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October 19, 2007

Via US MAIL

Cathy Catterson
Clerk, United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

**Re: Cir. No. 07-73987, *Owner-Operator Independent Drivers Association, Inc.*
*v. United States Department of Transportation, et. al***

Dear Ms. Catterson:

Enclosed, please find the original and 16 copies of Petitioner OOIDA's Brief along with the original and 6 copies of Petitioner OOIDA's two-volume Excerpts of Record. Please file stamp and return one copy of each of the foregoing in the enclosed self-addressed Federal Express envelope.

Thank you.

Sincerely,



Paul D. Cullen, Sr.

/cmo
Enclosures

No. 07-73987

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OWNER-OPERATOR INDEPENDENT)
DRIVERS ASSOCIATION, INC.)

Petitioner,)

vs.)

UNITED STATES DEPARTMENT OF)
TRANSPORTATION; FEDERAL MOTOR)
CARRIER SAFETY ADMINISTRATION; MARY)
E. PETERS; Secretary of the U.S. Department of)
Transportation; JOHN H. HILL, Administrator of)
the Federal Motor Carrier Safety Administration;)
and THE UNITED STATES,)

Respondents.)

PETITIONER OOIDA'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

The Owner-Operator Independent Drivers Association, Inc., (“OOIDA”) is a trade association incorporated in the State of Missouri. No parent company or publicly-held company holds a 10 percent or greater ownership interest in OOIDA. Its 157,000 members consist primarily of individuals who operate commercial motor vehicles within the United States and Canada. The purpose of the Association is to promote the general commercial, professional, legislative, regulatory, safety and other interests of its membership.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
ISSUES PRESENTED FOR REVIEW	4
STATEMENT OF THE CASE	5
A. Nature of the Proceedings	5
B. Statutory and Regulatory Framework	6
1. Statutory Provisions Concerning Motor Carrier Operating Authority	6
2. The North American Free Trade Agreement	8
3. Section 350 - DOT Fiscal Year 2002 Appropriations Rider ..	9
4. The 2007 Act	10
C. Regulatory History	11
SUMMARY OF THE ARGUMENT	14
STANDARD OF REVIEW	17
ARGUMENT	19
I. FMCSA’s Demonstration Project Does Not Address the Obligations of the United States Under NAFTA	19

A.	Introduction	19
B.	The United States is Only Obligated to Provide National Treatment to Mexico-Domiciled Motor Carriers	21
II.	FMCSA Exceeds Its Statutory Authority When Registering Mexico-Domiciled Motor Carriers	27
III.	FMCSA’s <i>De Facto</i> Exemption of Mexico-Domiciled Motor Carriers from U.S. Safety Laws and Regulations is not in Accordance with Law	29
A.	FMCSA has Granted <i>De Facto</i> Exemptions	29
B.	FMCSA Has Not Complied with the Procedural and Substantive Requirements for Awarding Exemptions	32
C.	The Administrative Record Does Not Support FMCSA’s Findings of Equivalence Between Certain Mexican and U.S. Regulations	37
1.	Commercial Driver’s Licenses	39
2.	Standards for Medical Qualification	45
3.	Controlled Substances Testing	46
IV.	FMCSA’s Decision to Accept Medical Certificates by Individuals in Mexico Who Are Neither Credentialed nor Supervised by FMCSA Is Not In Accordance With Law	50
V.	OOIDA Has Standing	53
	CONCLUSION	54
	STATEMENT OF RELATED CASES	55

TABLE OF AUTHORITIES

CASES

<i>Adams v. Richardson</i> , 480 F.2d 1159 (D.C. Cir.1973)	25
<i>AT&T Information Systems, Inc. v. General Services Administration</i> , 810 F.2d 1233 (D.C. Cir. 1987)	25
<i>Department of Transportation v. Public Citizen</i> , 541 U.S. 752 (2004)	26
<i>Environmental Defense Fund, Inc. v. Ruckelshaus</i> , 439 F.2d 584 (D.C. Cir.1971)	28
<i>International Brotherhood of Teamsters v. Pena</i> , 17 F.3d 1478 (D.C. Cir. 1994)	53
<i>Peter Pan Bus Lines v. FMCSA</i> , 471 F.3d 1350 (D.C. Cir. 2006)	27
<i>Public Citizen Health Research Group v. FDA</i> , 740 F.2d 21 (D.C. Cir. 1984)	53

STATUTES

5 U.S.C. § 706(2)(A)	17, 18
5 U.S.C. § 706(2)(C)	17, 18
5 U.S.C. § 706(2)(D)	18
28 U.S.C. § 2112(a)	53
28 U.S.C. § 2112(a)(3)	27
28 U.S.C. § 2342	53

49 U.S.C. § 13902	10
49 U.S.C. § 13902(a)	8, 17
49 U.S.C. § 13902(a)(1)	6, 13, 27
49 U.S.C. § 13902(a)(4)	7
49 U.S.C. § 13902(c)(8)	7
49 U.S.C. § 31136	5, 18, 30, 45
49 U.S.C. § 31136(a)(3)	50
49 U.S.C. § 31136(e)	8, 31
49 U.S.C. § 31149	18, 51
49 U.S.C. § 31149(c)(1)(c)	51
49 U.S.C. § 31149(d)(3)	51
49 U.S.C. § 31310	39
49 U.S.C. § 31315(b)	5, 8, 13, 16, 18, 30, 31, 33
49 U.S.C. § 31315(b)(3)	33
49 U.S.C. § 31315(b)(4)(A)	8, 34
49 U.S.C. § 31315(b)(5)	36
49 U.S.C. § 31315(b)(6)	35
49 U.S.C. § 31315(b)(7)	35
49 U.S.C. § 31315(c)	6, 10, 17, 31

49 U.S.C. § 31315(e) 16

49 U.S.C. § 31315(b) 33

49 U.S.C. § 13902(a)(1) 4, 15

REGULATIONS

49 C.F.R. 381.300 5

49 C.F.R § 381.300(a) 29

49 C.F.R § 381.400(a) 10, 11, 32

49 C.F.R. Part 391 45

49 C.F.R. § 381.300 18, 30

49 C.F.R. § 381.310(c)(1) 33

49 C.F.R. § 381.310(c)(3) 33

49 C.F.R. § 381.310(c)(6) 33

49 C.F.R. § 381.310(d) 34

49 C.F.R. § 381.315(a) 34

49 C.F.R. § 381.315(c)(1) 36

49 CFR §§ 381.300 through 381.315 33

49 CFR Part 40 48

REGULATORY AND LEGISLATIVE PROCEEDINGS

North American Free Trade Agreement, U.S.-Can-Mex., Dec. 17, 1992,
32 I.L.M. 289 (1993). 8

NAFTA Senate Passage, H.R. 3450, Vote No. 395, passed 61-38-1,
November 20, 1993. 8

Motor Carrier Safety and Improvement Act of 1999 (Pub. L. 106-159,
113 Stat. 1748, 49 U.S.C. § 31310). 39

In the Matter of Cross Border Trucking Services, See File No USA-MEX-98-
2008-01 (NAFTA Arbitration Panel Feb. 6, 2001). 20

Pilot Program for Drivers Delivering Home Heating Oil”, 66 Fed. Reg. 36823
(Jul. 13, 2001), FMCSA Docket No. 99-6585-10 36

Pub. L. 107-87, Title III, § 350, Dec. 18, 2001 115 Stat 864 (published in U.S.
Code Annotated following 49 U.S.C. § 13902 under Historical and Statutory
Notes) 9

Commercial Drivers License Standards Requirements and Penalties; Commercial
Drivers License Program Improvements and Non-Commercial Motor Vehicle
Violations, 68 Fed. Reg. 4394 (January 29, 2003) 40

U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq
Accountability Appropriations Act, Pub.L. 110-28, 121 Stat. 183 (2007). 10

Demonstration Project on NAFTA Trucking Provisions,
72 Fed. Reg. 23,883 (May 1, 2007);
FMCSA Docket No. 2007-28055-1 11, 12, 19

Demonstration Project on NAFTA Trucking Provisions,
72 Fed. Reg. 31,877 (Jun. 8, 2007);
FMCSA Docket No. 2007-28055-1547 12, 13, 19, 30, 38, 40, 48

Demonstration Project on NAFTA Trucking Provisions,
72 Fed. Reg. 46,263 (Aug. 17, 2007);
FMCSA Docket No. 2007-28055-2396 2, 13, 14, 19, 30, 41, 43

Grant of Operating Authority to Transportes Olympic,
FMCSA Docket No. 2007-28055-2443 14

JURISDICTIONAL STATEMENT

On September 6, 2007, Respondents (hereinafter collectively referred to as the Federal Motor Carrier Safety Administration (“FMCSA”)) announced the initiation of a “demonstration project” under which Mexico-domiciled motor carriers would be issued provisional operating authority to conduct trucking services beyond commercial zones established within 25 miles of the U.S.-Mexico border. On that date the first operating authority under this demonstration project was issued to Transportes Olympic of Nuevo Leon, Mexico.¹

On September 7, 2007, the Owner-Operator Independent Drivers Association, Inc. (“OOIDA”) filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit² together with an Emergency Motion for a Stay Pending Appeal. On September 21, 2007 the D.C. Circuit denied OOIDA’s Emergency Motion because, in its view, “Petitioner has not satisfied the stringent standards required for a stay pending court review.”³ Noting

¹ FMCSA Press Release of September 6, 2007 (Excerpt from the Record (ER) Tab 1)).

