSA 2010 is legislative in character for each of these reasons.

(2) The current carrier safety rating system.

The FMCSA's current operational model – which CSA 2010 would replace – assigns a safety rating to a motor carrier only after an on-site audit of the

carrier's safety management systems. As a subordinate part of the process, FMCSA employs a system known as SafeStat as one of several tools to select carriers for such audits. SafeStat analyzes the performance of individual motor carriers in four analytic Safety Evaluation Areas (SEAs): (1) Accident, (2) Driver, (3) Vehicle and (4) Safety Management.[4] The four SEA values are then combined into an overall safety status assessment, known as a SafeStat score.[5] These scores are based on a variety of factors including accident records and safety violations reported to the federal agency by state enforcement agencies, and also on roadside truck inspections by federal and state enforcement personnel. But violations discovered at roadside are included in SafeStat only if they lead to a vehicle or driver being declared out of service.

Although a carrier's SafeStat profile in three of the four SEAs is made public, a safety rating is assigned to a carrier only after the agency has conducted a full safety audit at the carrier's headquarters. Further, before a final safety rating is assigned, a carrier is provided a copy of the audit report and an opportunity to appeal the recommended rating. The safety ratings currently assigned by FMCSA are Satisfactory, Conditional and Unsatisfactory. If a carrier receives an

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[4] U.S. Dep't of Transportation, Federal Motor Carrier Safety Administration, Safety Status Measurement System (SafeStat), at www.fmcsa.dot.gov/facts-research/facts-figures/databases/safetstat.htm.
[5] *Id.* For a full description of the SafeStat methodology, visit the FMCSA SafeStat website at ai.fmcsa.dot.gov.

"Unsatisfactory" rating, after exhausting its administrative and judicial reviews, its registration with FMCSA is revoked or suspended and the carrier is no longer permitted to operate.[6]

No matter what a carrier's SafeStat record shows, a carrier's safety rating and right to operate is not affected until FMCSA conducts a safety audit. While the factors displayed in a carrier's SafeStat profile could affect its eventual safety rating, the profile itself displays only raw data and does not include any grading of the carrier.

(3) The new CSA 2010 system.

On April 9, 2010, FMCSA announced that it would replace SafeStat with a new Carrier Safety Measurement System ("CSMS") as part of an initiative called Comprehensive Safety Analysis 2010 ("CSA 2010").[7] The new system uses an expanded data base including all warnings, citations, and roadside inspections, even those not resulting in out-of-service violations. The new CSMS groups these data into seven Behavioral Analysis Safety Improvement Categories (BASICs): Unsafe Driving, Fatigued Driving (Hours-of-Service), Driver Fitness, Controlled Substances and Alcohol, Vehicle Maintenance, Cargo Related, and Crash History.[8] The system not only will target carriers for graduated levels of enforcement action,

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[6] 49 C.F.R. Part 385.
[7] 75 Fed. Reg. 18257-58 (April 9, 2010) (included in Exhibit "A" hereto).
[8] *Id.* at 18258.

but also is ultimately intended to assign safety ratings directly to carriers without the necessity for audits. At some point in the future, the agency intends to change its current safety rating terminology through a formal rulemaking,[9] but all the determinants of a safety rating are being changed by the CSA 2010 methodology that FMCSA proposes to implement on December 5 without benefit of APA scrutiny.

The agency has set "intervention" thresholds in each of the BASIC categories for taking action against carriers scoring above those thresholds, but has failed to respond to substantial issues raised concerning the methodology and peer grouping behind the data to be released.[10] In particular:

- **Due process concerns**. CSA 2010 for the first time will assign safety ratings based on citations and warnings which a motor carrier has no effective way to challenge.

- **Peer grouping.** Carriers which are required to maintain paper logs of drivers' on-duty and driving time are peer grouped with carriers who do not need to log in that way. This creates inequitable comparisons which prejudice carriers using paper logs, because a large proportion of logging violations typically involve recordkeeping errors rather than excessive driving hours.

[9] *Id.* at 18257.

[10] For supporting information on these issues, see Petitioners' Motion to Postpone filed with FMCSA (Exhibit "C" hereto).

- **Data inequity.** Enforcement officials in some States need "probable cause" for charging a moving violation in order to stop a truck for a safety inspection. This escalates the number of warnings received by carriers in those States. Although warnings are scored under both SafeStat and CSA-2010, the inequity will be compounded when they can influence an actual safety rating under CSA-2010. In addition to geographical inequity, under-reporting of satisfactory inspections skews several of the BASIC scores resulting in faulty statistical data.

- **Unexplained methodology changes**. In August of 2010, after two years of test trials, the agency announced it had made 800 technical changes in its methodology. While the changes themselves were announced, the background and reasoning for them have not been released to or available for review by the public.[11] The University of Michigan study commissioned by FMCSA has not been publicly reported or evaluated and necessarily will be based largely upon methodology reversed or changed in August.[12] It is reported that the August changes made as much as a 50% change in the percentile ranking of peer grouped carriers.[13]

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[11] Gobbell Affidavit (Exhibit "B", p. 35).

[12] For references to University of Michigan study and ongoing adjustments of CSA-2010 methodology, see, e.g., responses to questions 104-106 in "Frequently Asked Questions" page at www.csa2010.fmcsa.dot.gov (last visited October 13, 2010).

[13] See Appendix C to Petitioners' Motion to Postpone (Exhibit "C" hereto).

Because neither the science nor the math behind the methodology appears to have been subject to Data Quality Act review by the agency,[14] the data has no proven reliability and is not fit to be published given the substantial adverse consequences.

(4) CSA 2010 was promulgated without complying with the APA

This case is governed by *MST Express v. Department of Transportation*, 108 F.3d 401 (D.C. Cir. 1997). In that case, the petitioners challenged the use by the Federal Highway Administration (predecessor to FMCSA) of an unpublished regulation to determine safety ratings assigned to carriers. *Id.* at 401. This Court noted the importance of safety ratings given to carriers:

> The safety ratings are significant. They are made readily available to other federal agencies and to the public. Insurance companies use the ratings to make risk assessments and shippers consult the ratings when selecting a carrier. Moreover, while a carrier that receives a conditional rating is permitted to continue its normal operations, a carrier with an unsatisfactory safety rating may not transport certain hazardous materials or more than 15 passengers.

Id. at 403-04.

At the time, the Administration was using a "safety fitness rating methodology" or "SFRM" which provided Administration inspectors detailed guidelines by which to derive a carrier's safety rating from data obtained about the

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[14] See sec. 515 of Pub.L. 106-554, Treasury and General Government Appropriations Act for Fiscal Year 2001, as implemented by Office of Management and Budget Guidelines at 67 Fed.Reg. 8452.

carrier. *Id.* at 403. Though available to the public, the SFRM was not promulgated through rulemaking. *Id.* at 402-03. The Administration argued that the SFRM contained only "interpretive rules," exempt from notice-and-comment rulemaking. *Id.* at 405. This Court disagreed, holding that because the SFRM was the scheme adopted by the Administration for determining carrier safety ratings, and because the Secretary was required to promulgate by regulation the method by which it would determine carrier fitness, the SFRM should have been promulgated pursuant to notice-and-comment rulemaking. *Id.* at 406.

So it is here. FMCSA is proposing a new model for compelling compliance and determining the safety fitness of motor carriers. Accordingly, CSA 2010 is subject to APA notice-and-comment rulemaking. FMCSA has failed to provide adequate notice to the public as to the scope of the CSA 2010 rule, to disclose the algorithms and other formulas on which it is based, or to provide a realistic opportunity for informed public comment on the rule. The April 9, 2010 notice issued by the FMCSA invited comments on the change from SafeStat to the new CSMS, but did not address essential rulemaking issues under the Regulatory Flexibility Act (5 U.S.C. §§ 601 et seq.) or the Paperwork Reduction Act (44 U.S.C. §§ 3501 et seq.), nor did it otherwise provide the public with sufficient information or details regarding the new rule. Technical studies and data upon which an agency is relying in adopting or revising a rule or program must be

revealed for public evaluation. *Chamber of Commerce, supra*; *Sierra Club v. Costle,* 657 F.2d 298 (D.C. Cir 2003); *Small Refiner Lead Phase-Down Task Force v. E.P.A.*, 705 F2d 506 (D.C. Cir. 1983); *U.S. Air Tour Association v. FAA*, 298 F.3d 997 (D.C. Cir. 2002).