² Petition for Review, September 7, 2007, *Owner-Operator Independent Drivers Ass’n v. Federal Motor Carrier Safety Administration, et al.* (D.C. Cir. 2007) (No. 07-1355)(ER Tab 7).

³ Order, September 21, 2007, *Owner-Operator Independent Drivers Ass’n v. Federal Motor Carrier Safety Administration, et al.* (D.C. Cir. 2007) (No. 07-

that OOIDA's petition had been filed within ten days of the final agency action, the D.C. Circuit directed that the Secretary of Transportation notify the Judicial Panel on Multidistrict Litigation (Judicial Panel), pursuant to 28 U.S.C. § 2112(a)(3), that she has received OOIDA's petition for review along with the petition for review filed in the United States Court of Appeals for the Ninth Circuit in *Sierra Club v. Department of Transportation*, 9th Cir. No. 07-73415 (petition for review filed August 29, 2007).⁴ The Sierra Club petition for review cited an August 17, 2007, notice of intent to proceed with a demonstration project as the final agency action for which it sought review.⁵

On September 26, 2007, the Secretary of Transportation filed its notification to the Judicial Panel that "multicircuit petitions for review of the same FMCSA order have been filed."⁶ On September 26, 2007, the Sierra Club filed a pleading with the Judicial Panel raising an issue with respect to whether there were two petitions filed within ten days of the *same* agency order within the meaning of 28

1355)(ER Tab 8).

⁴ *Id.*

⁵ Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 46,263 (August 17, 2007); FMCSA Docket No. 2007-28055-2396 (ER Tab 4).

⁶ *Notice to the Judicial Panel on Multidistrict Litigation of Multicircuit Petitions for Review* (D.C. Cir. No. 07-1355), Respondent Federal Motor Carrier Safety Administration, September 26, 2007.

U.S.C. § 2112(a). Sierra Club's petition in this Court is based on the assertion that final agency action took place on August 17, 2007, while OOIDA's petition before the D.C. Circuit is based on the assertion that final agency action did not take place until September 6, 2007.⁷ The Sierra Club contended that the Judicial Panel had nothing over which it could exercise jurisdiction under 28 U.S.C. § 2112(a) because the petitions referred to it by the Secretary of Transportation appeared to address two separate agency orders.

Upon reviewing Sierra Club's filing, OOIDA concluded that resolution of the issue before the Judicial Panel would likely be time-consuming and complex, with the prospect that the Judicial Panel may be unable to resolve the matter posed by the Secretary's notice. Because of the urgent need to resolve the merits of the underlying controversy, and the benefits of having the claims of both petitioners resolved consistently by the same Circuit, OOIDA consented to the transfer of its petition for review to this Circuit.⁸ On October 2, 2007, the D.C. Circuit

⁷ *Sierra Club Foundation, et al., v. Department of Transportation, et al.*, (9th Cir.)(Docket No. 07-73415); *Petition for Review, Owner-Operator Independent Drivers Ass'n v. Federal Motor Carrier Safety Administration, et al.* (D.C. Cir. 2007)(No. 07-1355).

⁸ Unopposed Motion to Withdraw Opposition to Respondent FMCSA's Motion to Transfer to the Ninth Circuit, and Consent to Transfer, September 27, 2007, *Owner-Operator Independent Drivers Ass'n v. Federal Motor Carrier Safety Administration, et al.* (D.C. Cir. 2007)(No. 07-1355).

granted Petitioner's motion and ordered the petition transferred to the Ninth Circuit.

This court has jurisdiction over OOIDA's petition for review pursuant to 28 U.S.C. §§ 2342 and 2344 because that petition was filed in a court with proper venue within sixty days of either August 17, 2007 or September 6, 2007, the dates on which final agency action is alleged to have taken place, and because the petition was properly transferred to this Circuit.

ISSUES PRESENTED FOR REVIEW

1. 49 U.S.C. §§ 13902(a)(1) & (4) forbid FMCSA from issuing operating authority except to persons willing and able to comply with specified U.S. laws regulating motor carrier operations. Does FMCSA's decision to issue operating authority to Mexico-domiciled motor carriers on the condition that they comply with certain Mexican rather than U.S. regulations violate this provision?

2. FMCSA has determined that it will accept compliance with certain Mexican regulations as being the equivalent to compliance with corresponding U.S. regulations. Does this determination constitute an exemption from U.S. regulations under U.S. law and, if so, did FMCSA violate the rights of interested parties by approving such exemptions without following the procedures, or

performing the safety analysis required under 49 U.S.C. § 31315(b) and 49 C.F.R. 381.300 *et seq.*?

3. 49 U.S.C. §§ 31136 and 31149 require FMCSA to establish medical standards for CMV operators, establish a national registry of medical examiners, supervise the activities of credentialed medical examiners, and accept medical certificates only from examiners on the national registry. Was FMCSA's determination to accept physical examinations conducted by Mexican doctors who are neither credentialed nor supervised by FMCSA in excess of its statutory authority or limitations?

4. Is FMCSA's determination that acceptance of compliance with certain Mexican regulations would provide the same level of safety as compliance with certain U.S. regulations supported by the administrative record?

STATEMENT OF THE CASE

A. Nature of the Proceedings

Prior to September 6, 2007, and subject to some limited exceptions, Mexico-domiciled motor carriers were permitted to operate within the United States only in limited areas adjacent to the United States-Mexico border. On September 6, 2007, FMCSA initiated a so-called "demonstration project" to permit, for the first time, Mexico-domiciled trucks to operate throughout the

United States. OOIDA contends that FMCSA has: (1) provided Mexico-domiciled motor carriers with operating authority in violation of 49 U.S.C. § 13902(a)(1) & (4); (2) granted unauthorized and unlawful exemptions from U.S. laws and regulations governing the activities of all motor carriers operating within the United States; and (3) violated conditions imposed upon it by Congress on the implementation of its demonstration project, i.e. that it implement its demonstration project as a “pilot program” within the meaning of 49 U.S.C. § 31315(c), and that it provide interested parties with specific information for their review and analysis prior to initiating the pilot program. FMCSA’s initiation of its demonstration project on September 6, 2007, was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law. Further, its action was in excess of statutory jurisdiction, authority or limitations or short of statutory right and without the observance of procedures required by law. OOIDA seeks an order enjoining further implementation of FMCSA’s demonstration project.

B. Statutory and Regulatory Framework

1. Statutory Provisions Concerning Motor Carrier Operating Authority

Under U.S. law, FMCSA may only register a person (i.e. issue operating

authority) to provide transportation as a motor carrier if it finds that the person is “willing and able” to comply with, *inter alia*, any safety regulations imposed by the Secretary, regulations promulgated by FMCSA under Section 31135, safety fitness requirements established under Section 31144 and minimum financial responsibility requirements.⁹ If FMCSA determines that a registrant does not meet or is not able to meet any of the aforementioned requirements, it *must* withhold registration.¹⁰

Subsection 13902(c) contains various restrictions on foreign-domiciled motor carriers designed to prevent discrimination against and burdens on United States transportation companies. In order to remove any doubt with respect to the requirement that all foreign motor carriers comply with U.S. laws and regulations when operating within the borders of the United States, 49 U.S.C. § 13902(c)(8) specifically provides:

(8) Limitation of statutory construction.—This subsection shall not be construed as affecting the requirement for all foreign motor carriers and foreign motor private carriers operating in the United States to comply with all applicable laws and regulations pertaining to fitness, safety of operations, financial responsibility, and taxes imposed by section 4481 of the Internal Revenue Code of 1986.

⁹ 49 U.S.C. §§ 13902(a)(1)(A-C)(2007), Addendum (Add.) Tab 5.

¹⁰ 49 U.S.C. § 13902(a)(4), Add. Tab 5.

The only possible statutory basis for avoiding compliance with 49 U.S.C. § 13902(a) is by way of an exemption.¹¹ Under 49 U.S.C. § 31315(b)(4)(A) a request for an exemption must be published in the Federal Register giving the public an opportunity to inspect and analyze the safety analysis submitted by the applicant, together with any other information known to FMCSA, and to comment upon the request. FMCSA must find that the “exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.”¹²

2. The North American Free Trade Agreement

On December 17, 1992, the leaders of the United States of America, Canada, and the United Mexican States gathered to sign the North American Free Trade Agreement (“NAFTA”), a treaty regulating trade in goods and services between and among the parties to that treaty.¹³ On November 20, 1993, the U.S. Senate officially ratified the NAFTA treaty.¹⁴ Transborder trucking services are governed by NAFTA Article 1202(1) which provides that “[e]ach Party shall

¹¹ 49 U.S.C. § 31136(e), Add. Tab 6.

¹² 49 U.S.C. § 31315(b), Add. Tab 8.

¹³ North American Free Trade Agreement, U.S.-Can-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993), Add. Tab 1 (excerpt).