APA notice and comment requirements apply to agency decisions (such as the one here) that change the handling of data about a regulated industry, *P.A.M. News Corp. v. Hardin,* 440 F.2d 255, 257-58 (D.C. Cir. 1971), or set standards or "metrics" for inspections or enforcement action. *Prometheus Radio Project v. Federal Communications Commission*, 373 F.3d 372, 390, 418-20 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005); *Chamber of Commerce of the United States v. United States Dep't of Labor*, 174 F.3d 206, 211-13 (D.C. Cir. 1999).

Other than the FMCSA's April 2010 announcement which contained few if any of the hallmarks of a Notice of Proposed Rulemaking, little if any agency information about CSA 2010 has been published in the Federal Register. Neither publication of information on an agency website nor the hosting of "listening sessions" around the country[15] is a substitute for the APA notice-and-comment requirements. *Utility Solid Waste Activities Group v. E.P.A.*, 236 F.3d 749, 754 (D.C. Cir. 2001) ("This court has never found that Internet notice is an acceptable substitute for publication in the Federal Register."). The FMCSA's apparent

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[15] 75 Fed.Reg. at 18258 (see Exhibit "A" hereto).

"rulemaking lite" approach cannot replace the discipline of a formal rulemaking process, in which an agency's required "statement of basis and purpose" ultimately must reflect point-by-point consideration of public comments. 5 U.S.C. § 553(c).

Because the FMCSA has not provided adequate notice and opportunity for comment, the proposed CSA 2010 regulation must be set aside and remanded to the FMCSA. Thus, the Petitioners seeking a stay here have made the requisite showing that they are likely to prevail on the merits.

B. Motor carriers and freight brokers will suffer irreparable economic and competitive harm if the FMCSA is permitted to publish individual carrier BASIC grades and rankings.

The public release of individual motor carriers' BASIC scores and grades will have a substantial anticompetitive effect on the motor carrier industry, and on small carriers in particular. Shippers or transportation brokers who are customers of FMCSA regulated motor carriers will be exposed to the threat of vicarious liability for alleged "negligent selection" of a motor carrier that the FMCSA regulates and confirms is licensed, insured and authorized to operate. This threat will become immediate whenever a carrier used by such customers has an accident while handling their freight, and then turns out to have less than perfect BASIC scores. The problem of vicarious liability is real. State law has been applied to require a shipper or broker to second guess the agency's ultimate fitness determination through use of publicly released data, even when the FMCSA has

certified that a carrier is licensed and authorized for use. *Schramm v. Foster*, 2004 U.S. Dist. Lexis 16875 (D.Md. August 23, 2004); *Jones v. D'Souza*, 2007 U.S. Dist. LEXIS 66993 (W.D. Va. 2007) (due to availability of safety-related data, shippers and brokers held accountable for the safety performance of carriers they retain—even if FMCSA has rated the carrier as satisfactory).[16]

Although currently available SafeStat information contains warnings against such use of the data, courts have misapprehended the role of the FMCSA and its current safety procedures. The agency has been advised both formally and informally that release of the new BASIC scores – whether carriers above the "intervention" thresholds are labeled as "deficient" or merely carry an "alert" designation as FMCSA proposed on November 18[17] – will increase the likelihood of a finding of vicarious liability by classifying otherwise fully qualified and licensed motor carriers as somehow unsafe for the public to utilize. Shippers and brokers will be forced to avoid carriers that FMCSA labels as less than fully safe or risk being charged with negligence for tendering freight to an unsafe carrier.[18] Fortune 500 customers (including shippers, logistics companies and intermodal equipment providers) are including contractual provisions barring use of any carrier with a "deficient/alert" or "marginal" rating in any BASICs category when

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[16] See also Forward Air Affidavit (Exhibit "B", pp. 23-24).
[17] See Exhibit "A" hereto.
[18] See Lund Declaration and Affidavits of Des Moines Truck Brokers and Universal Traffic Service (Exhibit "B", pp. 7, 13-14 and 67 respectively).

CSA 2010 data is released to the public.[19] Carriers, currently certified by the FMCSA as safe to operate, face the prospect of being black-balled by shippers and brokers who cannot afford the risk of vicarious liability.[20]

Even if the data were accurate, the devastating effects of its release should not be countenanced without the safeguards of the notice and comment procedures of the APA. But the data has not been demonstrated to be reliable. Concerns over data quality include the difficulty in correcting flawed and misleading data. Although there is a DataQ mechanism for seeking corrections, the process is unsatisfactory and corrections are at the discretion of States where reported violations allegedly occurred. Other concerns include FMCSA's reliance on warnings in the CSMS as well as citations, the likely underreporting of clean inspections, and the distortion of peer group samples resulting from FMCSA's failure to segregate carriers required to keep paper logs from those who need not; see discussion above in part 6.A(3). Moreover, the Petitioners here are especially concerned about data reliability problems created by the "law of large numbers," i.e., the prejudicial effect of reporting anomalies on entities with small samplings.[21]

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[19] See Appendices A and B to Petitioners' Motion to Postpone filed with the FMCSA, as reproduced in Exhibit "C" hereto.
[20] See Affidavits of Ennis Corp., H&V Leasing and Reliable Transportation Specialists (Exhibit "B", pp. 17, 50 and 57 respectively).
[21] See Exhibit "C" hereto, at p.6.

Once a carrier has been debarred by shippers or brokers because of a FMCSA safety rating or its reputation has been tarnished, there is no way to undo the harm. Once the data has been made public, the agency cannot prevent a state or federal court from allowing it into evidence in a civil proceeding to establish that a properly licensed motor carrier permitted to operate by the FMCSA was unsafe and the shipper or freight broker who hired such a carrier may be vicariously liable for its conduct. The agency ignored this economic reality and the devastating effect on tens of thousands of small for-hire carriers.[22]

Public release of BASIC ratings will change the rules of the game. By the agency's own admission, public release is intended "to leverage the support of shippers, insurers, and other interested stakeholders to ensure that motor carriers remain accountable for sustaining safe operations over time"[23] – even though it is the FMCSA's legal responsibility to certify motor carriers as safe. Once the proposed CSMS data is released, many motor carriers that are now rated "Satisfactory" by the FMCSA will receive at least one BASIC grade in the "deficient/alert" category and effectively will be barred from handling customers'

[22] For sources of this order-of-magnitude estimate, see *id.* at p.3 and n.1.

[23] See p.4 of Attachment to letter from FMCSA Administrator to Minnesota Trucking Association (June 8, 2010), available at csa2010.fmcsa.dot.gov/Documents/MTALetter-06-08-10.pdf.

freight.[24] The consequences – whether intended or not – of bankruptcies and loss of jobs due to unfounded safety concerns, as well as concerns about vicarious liability, are foreseeable results which require relief. Small businesses, faced with the risk of losing major customers any time newly downloaded state data on the FMCSA website depicts their operations as "deficient" or under an "alert" in any BASIC category, will be unable to make major investments in new equipment and lenders will be unlikely to finance them.[25] Brokers' ability to match loads with available carrier capacity will be compromised.[26] Motor carriers will incur far more "deadhead" or empty runs, fuel will be wasted, and costs of transportation will be increased, compromising the efficiency of the market.[27]

The harm to the carriers is exacerbated by the many defects in the CMS data, and the lack of consistency in the BASIC ratings of motor carriers as compared to the carrier safety ratings currently assigned by the FMCSA. Of all the carriers in the agency's test States that have been branded as "deficient" or under "alert" for their BASIC scores in one or more category, a majority currently qualify under the agency's safety rating program for a "Satisfactory" safety rating. Publication of questionable data suggesting that all these carriers are unsafe is not only

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[24] See, e.g., Affidavits of BP Express, Ennis Corp., H&V Leasing and Jim Loyd Transport (Exhibit "B", pp. 11, 17, 50 and 54-55 respectively).
[25] Baker Affidavit (Exhibit "B", p. 9).
[26] Lund Declaration and Norman Affidavit (Exhibit "B," pp. 8 and 66-67, respectively.).
[27] Tyme-It Transportation Affidavit (Exhibit "B", p. 39).

misleading, but arbitrary and capricious given that only a tiny percentage of these carriers are receiving unsatisfactory ratings after an audit.[28]

Once the agency has released the BASIC results to the public, it will be impossible for either motor carriers or brokers to recoup their losses or reverse the damage to their reputations and businesses.