¹⁴ H.R. 3450, Vote No. 395, passed 61-38-1, November 20, 1993.

accord to service providers of another Party treatment no less favorable than it accords, in like circumstances, to its own service providers.” The obligation described in Article 1202(1) is known as “national treatment.” The United States has undertaken no obligation under NAFTA to provide exemptions or waivers from the application of U.S. trucking laws or regulations to Mexico-domiciled motor carriers except insofar as such exemptions or waivers may also be available to U.S. domiciled motor carriers.

3. Section 350 - DOT Fiscal Year 2002 Appropriations Rider

On December 18, 2001, Congress appropriated funds for the Department of Transportation for the fiscal year ending September 30, 2002. Title III, Section 350 of that appropriations bill contained a number of provisions conditioning the expenditure of funds for processing of applications by Mexico-domiciled motor carriers for authority to operate in the United States beyond the municipalities and commercial zones on the U.S.-Mexican border on FMCSA’s implementation of various safety-related measures.¹⁵

¹⁵ Pub.L. 107-87, Title III, § 350, Dec 18, 2001 115 Stat 864 (published in U.S. Code Annotated following 49 U.S.C. § 13902 under Historical and Statutory Notes).

4. The 2007 Act

On May 25, 2007, the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act¹⁶ was signed into law (the "2007 Act"). Section 6901(a) of the 2007 Act provides that funds appropriated for the Department of Transportation may be obligated or expended to grant expanded operating authority to Mexico-domiciled motor carriers "only to the extent that – (1) granting such authority is first tested as part of a pilot program." FMCSA's regulations provide that a pilot program is one that provides temporary regulatory relief to a participant by way of an exemption from one or more sections or parts of the regulations (49 C.F.R § 381.400(a) and (b)). 49 U.S.C. § 31315(c) provides that "as a condition of approval of [a pilot] project, that the safety measures in the project are designed to achieve a level of safety that is equivalent to, or greater than, the level of safety that would otherwise be achieved through compliance with the regulations prescribed under this chapter or section 31136."

¹⁶ U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, Pub.L. 110-28, 121 Stat. 183 (2007); 49 U.S.C. § 13902 (Historical and Statutory Notes), Add. Tab 3 (excerpt).

The 2007 Act also provides that, prior to initiating a pilot program, the Secretary shall publish in the Federal Register and provide sufficient opportunity for public notice and comment:

(v) a list of Federal motor carrier safety laws and regulations, *including the commercial drivers license requirements*, for which the Secretary of Transportation will accept compliance with a corresponding Mexican law or regulation as the equivalent to compliance with the United States law or regulation, including for each law or regulation an analysis as to how the corresponding United States and Mexican laws and regulations differ. Section 6901(b)(2)(B)(v). (Emphasis added).

C. Regulatory History

On May 1, 2007, FMCSA published a notice and request for public comment announcing the initiation of a “project to demonstrate the ability of Mexican-based motor carriers to operate safely in the United States beyond the commercial zones along the U.S.-Mexican border.”¹⁷ This notice made no mention of, nor did it propose, a pilot program. No regulations were identified for which an *exemption* would be necessary to obtain *temporary regulatory relief* as contemplated by 49 C.F.R. § 381.400(a) and (b). In fact, the May notice stated

¹⁷ Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 23,883 (May 1, 2007); FMCSA Docket No. 2007-28055-1 (ER Tab 2).

that “[t]he demonstration project gives participants no exemptions from U.S. safety requirements.”¹⁸

On June 8, 2007, in response to the requirements of Section 6901 of the 2007 Act, FMCSA published a notice in the Federal Register soliciting supplemental comments from the public on its demonstration project.¹⁹ In its June notice, FMCSA asserted that its planned demonstration project satisfied the statutory requirements for a pilot program,²⁰ but also noted that “participating Mexico-domiciled motor carriers would not be provided with relief from any of the rules implementing section 350, or any of the safety regulations.”²¹ The June 8 notice also announced that FMCSA would accept compliance with three areas of Mexican regulations as being equivalent to compliance with United States

¹⁸ Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 23,883, 23,884 (May 1, 2007); FMCSA Docket No. 2007-28055-1 (ER Tab 2).

¹⁹ Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 31,877 (June 8, 2007); FMCSA Docket No. 2007-28055-1547 (ER Tab 3).

²⁰ Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 31,877, 31,878 (Col. 3) (June 8, 2007); FMCSA Docket No. 2007-28055-1547 (ER Tab 3).

²¹ *Id.*

regulations: (1) Commercial Driver's License; (2) Physical examinations of drivers; and (3) Controlled substances testing.²²

OOIDA contends that recognition of compliance with Mexican regulations in lieu of compliance with FMCSA's regulations is not authorized under 49 U.S.C. § 13902(a)(1) and (4) and can only be made in the form of an exemption within the meaning of 49 U.S.C. § 31315(b). FMCSA contends that "[t]hese are not exemptions, but well-established alternative means of meeting U.S. standards that pre-date the demonstration project."²³

On August 17, 2007, FMCSA published a notice entitled, "Action Notice; response to public comments." There it "announc[ed] its *intent to proceed* with a project to demonstrate the ability of Mexico-domiciled motor carriers to operate safely in the United States, beyond the commercial zones along the U.S.-Mexican border."²⁴ FMCSA's "intent to proceed" was specifically made contingent upon:

²² Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 31,877, 31,884 (June 8, 2007); FMCSA Docket No. 2007-28055-1547 (ER Tab 3).

²³ Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 46,263, 46,267 (August 17, 2007)(emphasis added); FMCSA Docket No. 2007-28055-2396 (ER Tab 4).

²⁴ Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 46,263 (August 17, 2007); FMCSA Docket No. 2007-28055-2396 (ER Tab 4).

(1) completion of a report on the proposed pilot program by its Inspector General; and (2) completion by the Agency of “any follow-up actions needed to address any issues that may be raised in the [Inspector General’s] report.”²⁵ Because of these contingencies, the agency was unable to say what final form its pilot program might take following the Inspector General’s comments and when that pilot program might be implemented. The August 17, 2007, notice of intent emphasized that “the Agency has not yet initiated the demonstration project,” and that the start of the project would be represented by the grant of operating authority to Mexico-domiciled motor carriers.²⁶ On September 6, 2007, FMCSA implemented its demonstration project by holding a press conference, issuing a press release and granting operating authority to a Mexico-domiciled motor carrier, Transportes Olympic of Neuvo Leon, Mexico.²⁷

SUMMARY OF THE ARGUMENT

FMCSA’s demonstration project represents a giant step backwards on the

²⁵ Demonstration Project on NAFTA Trucking Provisions, , 72 Fed. Reg. 46,263, 46,264-65 (August 17, 2007); FMCSA Docket No. 2007-28055-2396 (ER Tab 4).

²⁶ Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 46,263 (Col.1) (August 17, 2007); FMCSA Docket No. 2007-28055-2396 (ER Tab 4).

²⁷ FMCSA Docket No. 2007-28055-2443 (ER Tab 1).

path to compliance with our nation's obligations under NAFTA. Article 1202(1) obligates a Party to NAFTA to afford "national treatment" to other parties. This provision is the basis for entitlement to provide cross-border trucking services in the territories of the other parties. National treatment entitles Mexican trucking service providers to be treated exactly like a U.S.-domiciled motor carriers with respect to the application of U.S. laws and regulations. FMCSA's demonstration project does not do that. Rather, it identifies three major areas in which Mexico-domiciled motor carriers need not comply with U.S. statutes and regulations if they are in compliance with certain Mexican laws and regulations. This is not national treatment.

FMCSA's demonstration project violates the laws of the United States, the application of which is entirely consistent with NAFTA's national treatment provision. Under 49 U.S.C. §§ 13902(a)(1) and (4), FMCSA may not issue motor carrier operating authority unless the applicant is willing and able to comply with enumerated federal statutes and regulations applicable to motor carrier safety, financial responsibility, etc. FMCSA is simply not authorized to issue operating authority to any motor carrier (U.S. or Mexican) unless that carrier agrees to comply with applicable U.S. laws and regulations. This provision forbids FMCSA to accept compliance with certain Mexican laws and regulations in lieu of

compliance with U.S. laws and regulations. There is nothing in our NAFTA treaty obligations that would require a different result. Indeed, the national treatment requirements of NAFTA also mandate strict compliance with U.S. laws and regulations.

The only possible legal alternative to full compliance with all U.S. laws and regulations governing motor carrier safety under Sections 13902(a)(1) and (4) is by way of an exemption issued under 49 U.S.C. § 31315(b).²⁸ But FMCSA contends that it has provided no exemptions to Mexico-domiciled motor carriers even where it has accepted compliance with Mexican regulations in lieu of U.S. regulations. FMCSA cites no statutory authority for its conclusion that accepting Mexican in lieu of U.S. statutes and regulations does not constitute an exemption and we know of none.

The exemption process provides important safeguards for the public, including the right to be notified in advance of the reasons purportedly supporting the exemption and the right to comment on the propriety of the proposed exemption. FMCSA's conduct has deprived OOIDA and other interested parties of important rights under the exemption process. Further, it is not based on a sufficient public record and should be set aside as not being in accordance with

²⁸ 49 U.S.C. § 31315(e), Add. Tab 8.

law.