C. Withholding publication of individual Motor Carrier BASIC scores and grades will not harm FMCSA.

The CSA 2010 program will replace an existing safety monitoring and enforcement program that has worked for 55 years. Prior to implementation of the proposed CSA 2010 program, the reduction in motor carrier involved accidents reached record levels, demonstrating the success of the current federal safety enforcement program.[29] While the agency has been promoting the new program as more comprehensive than the existing program, the number of additional carriers that will be placed out of service for actual safety deficiencies by the new program is minimal – especially in relation to the many carriers facing extinction due to vicarious liability fears stoked by defective BASIC data.[30]

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[28] Gobbell Affidavit (Exhibit "B", p. 39).
[29] Statement of Anne S. Ferro, Administrator, FMCSA, before the Committee on Transportation and Infrastructure, Subcommittee on Highways and Transit, U.S. House of Representatives, June 23, 2010, *available* at www.fmcsa.dot.gov/about/news/speeches/Statement-of-Anne-S-Ferro062310.aspx.
[30] Gobbell Affidavit (Exhibit "B", pp. 39).

Implementation of the CSA 2010 program should be delayed until its deficiencies are corrected. The agency itself has recognized many of the defects and anomalies in the data and systems it will be relying on and, due to these defects, already has decided to postpone indefinitely the release to the public of individual data in two BASICs categories.[31] If the agency is allowed to continue to use BASICs data for internal enforcement purposes, but is prohibited from releasing the information to the public until it has complied with the APA, FMSCA will suffer no harm to its operations or to the fulfillment of its Congressional mandate to regulate highway safety.

D. The public interest in a safe and efficient transportation system can be best served by granting the stay sought.

As shown above, it is in the public interest to avoid the harm that would be caused by the release of the data – the increased cost to shippers and carriers, the harm to competition within the trucking and broker industry, the loss of jobs in both industries, the reduction in investment, and the drag all of these problems will put on the struggling economy. At the same time, the public interest in truck safety will be served by allowing FMCSA to proceed internally with fine-tuning CSA 2010 and the existing agency safety program. Indeed, fully exposing CSA 2010 to the scrutiny of public notice and comment will give the public greater assurance

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[31] See November 18 FMCSA announcement included in Exhibit "A" hereto.

that any new safety enforcement program adopted by FMCSA will be an effective, comprehensive program without the faults contained in the current version.

7. Motion filed with Agency. In compliance with Rule 18, F.R.A.P. and Circuit Rule 18(a)(1), Petitioners moved the FMCSA for a stay pending review of its rule. A true and correct copy of that motion to postpone is reproduced in Exhibit "C" attached hereto. The agency failed to act on the motion or otherwise afford the relief requested. The agency's response begs the question of what public purpose requires the release of BASIC data on December 5, rather than subjecting its utility and relevance to full review in the promised future rulemaking on safety rating terminology.

8. Certificate of Parties. A certificate of parties as described in Circuit Rule 28(a)(1)(A) is attached hereto marked Exhibit "D."

9. Disclosure Statement. A disclosure statement as described in Circuit Rule 26.1 is attached hereto as Exhibit "E."[32]

10. Relief requested. Movants respectfully pray that this emergency motion for stay be granted, and that public release of BASIC percentile rankings under CSA 2010 be delayed until the Court can consider the merits of this matter and the FMCSA complies with APA notice and comment provisions.

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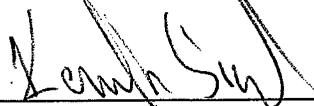
[32] Undersigned counsel also certify under Circuit Rule 18(a)(2) that they have today advised the FMCSA Chief Counsel's office by telephone that this Motion will be filed.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION) OF SMALL TRUCKING COMPANIES,) THE EXPEDITE ALLIANCE OF) NORTH AMERICA and AIR &) EXPEDITED MOTOR CARRIERS) ASSOCIATION,)) Petitioners,)) v.)) FEDERAL MOTOR CARRIER) SAFETY ADMINISTRATION,)) Respondent.)	**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing were served by hand delivery this 29th day of November 2010 to:

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