The 2007 Act directed FMCSA to proceed with its proposed demonstration project as a “pilot program” under 49 U.S.C. § 31315(c). By statute and FMCSA regulations, pilot programs anticipate the grant of temporary relief from a regulation by way of exemption in order to test alternative ways to accomplish the purposes of the regulation from which temporary relief is given. FMCSA ignored this Congressional directive and did not implement its demonstration project as a pilot program.

The 2007 Act also required FMCSA to document on the public record the *differences* between certain Mexican truck-safety regulations and its own regulations. It failed to do so thus depriving OOIDA and other interested parties of the right to comment in an informed manner on FMCSA’s general conclusory statements regarding their comparability.

FMCSA’s demonstration project has been designed and implemented in a manner not in accordance with law and should be stayed until brought into compliance with the law.

STANDARD OF REVIEW

Whether FMCSA’s action issuing of motor carrier operating authority to Mexican motor carriers exceeded its authority under 49 U.S.C. § 13902(a) is

reviewed by the courts for whether such action is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.²⁹

Whether FMCSA, in accepting Mexico-domiciled driver compliance with Mexican rules as equivalent to their compliance with U.S. commercial driver license, medical qualification, and drug testing standards, followed the procedures, established the record, and made the proper safety analysis and determination required under 49 U.S.C. § 31315(b) and 49 C.F.R. § 381.300 *et seq.* is reviewed by the courts for whether such action is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or, without observance of procedure required by law.³⁰

Whether or not FMCSA's action to accept Mexico-domiciled driver compliance with Mexican rules as equivalent to U.S. medical qualification requirements is in compliance with 49 U.S.C. §§ 31136 & 31149 is reviewed by the court for whether such action is in accordance with law or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

²⁹ 5 U.S.C. § 706(2)(A)&(C), Add. Tab 4.

³⁰ 5 U.S.C. § 706(2)(A),(C)&(D), Add. Tab 4.

ARGUMENT

I. FMCSA's Demonstration Project Does Not Address the Obligations of the United States Under NAFTA

A. Introduction

On May 1, 2007, FMCSA announced the initiation of a demonstration project as “part of FMCSA’s implementation of the North American Free Trade Agreement’s (NAFTA’s) cross-border trucking provisions.”³¹ FMCSA has called its demonstration project “a critical step in the process of moving forward with the Nation’s obligations under NAFTA.”³² In proceedings before the D.C. Circuit, FMCSA filed a declaration by Jeffrey N. Shane, Under Secretary of Transportation for Policy, in which Under Secretary Shane declared that “[a] halt to the Project would cause further delay in complying with our NAFTA motor carrier commitments and thus would cause considerable harm to our relationship with

³¹ 72 Fed. Reg. 23883 (Col. 1)(May 1, 2007)(ER Tab 2). This statement was repeated in FMCSA’s Federal Register Announcements of June 8, 2007 (72 Fed. Reg. 31,877 (Col. 1))(ER Tab 3) and August 17, 2007 ((72 Fed. Reg. 46,263 (Col 3))(ER Tab 4).

³² Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 46,263, 46,266 (Col. 1)(August 17, 2007); FMCSA Docket No. 2007-28055-2396 (ER Tab 4).

Mexico”³³ FMCSA also filed a declaration by Reuben Jeffery III, Under Secretary of State for Economic, Energy and Agricultural Affairs, in which Under Secretary Jeffery opined that, “[a]dditional delay on cross border trucking could . . . reinforce Mexico’s concerns over the U.S. commitment to comply with its NAFTA obligations.”³⁴ These are serious statements to which this Court should give careful consideration.³⁵

In order to aid the Court in its evaluation of these statements, we turn to two authoritative documents that describe the obligations of the United States under NAFTA respecting cross-border trucking services. First, we examine the text of the NAFTA treaty itself as ratified by the U.S. Senate.³⁶ Second, we examine in

³³ Shane Declaration at 3, ¶ 6, Exhibit D to Federal Motor Carrier Safety Administration’s Opposition to Petitioner’s Emergency Motion for Stay and Affirmative Motion for Transfer.

³⁴ Jeffrey Declaration at 3, ¶ 6, Exhibit E to Federal Motor Carrier Safety Administration’s Opposition to Petitioner’s Emergency Motion for Stay and Affirmative Motion for Transfer.

³⁵ The Shane and Jeffery Declarations were filed in both the OOIDA proceeding before the D.C. Circuit and the Sierra Club proceeding in this Court. Of course, such after the fact declarations are not properly part of the administrative record and could be ignored by the Court for that reason. *AT&T Information Systems, Inc. v. General Services Administration*, 810 F.2d 1233, 1236 (D.C. Cir. 1987).

³⁶ *In the Matter of Cross Border Trucking Services*, See File No USA-MEX-98-2008-01 (NAFTA Arbitration Panel Feb. 6, 2001), Add. Tab 2.

some detail a February 6, 2001, opinion by an International Arbitration Panel (IAP) convened under the auspices of NAFTA. The IAP determined that a blanket refusal by the United States to process applications for operating authority by Mexico-domiciled motor carriers violated its obligations under NAFTA.³⁷ The analysis provided in these documents shows that the only obligation that the United States has under NAFTA with respect to cross-border trucking services is to afford Mexico-domiciled motor carriers “national treatment” through the application of U.S. statutes and regulations to their activities within the United States. FMCSA’s demonstration project does nothing to bring the U.S. closer to compliance with its obligation to afford Mexico-domiciled motor carriers with national treatment.

B. The United States is Only Obligated to Provide National Treatment to Mexico-Domiciled Motor Carriers

NAFTA Article 1202(1) provides that “[e]ach Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service providers.” This so-called “national treatment” provision covers trucking services in which a tractor and trailer provide service from a point in Mexico to a point in the United States as well as transit of Mexican

³⁷*Id.* at 90, ¶295.

trucks from Mexico through the United States to Canada. Those who provide such services are called service providers. Service providers of the United States are U.S. owned or domiciled trucking firms.³⁸ The treatment given to U.S. domestic trucking service providers under U.S. laws and regulations establishes a base line for determining whether the United States is providing national treatment to service providers from Mexico or Canada.³⁹

Implementation of this commitment is really rather simple. The only thing that FMCSA must do to fulfill its national treatment obligation under NAFTA is to entertain and process applications for motor carrier operating authority by Mexico-domiciled motor carriers under the same terms and conditions as it entertains and processes similar applications by U.S.-domiciled applicants.

On February 6, 2001, an International Arbitral Panel (IAP) issued its final decision from a challenge by the Government of Mexico alleging that a blanket refusal by the United States to process applications by Mexico-domiciled motor carriers for operating authority violated its NAFTA obligation to afford national treatment to such carriers. A full copy of the IAP decision is included in the Addendum to this brief. The IAP decision sets forth the contentions of the parties,

³⁸ *Id.* at 74-75, ¶ 253.

³⁹ *Id.*

the legal and factual basis for those contentions and the conclusions of the IAP itself.

The Government of Mexico contended that: (1) the United States agreed to phase out its moratorium on cross-border trucking services by virtue of its agreement to accord national treatment to Mexico-domiciled motor carriers; and (2) that reservations to such commitments had expired under the schedules set out in such reservations.⁴⁰

Mexico insisted that it was “under no obligation under NAFTA to enforce U.S. standards, despite cooperation between the United States and Mexico to make regulatory standards compatible”⁴¹ Mexico insisted that NAFTA’s “market access commitments for truck and bus services was not made contingent upon completion of the standards-compatibility work program.”⁴² Of particular interest is this passage from Mexico’s brief as quoted in the IAP’s final decision:

Rather, the governments contemplated that motor carriers would have to comply fully with the standards of the country in which they were providing service. In other words, there was a clear expectation that a Mexican motor carrier applying for operating authority in the United States would have to demonstrate that it could comply with all

⁴⁰ *Id.* at 21, ¶ 102.

⁴¹ *Id.* at 22, ¶ 109.

⁴² *Id.* at 23, ¶ 112.

requirements imposed on U.S. motor carriers.⁴³

For its part, the United States argued that “highway safety can only be assured through a comprehensive, integrated safety regime.”⁴⁴ Further, the United States insisted that it was not obliged to license Mexico-domiciled motor carriers “while serious concerns persist regarding their overall safety record” and while “Mexico is still developing first-line regulatory and enforcement measures”⁴⁵ The legal basis urged by the United States to support its position rested on the “like circumstances” language in NAFTA Article 1202 that “make [] it clear that the United States may make and apply legitimate regulatory distinctions for purposes of ensuring the safety of U.S. roadways.”⁴⁶

While the position of the United States had much to recommend it from the point of view of highway safety, a unanimous five member panel rejected that position, finding that the “U.S. blanket refusal to review requests for operating authority . . . because of safety concerns is inconsistent with . . . U.S. treatment of

⁴³ *Id.* See also *id.* at 25-26, ¶ 125.

⁴⁴ *Id.* at 33, ¶ 155.

⁴⁵ *Id.* at 35, ¶ 161. See also *id.* at 62, ¶ 242.

⁴⁶ *Id.* at 37, ¶ 168 quoting excerpts from a legal brief submitted on behalf of the United States.

U.S. domestic service providers.”⁴⁷ Because of this inconsistency, the IAP concluded that “the U.S. refusal to consider applications is not consistent with the obligation to provide national treatment.”⁴⁸ Noting that the United States was well aware of deficiencies in the Mexico truck regulatory system when NAFTA was negotiated,⁴⁹ the IAP specifically noted “that the inadequacies of the Mexican regulatory system provide an insufficient legal basis for the United States to maintain a moratorium on the consideration of applications for U.S. operating authority from Mexican-owned and/or domiciled truck service providers.”⁵⁰

Following its findings, the IAP took pains to point out that nothing in its decision should be interpreted as in any way inhibiting the ability of a Party to implement its own legitimate safety objections:

It is important to note what the Panel is not determining. It is not making a determination that the Parties to NAFTA may not set the level of protection that they consider appropriate in pursuit of legitimate regulatory objectives. It is not disagreeing that the safety of trucking services is a legitimate regulatory objective. Nor is the panel imposing a limitation on the application of safety standards properly established and applied pursuant to applicable obligations of the Parties under NAFTA.

⁴⁷ *Id.* at 68, ¶ 256.

⁴⁸ *Id.* at 74, ¶ 278. See also *id.* at 81, ¶ 259.

⁴⁹ *Id.* at 73, ¶ 274.

⁵⁰ *Id.* at 81, ¶ 296.

The IAP also held that a Party may be permitted to implement additional procedures with respect to service providers domiciled within the territory of another Party, provided that such procedures (requirements) were imposed in good faith with respect to a legitimate safety concern and that such requirements did not conflict with other provisions of NAFTA.⁵¹

Two conclusions follow from this analysis. First, the United States would bring its policies in complete harmony with its NAFTA obligations by simply making operating authority available to Mexico-domiciled motor carriers under precisely the same terms and conditions as it applies to U.S.-domiciled motor carriers. Second, attempts to harmonize U.S. and Mexican truck regulatory regimes, while advancing potentially beneficial safety goals, has nothing to do with complying with the obligation of the United States to provide *national treatment*.

Concerns over potential delays in our country's compliance with NAFTA as expressed by Under Secretaries Shane and Jeffery are best resolved by focusing on national treatment rather than regulatory harmonization, which is almost the entire focus of FMCSA's demonstration project. FMCSA's characterization of its

⁵¹ *Id.* at 82 ¶ 301.

demonstration project as a critical first step in moving towards compliance with NAFTA is simply incorrect. Moreover, as we now demonstrate, NAFTA's requirement to afford national treatment is also the only approach that is compatible with FMCSA's statutory and regulatory responsibilities under U.S. law.

II. FMCSA Exceeds Its Statutory Authority When Registering Mexico-Domiciled Motor Carriers Under the Demonstration Project

Statutory requirements for issuing motor carrier operating authority are in complete harmony with NAFTA's national treatment requirement. Under 49 U.S.C. § 13902(a)(1), FMCSA is authorized to issue motor carrier operating authority *only* if it finds that the applicant is, *inter alia*, willing and able to comply with any safety regulations promulgated by FMCSA, safety fitness requirements established by FMCSA under Section 31144, minimum financial responsibility requirements established under Sections 13906 and 31138, and the duties of employers and employees under Section 31135.⁵² Section 13902(a)(4) mandates that the Secretary "shall withhold registration" if she determines that a registrant "does not meet, or is not able to meet" any of the aforementioned requirements.

⁵² A motor carrier must also be willing and able to comply with regulations referred to in Section 13902(a)(1)(A), the scope of which was left open to further interpretation by FMCSA in *Peter Pan Bus Lines v. FMCSA*, 471 F.3d 1350, 1354-55 (D.C. Cir. 2006).

In *Department of Transportation v. Public Citizen*,⁵³ the Supreme Court addressed FMCSA’s responsibilities under Section 13902(a)(1) holding that the Agency had “no discretion” under this provision⁵⁴ to prevent entry of Mexican trucks operated by motor carriers that satisfied the conditions in this section.⁵⁵ By necessary implication, FMCSA would also have no discretion under Section 13902(a)(4), but to deny registration (operating authority) to a motor carrier who “does not meet, or is unable to meet the requirements in Section 13902(a)(1).” This would be true whether the motor carrier was domiciled in Canada, Mexico, or the United States.

FMCSA’s demonstration project completely ignores the statutory mandate imposed under Sections 13902(a)(1) & (4). Rather than addressing the question of whether Mexico-domiciled motor carriers are willing and able to comply with U.S. safety regulations, FMCSA is implementing a policy of issuing operating authority on the basis of compliance with Mexican laws and regulations governing commercial drivers licenses, physical qualifications of drivers and drug testing. Under *Public Citizen*, FMCSA has no authority to depart from the mandate of

⁵³ *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004).

⁵⁴ *Id.* at 770.

⁵⁵ *Id.* at 767.

Section 13902(a) requiring that all motor carriers demonstrate that they are willing and able to comply with U.S. laws and regulations. FMCSA's decision to issue operating authority based upon compliance with Mexico's laws and regulations is, very simply, not in accordance with law and exceeds the statutory limits on the agency's authority to grant operating authority.

III. FMCSA's *De Facto* Exemption of Mexico-Domiciled Motor Carriers from U.S. Safety Laws and Regulations is not in Accordance with Law

A. FMCSA has Granted *De Facto* Exemptions

FMCSA's action to grant exemptions to Mexican truck drivers from the U.S. motor carrier safety rules is not in accordance with law. FMCSA's regulations define the term exemption:

An exemption is temporary regulatory relief from one or more FMCSAR given to a person or class of persons subject to the regulations or who intend to engage in an activity that would make them subject to the regulations.⁵⁶

FMCSA's decision to excuse compliance with its regulations while substituting compliance with Mexican regulations fits this definition perfectly. In its June 8, 2007, notice FMCSA announced that it will begin accepting the Mexican CDL's (commercial driver's licenses), Mexican driver medical qualification standards, and Mexican drug testing procedures in place of

⁵⁶ 49 C.F.R § 381.300(a), Add. Tab 9.

compliance with U.S. regulations.⁵⁷ This announcement was confirmed in FMCSA's August 17 notice.⁵⁸ Excusing compliance with U.S. regulations for the duration of its demonstration project certainly qualifies as "temporary regulatory relief" for a person or class of persons subject to those regulations. FMCSA's statement that it is granting no exemptions from its regulations, but is merely employing "well-established alternative means of meeting U.S. standards that pre-date the demonstration project" is nothing more than a rhetorical flourish having no legal significance and being entitled to no weight. The real effect of these announcements is to grant exemptions from Mexican driver compliance with those U.S. rules without having gone through the statutory and regulatory requirements for doing so.⁵⁹

FMCSA cites to no alternative statutory authority to support its action and OOIDA knows of none. 49 U.S.C. § 31136 recites the authority of the Secretary

⁵⁷ Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 31,877, 31, 884 (Col. 2-3)(June 8, 2007); FMCSA Docket No. 2007-28055-1547 (ER Tab 3).

⁵⁸ Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 46,263, 46, 276 (August 17, 2007); FMCSA Docket No. 2007-28055-2396 (ER Tab 4).

⁵⁹ 49 U.S.C. § 31315(b), Add. Tab 8, and 49 C.F.R. § 381.300 *et seq.*, Add. Tab 9.

of Transportation to promulgate regulations covering commercial motor vehicle safety. 49 U.S.C. § 31136(e) provides:

(e) Exemptions.—The Secretary may grant in accordance with Section 31315 waivers and exemptions from, or conduct pilot programs with respect to, any regulations prescribed under this Section.

FMCSA's acceptance of compliance with certain Mexican regulations in lieu of compliance with FMCSA's regulations is clearly an exemption within the meaning of 49 U.S.C. § 31315(b) and (c). Congress confirmed this conclusion in the 2007 Act which directs FMCSA to test plans for conferring operating authority on Mexico-domiciled motor carriers "as part of a pilot program."⁶⁰ By necessary implication, such action involves the granting of exemptions to provide temporary regulatory relief. The requirements for a pilot program are provided for in 49 U.S.C. § 31315(c) which states:

the Secretary shall publish in the Federal Register a detailed description of each pilot program, including the exemptions to be considered and provide notice and an opportunity to public comment before the effective date of the program.

⁶⁰ 2007 Act, § 6901(a), Add. Tab 3.

FMCSA's own regulations define a pilot program as one in which *temporary* regulatory relief from one or more FMCSA regulation is sought and in which participants receive that regulatory relief by way of an *exemption*.⁶¹

FMCSA is steadfast in its position, however, that its demonstration project does not include exemptions from U.S. regulations. This position has allowed FMCSA to sidestep the procedures required in the exemption process. By denying that it is granting exemptions, FMCSA has deprived interested parties of important procedural protections included in the exemption process as well as the substantive protection in the requirement that FMCSA must find that the conditions for granting exemptions provide for at least the same level of public safety as compliance with the rules for which the exemptions are made.

B. FMCSA Has Not Complied with the Procedural and Substantive Requirements for Awarding Exemptions

The statutory and regulatory provisions governing exemptions to motor carrier safety rules require that a specific substantive record be made, a safety analysis be performed, and that interested parties have access to and the right to comment on the safety analysis and all relevant information known to the

⁶¹ 49 C.F.R. § 381.400(a) and (b), Add. Tab 9.

Secretary concerning the proposed exemption.⁶² These requirements are set out in 49 U.S.C. §31315(b) and 49 CFR §§ 381.300 through 381.315.

The statute requires “[t]he regulations shall, at a minimum, require the person to provide the following information for each exemption request: (A) The provisions from which the person requests exemption. (B) The time period during which the requested exemption would apply. (C) An analysis of the safety impacts the requested exemption may cause. (D) The specific countermeasures the person would undertake to ensure an equivalent or greater level of safety than would be achieved absent the requested exemption.”⁶³ The implementing regulation also requires a description of the reason the exemption is needed,⁶⁴ an estimate of the total number of drivers and CMVs that would be operated under the terms and conditions of the exemption,⁶⁵ and a description of “the impacts (e.g., inability to test innovative safety management control systems, etc.) [the person being granted the exemption] could experience if the exemption is not granted by the FMCSA.”⁶⁶

⁶² 49 U.S.C. § 31315(b), Add. Tab 8.

⁶³ 49 U.S.C. § 31315(b)(3), Add. Tab 8.

⁶⁴ 49 C.F.R. § 381.310(c)(1)Add. Tab 9.

⁶⁵ 49 C.F.R. § 381.310(c)(3), Add. Tab 9.

⁶⁶ 49 C.F.R. § 381.310(c)(6), Add. Tab 9.

Although the information necessary to disclose (A) and (B) could be deduced from FMCSA's Federal Register notices, FMCSA has not attempted to describe the safety impact of the exemption under (C) or the countermeasures it is taking under (D) to ensure an equivalent or greater level of safety than would be achieved absent the requested exemption. Especially important in light of the U.S.'s obligations under NAFTA to give Mexican motor carriers national treatment, FMCSA did not explain why the exemption was needed or the impact on the project of the exemption not being granted.

The statutory requirements continue: "Upon receipt of an exemption request, the Secretary shall publish in the Federal Register a notice: explaining the request that has been filed; giving the public an opportunity to inspect the safety analysis and any other relevant information known to the Secretary and to comment on the request."⁶⁷ The information "known to the Secretary" includes "all research reports, technical papers, and other publications and documents" that support an application for exemption.⁶⁸

⁶⁷ 49 U.S.C. § 31315(b)(4)(A), Add. Tab 8, and 49 C.F.R. § 381.315(a), Add. Tab 9.

⁶⁸ See 49 C.F.R. § 381.310(d), Add. Tab 9.

FMCSA has denied that exemptions are part of its demonstration project and has provided no supporting documentation for its action. The record is devoid of anything more than summary information concerning the Mexican drivers license, medical qualification procedures and drug testing procedures. The record contains no documents, reports, technical or other papers that would support FMCSA's exemptions.

The statute also provides that: "The Secretary shall establish terms and conditions for each exemption to ensure that it will likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption."⁶⁹ FMCSA has established no terms or conditions for each exemption or even established that any particular level of safety would be achieved under the exemptions. Since FMCSA does not even acknowledge that exemptions have been granted, no such finding was made.

"Before granting a request for exemption, the Secretary shall notify State safety compliance and enforcement personnel, including roadside inspectors, and the public that a person will be operating pursuant to an exemption and any terms and conditions that will apply to the exemption."⁷⁰ The record contains no

⁶⁹ 49 U.S.C. § 31315(b)(6), Add. Tab 8.

⁷⁰ 49 U.S.C. § 31315(b)(7), Add. Tab 8.

evidence that FMCSA has made such notification to state personnel, and its denial that it is not granting exemptions is evidence that it has no intent to do so.

“The Secretary shall grant or deny an exemption request *after a thorough review of its safety implications*, but in no case later than 180 days after the filing date of such request.”⁷¹ The decision shall be published as a Notice in the Federal Register, and if granted it shall contain the provisions of the FMCSRs from which the exemption is granted, the effective period of the exemption, and all terms and conditions of the exemption.⁷² The record indicates no effort by FMCSA to do a “thorough review” of the safety implications of the exemptions. Nor has any “Final Determination” has been published, as has been the practice of the agency, outlining the terms of the grant of exemptions.⁷³

Neither the May, June or August notices cite to these requirements, nor does FMCSA comply with them. The June Notice asserts that the U.S. and Mexican version of these three regulatory areas are equivalent. But that conclusory

⁷¹ 49 U.S.C. § 31315(b)(5), Add. Tab 8.

⁷² 49 C.F.R. § 381.315(c)(1), Add. Tab 9.

⁷³ See, for example, "Hours of Service of Drivers; Pilot Program for Drivers Delivering Home Heating Oil", 66 Fed. Reg. 36823 (Jul. 13, 2001), FMCSA Docket No. 99-6585-10, <http://dmses.dot.gov/docimages/p62/134407.pdf>.

assertion does not provide any analysis informing the public of how FMCSA made such a determination.

Without compliance with the procedures and substantive notice required for exemptions, the public has been denied the opportunity to provide meaningful comment as required by law. Without informed comments by interested parties, FMCSA has no proper record upon which to make a determination to grant an exemption. Its actions fail to observe procedures required by law and are not otherwise in accordance with law.

C. The Administrative Record Does Not Support FMCSA's Findings of Equivalence Between Certain Mexican and U.S. Regulations

Having refused to characterize its action as the award of an exemption, FMCSA cites to no other statutory or regulatory authority authorizing it to make findings that certain U.S. and Mexican rules are equivalent. Such findings are no substitute for the procedural and substantive requirements necessary to establish exemptions.

The 2007 Act required the agency to publish, for public comment, its analysis of how these Mexican and U.S. regulations *differ*.⁷⁴ FMCSA did not

⁷⁴ Section 6901(b)(2)(B)(v) (emphasis added), Add. Tab 3.

publish a comparison of U.S. and Mexican regulations covering these subjects nor did it provide an analysis as to how such regulations differ.

FMCSA points to Table 1 at the end of the June 8, 2007, notice⁷⁵ as describing the “most important diverging features of the Mexican and U.S. medical standards for driver certification and allowing for meaningful comment.” But Table 1 does not include a serious analysis of how Mexican and U.S. laws and regulations differ. The sentence immediately proceeding Table 1 shows that its purpose was to document FMCSA’s findings of *similarities* not *differences*:

Table 1 below outlines the specific U.S. and Mexican regulations in the three areas where the Mexican regulations or processes are being accepted as meeting U.S. requirements.

Table 1 is a very superficial statement that was intended to present FMCSA’s conclusions as to why certain Mexican laws and regulations are the equivalent of U.S. requirements. It certainly does not contain an analysis of points of divergence that would allow OOIDA and other interested parties to comment on the subject of FMCSA’s finding of equivalency as required by Section 6901(b)(2)(B)(v) of the 2007 Act. FMCSA’s failure to provide meaningful comparisons of differences between U.S. and Mexican regulations was not in

⁷⁵ Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 31,877, 31,884-85 (June 8, 2007); FMCSA Docket No. 2007-28055-1547 (ER Tab 3).

accordance with law. Since providing such information was made a statutory prerequisite to commencing the pilot program, FMCSA's default is an independent basis on which to declare this demonstration project unlawful. The failure to disclose this information deprived OOIDA and other interested parties of an opportunity to submit fully informed comments upon the agency's exercise to declare Mexican drivers licenses, medical qualification standards, and drug testing equivalent to compliance with U.S. law.

1. Commercial Driver's Licenses

FMCSA's position that U.S. and Mexican CDL requirements were found to be similar in 1991 certainly does not satisfy the provision of the 2007 Act requiring that a comparison of their differences be made today as part of its demonstration project. There are very good reasons for Congress' 2007 decision requiring a current comparison of CDL requirements. For example, U.S. CDL provisions relating to disqualification for violations committed while driving a non-commercial vehicle were adopted *after* the Secretary's 1991 finding that U.S. and Mexican CDLs were equivalent.⁷⁶ Following the express direction of

⁷⁶ Motor Carrier Safety and Improvement Act of 1999, Pub. L. 106-159, 113 Stat. 1748, 49 U.S.C. § 31310.

Congress, the FMCSA enacted the specific disqualification standards, explaining that:

The Congress has chosen, in the interest of safety, not to distinguish between risk taking behavior in a passenger car or a CMV [commercial motor vehicle]. Section 201 (b) of the MCSIA specifically directed the Secretary of Transportation to issue regulations requiring the disqualification of CDL holders convicted of serious offense while operating a non-CMV.⁷⁷

Prior to commencing the demonstration project, FMCSA readily acknowledged that the Mexican CDL qualifications are *not equivalent*. This allows Mexican drivers on U.S. highways during the demonstration project under circumstances where U.S. drivers with the same driving record would be disqualified. In response to a petition for reconsideration, in a rulemaking concerning CDL requirements, the FMCSA stated that the final rule left “unresolved differences between the consequences for a U.S. driver convicted of a disqualifying offense in a non-CMV, and a foreign domiciled driver who commits similar offenses in his/her country of domicile.”⁷⁸

⁷⁷ Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 31,877, 31,884-85 (June 8, 2007); FMCSA Docket No. 2007-28055-1547 (ER Tab 3).

⁷⁸ Commercial Drivers License Standards Requirements and Penalties; Commercial Drivers License Program Improvements and Non-Commercial Motor Vehicle Violations, 68 Fed. Reg. 4394, 4395 (January 29, 2003), <http://dmses.dot.gov/docimages/p74/216653.pdf>.

The FMCSA attempts to justify its deficiency with remarkable circularity, stating that it could not resolve the issue “through the rulemaking process because it involves offenses in *countries that have not adopted laws to disqualify commercial drivers for offenses committed in private vehicles.*”⁷⁹ Instead, FMCSA looked to the future where it expected the U.S. and Mexico to “complete appropriate reciprocity agreements.”⁸⁰

Well, the *future* is now. No promised reciprocity agreements have been completed. Instead, rejecting all challenges to the agency’s failure to specifically re-evaluate the CDL equivalency in authorizing the pilot program, the FMCSA simply reverts to its prior conclusion, stating that:

The Agency has long recognized Mexico’s LFC as equivalent to the CDL as a valid substitute for the CDL and is the basis for the signed international agreement under which the United States and Mexico have recognized each other’s commercial licenses.⁸¹

FMCSA’s self justifying statements beg the essential question. U.S. disqualification standards for a CDL are markedly more stringent at the express

⁷⁹ *Id.* (emphasis added).

⁸⁰ *Id.*

⁸¹ Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 46, 263, 46, 27 (August 17, 2007); FMCSA Docket No. 2007-28055-2396 (ER Tab 4).

direction of Congress, than those applicable to commercial licensing standards in Mexico. The U.S. CDL and the Mexican LFC are not equivalent in this regard. The FMCSA has failed to address this deficiency.

Further, CDL disqualification in the U.S. is mandatory in specific circumstances. According to the chart provided in FMCSA's June Federal Register notice, the license cancellation rules appear *discretionary* in Mexico. FMCSA has not demonstrated how Mexican license cancellation rules provide for at least the same level of safety as the U.S. *mandatory* CDL disqualification rules. FMCSA's refusal to conduct the mandated comparison and analysis of Mexican and U.S. CDL requirements masks other important differences and makes it quite obvious that it is not proceeding in accordance with law. Even DOT's Inspector General expressed concerns over the comparability of CDL requirements in Mexico. In his September 6, 2007 report to FMCSA, the Inspector General repeated concerns about the need to assess the continued validity of the 1991 determination:

15. Will any elements of the demonstration program evaluation be designed to test the validity of prior determinations made regarding the comparability of the Mexican and U.S. systems? The current system and the demonstration program operate on the assumption that the Mexican Licencia Federal is equivalent to the U.S. Commercial Driver's License, a determination made by the Department in 1991. If

this determination will not be tested, will the Safety Evaluation Panel examine the basis for this prior determination?⁸²

FMCSA blithely states that the “demonstration project is not the appropriate context for any reconsideration of that determination.”⁸³ If not within the demonstration project, then when? If not in response to a specific Congressional directive, then when?

In comments submitted to FMCSA on May 31, 2007, in the underlying proceeding, OOIDA outlined 15 specific questions related to U.S. CDL qualifications that it believes must be addressed in order to adequately assess the equivalency of the U.S. and Mexican CDL.⁸⁴ These questions illustrate the many aspects of a driver’s qualification that Congress and FMCSA have determined are necessary to ensure an individual is qualified to operate a commercial motor vehicle safety. The wide breadth of the issues implicated by these questions also suggests the necessary magnitude of any effort that would fairly evaluate whether

⁸² Issues Pertaining to the Proposed NAFTA Cross-Border Trucking Demonstration Project, FMCSA Report No. MH-2007-065, Issued September 6, 2007 at 28 ¶15 (ER Tab 14).

⁸³ Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 46,263, 46,279 (Col. 3)(August 17, 2007); FMCSA Docket No. 2007-28055-2396 (ER Tab 4).

⁸⁴ Comments of the Owner-Operator Independent Drivers Association, Inc., May 31, 2007, Docket No. FMCSA-2007-28055-1521 at p. 10-11 (ER Tab 10).

compliance with Mexico's driver qualification rules would provide for the same level of safety as compliance with the U.S. rules. Certainly, information known to FMCSA in order to come to its conclusion concerning the equivalence of Mexican and U.S. CDLs, and requirement that such information be made available to the public during the process of considering an exemption, would at a minimum include an English translation of the Mexican CDL requirements and memoranda or analyses comparing the two. No such documents were made part of the record.

FMCSA has refused to provide the comparison of U.S. and Mexican CDL standards as required by the 2007 Act and has refused to examine the comparability as part of the demonstration project. FMCSA's approval of the demonstration project while it refuses to reexamine the question of CDL comparability that has not been looked at since 1991 is not in accordance with law. FMCSA's failure to disclose the information known to the Secretary that bears on the question of the Mexican CDL's equivalence renders its conclusions arbitrary and capricious and does not begin to satisfy the statutory conditions for granting the exemption. On this record there is nothing to support the ultimate conclusion that the exemption provides for at least the same level of safety as does compliance with the rule.

2. Standards for Medical Qualification

FMCSA cites to *Reglamento del Servicio de Medicina Preventiva del Transporte* as the corresponding regulatory equivalent to U.S. medical qualification requirements found in Part 391 of title 49 of the Code of Federal Regulations. The Agency states that Mexico requires a comprehensive physical and psychological examination for a driver to be licensed. Again, FMCSA's notices provide none of the information required by the 2007 Act with respect to how U.S. and Mexican regulations differ. How do Mexico's rules compare to those found in 49 U.S.C. §§ 31136 and 31149 and 49 C.F.R. Part 391? Does Mexico issue waivers from their medical standards? The record here is silent. Waivers are possible in the U.S. and Canada. However, by agreement, each nation's drivers operating under a waiver are not allowed into the other's jurisdiction. How will our enforcement officials know whether a Mexican driver is operating under a waiver? Neither the June nor August notices provide information on which the public can evaluate how the Mexican medical qualification rules provide for the same level of safety as the U.S. rules. Nowhere on the record did FMCSA publish the documents, analysis, technical paper, or other papers known to FMCSA on which it relied to examine the issue of equivalency. Such documents would at a minimum include an English translation

of the Mexican medical qualification requirements and memoranda or analyses comparing them to the U.S. rules. No such documents were made part of the record.

Beyond the inability of the public to file useful comments to such a barren record, nothing in this record suggests that the FMCSA performed the kind of detailed analysis of differences between the U.S. and Mexican rule contemplated by the 2007 Act or the detailed safety analysis required for granting exemptions. FMCSA's actions were arbitrary and capricious and otherwise not in accordance with law.

3. Controlled Substances Testing

Nowhere in FMCSA's Federal Register notices this year does it give details as to whether or to what extent Mexican procedures or regulations are equivalent to U.S. regulations and how they provide for the same level of safety. FMCSA has only cited to corresponding Mexican regulation identifiers without detailing, in English, the content of those regulations and how they've been determined to be equivalent to U.S. regulations. Drug and alcohol testing is an integral part of the U.S. driver qualification process and furthers FMCSA goals related to highway safety. Procedures specifically detailing requirements on both employers and drivers are detailed at 49 C.F.R. at Part 382. Pre-employment, post-accident,

random, reasonable suspicion, return-to-duty and follow-up testing are meant to insure that CDL holders are held to a higher standard than other vehicle operators.

In comments submitted to FMCSA on May 31, 2007, in the underlying proceeding, OOIDA asked about 38 specific areas related to U.S. drug testing rules that it believes must be addressed in order to adequately assess the equivalency of whatever it is FMCSA intends to accept in place of U.S. drug testing requirements.⁸⁵ The procedures for when and how drug testing of truck drivers must take place are detailed and complicated. They implicate complex procedures and record keeping. The administration of such procedures over an international border is not self-apparent and provides challenges above those faced by drivers, motor carriers, and drug testing facilities in the United States. The questions outlined by OOIDA in its comments to the agency suggests the scope of the record that would need to be made public and the analysis needed to determine whether the conditions for granting the exemption provide for the same level of safety as compliance with the U.S. drug testing rules. This record would at a minimum include an English translation of the Mexican drug testing rules and

⁸⁵ Comments of the Owner-Operator Independent Drivers Association, Inc., May 31, 2007, Docket No. FMCSA-2007-28055-1521 at p. 7-9 (ER Tab 10).

memoranda or analyses comparing them to the extensive U.S. rules. No such documents were made part of the record.

The June notice refers to an MOU in which Mexico agrees to adhere to U.S. drug testing regulations, states that their procedures and regulations are equivalent (a task which Congress has assigned to FMCSA), and then states that Mexican laboratories are not certified due to lack of proper equipment and other procedural requirements.⁸⁶ FMCSA also admits that “[c]urrently there are not any collection facilities certified in Mexico to collect controlled substance and alcohol specimens in accordance with 49 CFR Part 40.”⁸⁷ These facts appear to contradict the conclusion that Mexico’s drug testing standards are equivalent to those required of U.S. drivers and carriers. The Notice states that FMCSA has agreed to accept a drug test collected in Mexico using U.S. forms, but is silent as to the testing procedures that it believes are acceptable.

FMCSA should have at least published a side-by-side comparison of the Mexican and U.S. rules, to accompany its analysis as to how the Mexican differ and how the rules will provide for at least the same level of safety as the U.S.

⁸⁶ Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 31,877, 31,885 (Table 1)(June 8, 2007); FMCSA Docket No. 2007-28055-1547 (ER Tab 3).

⁸⁷ *Id.*

rules. The 2007 Act requires such an approach, yet FMCSA has refused to comply.

Having failed to provide OOIDA and other interested parties with the information required by the 2007 Act, thus precluding informed comments by the public, it is little wonder that there are no reports, technical paper or other papers known to the Secretary on which FMCSA can support its broad conclusory statements concerning the equivalency of these rules the public has no assurance that the Mexican rule will provide for the same level of safety. Again, the agency's actions were not in observance of procedure required by law, not in accordance with the finding required for exemptions under Section 31315(b), and arbitrary and capricious.

FMCSA has failed to support in the record its broad assurances that it intends to require Mexican trucks to meet all U.S. safety standards. Were it not for Congressional intervention with the 2007 Act, FMCSA would not have been required to even reveal that it was effectively granting the three exemptions outlined above. OOIDA believes that there may well be additional areas involving Mexican motor carrier and driver compliance with U.S. rules that have not been addressed by FMCSA. Unless FMCSA is required to follow the formal procedures for exemptions there is a real prospect that additional problems will

just be swept under the rug. These issues were raised in OOIDA's comments before the agency⁸⁸ but remain unaddressed.

IV. FMCSA's Decision to Accept Medical Certificates by Individuals in Mexico Who Are Neither Credentialed nor Supervised by FMCSA Is Not In Accordance With Law

FMCSA's June notice states that "the Secretary of Transportation will also consider that physical examinations conducted by Mexican doctors . . . [to be] equivalent to examinations . . . conducted . . . in the United States . . ." ⁸⁹ No statutory authority for this determination is cited by FMCSA and for good reason. FMCSA's action is specifically barred by statute.

Title 49 of the U.S. Code imposes detailed requirements on FMCSA with respect to overseeing the physical qualifications of drivers of commercial motor vehicles. 49 U.S.C. § 31136(a)(3) provides that FMCSA adopt regulations that, "at a minimum," ensure that:

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

⁸⁸ Comments of the Owner-Operator Independent Drivers Association, Inc., May 31, 2007, Docket No. FMCSA-2007-28055-1521 (ER Tab 9); Comments of the Owner-Operator Independent Drivers Association, Inc., June 28, 2007, Docket No. FMCSA-2007-28055-1960 (ER Tab 10).

⁸⁹ Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. at 31, 877, 31, 844 (Col. 2-3)(June 8, 2007); FMCSA Docket No. 2007-28055-1547 (ER Tab 3).

physical examination required of such operators are performed by medical examiners who have received training in physical and medical examination standards and, after the national registry maintained by the Department of Transportation under section 31149(d) is established, are listed on such registry

FMCSA is required to establish a Medical Review Board, appoint a chief medical examiner, establish medical standards for operators of commercial motor vehicles, establish and maintain a national registry of medical examiners, require periodic physical examinations of drivers to be performed by medical examiners listed on a national registry and require drivers to maintain a current valid certificate.⁹⁰ FMCSA is also mandated to conduct periodic reviews of select medical examiners on the national registry to ensure that proper examinations are being conducted,⁹¹ as well as to monitor and investigate patterns of improper certification by medical examiners and remove those responsible for improper certification from the national registry. Most importantly, FMCSA may accept as valid only medical certificates issued by persons on the national registry.⁹² FMCSA's decision to accept a medical certification procedure under Mexican

⁹⁰ 49 U.S.C. § 31149, Add. Tab 7.

⁹¹ 49 U.S.C. § 31149(c)(1)(c), Add. Tab 7.

⁹² 49 U.S.C. § 31149(d)(3), Add. Tab 7.

rules that do not satisfy these statutory standards is simply not in accordance with law and in excess of its authority under Sections 31136 and 31149.

FMCSA admits that it has no plan to enforce these requirements on Mexico-domiciled drivers. It attempts to excuse its dereliction by pointing out that it currently has not implemented many of these provisions with respect to U.S.-domiciled drivers either. That is no excuse. FMCSA has no legal authority to affirmatively exempt individuals from these statutory requirements. But that is precisely what it has done by accepting Mexican medical certificates as equivalent. FMCSA should not be allowed to excuse its dereliction with respect to Mexican drivers because it is also derelict with respect to U.S. drivers. It is one thing to exercise forbearance in the enforcement of certain provisions of a statute, it is quite another thing to formally grant a whole class of individuals status as if they had complied. Further, the demonstration project is intended to form the basis for judgments on a permanent program. How can such judgments be made with respect to medical examinations when compliance with Section 31136(a)(3) on an international scale has never been tested? FMCSA's demonstration project simply goes too far.

FMCSA cites no authority for the argument that its delinquency in promulgating rules mandated by Congress two years ago gives it such discretion.

FMCSA's delinquency in promulgating these rules is unreasonable and an abdication of its statutory responsibility.⁹³

V. OOIDA Has Standing

OOIDA is a not-for-profit corporation having more than 157,000 members – professional drivers and small business truckers located in all 50 states who collectively own and operate more than 240,000 individual heavy-duty trucks and small truck fleets. OOIDA filed this petition in a representative capacity on behalf of its members. OOIDA filed comments with FMCSA during every phase of this proceeding.

OOIDA has standing to pursue this appeal. Unless FMCSA is enjoined, OOIDA, and its members, will suffer actual or imminent injury that is concrete and particularized and is fairly traceable to the FMCSA's actions. It is likely that a favorable decision in this proceeding will redress that injury.⁹⁴

⁹³ *Public Citizen Health Research Group v. FDA*, 740 F.2d 21, 31 (D.C. Cir. 1984) (“When agency recalcitrance is in the face of a clear statutory duty or is of such magnitude that it amounts to an abdication of statutory responsibility, the court has the power to order the agency to act to carry out its substantive statutory mandates.” citing *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir.1973) (*en banc*) (*per curiam*); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 594-595 (D.C. Cir.1971)).

⁹⁴ *International Brotherhood of Teamsters v. Pena*, 17 F.3d 1478-1484 (D.C. Cir. 1994).

CONCLUSION

1. FMCSA exceeds its authority to grant operating authority to motor carriers by accepting compliance with certain Mexican regulations in place of compliance with U.S. regulations.
2. Acceptance of compliance with certain Mexican regulations in place of U.S. regulations constitutes an exemption from compliance with the U.S. regulations. FMCSA denied OOIDA important procedural and substantive rights by refusing to follow the procedures required when awarding exemptions, by not making the public record required, and by not performing the required safety analysis.
3. FMCSA's conclusion that acceptance of compliance with certain Mexican regulations would provide the same level of safety as compliance with certain U.S. regulations was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.
4. Congress directed FMCSA to implement its demonstration project as part of a pilot program. Under FMCSA regulations, the award of an exemption is inextricably linked to the conduct of pilot programs. FMCSA violated the conditions attached to the appropriation of funds by Congress for its operations by deciding to proceed without a pilot program and without granting formal exemptions.

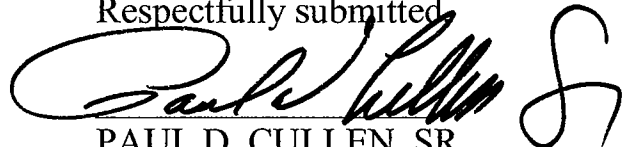
5. Congress directed FMCSA to provide the public with an analysis of the differences between certain U.S. and Mexican laws and regulations prior to initiating its demonstration project. FMCSA did not meet the conditions attached to the appropriation of funds by Congress for its operations by failing to provide the required information and analysis *prior* to the implementation of its demonstration program.

6. FMCSA's waiver of the statutory medical certification requirements was in excess of its statutory authority and is not in accordance with law.

STATEMENT OF RELATED CASES

Sierra Club et al. v. United States Department of Transportation, 9th Cir. No. 07-73415, is currently pending before this Court and deals with the same transaction or event as this case.

Respectfully submitted



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**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P.
32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 07-73987**

I certify that Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 11,473 words.

A handwritten signature in black ink, appearing to read "Paul D. Cullen, Sr.", written in a cursive style.

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No. 07-73987

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OWNER-OPERATOR INDEPENDENT)
DRIVERS ASSOCIATION, INC. (a.k.a "OOIDA"))

Petitioner,)

vs.)

UNITED STATES DEPARTMENT OF)
TRANSPORTATION; FEDERAL MOTOR)
CARRIER SAFETY ADMINISTRATION; MARY)
E. PETERS; Secretary of the U.S. Department of)
Transportation; JOHN H. HILL, Administrator of)
the Federal Motor Carrier Safety Administration;)
and THE UNITED STATES,)

Respondents.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON THIS 19TH DAY OF OCTOBER, 2007, I caused copies of the Petitioner's Brief and Excerpts of Record to be sent via First Class mail to:

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