



**ADVOCATES
FOR HIGHWAY
AND AUTO SAFETY**

**750 First Street, N.E.
Washington, D.C. 20002**

July 9, 2007

DOT Docket No. FMCSA-2007-28055

U.S. Department of Transportation
Docket Management Facility
West Building Ground Floor, Room W12-140
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

**Demonstration Project on NAFTA Trucking Provisions
Notice; Supplemental request for public comment
72 FR 31877 et seq., June 8, 2007**

Comments regarding Docket Item No. FMCSA-2007-28055-1639

Advocates for Highway and Auto Safety (Advocates) submits these comments in response to documents placed in the electronic docket for this rulemaking proceeding. On Friday, January 22, 2007, the Federal Motor Carrier Safety Administration (FMCSA) filed 19 documents in the docket during the public comment period for the supplemental notice regarding the Demonstration Project on NAFTA Trucking Provisions, 72 FR 31877 (June 8, 2007). The documents are listed in the docket as entries FMCSA-2007-28055-1639 through FMCSA-2007-28055-1658. The documents were not provided in the public docket until late in the course of an already foreshortened 20-day period for public comment. In fact, the documents were not docketed until near the close of business¹ on the Friday prior to the June 28, 2007, deadline for public comment.

The FMCSA asserts that making the documents available to the public was intended to provide context and to assist the public in evaluating and commenting on the demonstration project. FMCSA-2007-28055-1639 at 1. The documents consist of over 350 pages of text and material much of which relates to FMCSA technical regulations, procedures and activities that must be scrutinized carefully and in detail. However, the agency chose to make these documents available to the public only in the waning days of the public comment period.² Whether intentional or not, this late filing of the documents

¹ Each document is stamped by the Department of Transportation (DOT) Docket Management Facility as having been received between 3:52 P.M. and 3:55 P.M. on June 22, 2007.

²The timing of the submission to the docket is suspect, coming as it did late on a Friday afternoon with less than a week left in the 20-day comment period. Coupled with the fact that the FMCSA did not issue any press release or other notification of the submission of the documents to alert

severely limited the period during which the documents were available to the public prior to the close of comment period. The agency's tactic, as a practical matter, allowed at most only four working days for review of the documents before the filing deadline. This did not provide the public or Advocates with a sufficient opportunity to analyze the lengthy document submission and prepare comments before the comment period deadline.

The subsequent re-opening of the docket for public comment on June 29, 2007, for an additional abbreviated period of 11 days³ was likewise insufficient time to allow for careful review of the more than 350 pages of text and technical information contained in the documents submitted near the close of business on June 22, 2007. Thus, even with the re-opening of the comment period, the public, at most, had only two weeks within which to consider the 19 documents and hundreds of pages filed by FMCSA.

This action violates the spirit of procedural due process requirements for informal rulemaking proceedings has prejudiced Advocates. Because of the limited notice and time for public comment, Advocates is now forced to submit comments on these documents after the comment closing date, when consideration of public comment is solely at the discretion of the agency. 72 FR 31877 ("Comments received after the comment closing date will be included in the docket, and *will be considered to the extent practicable.*") (emphasis added). This is not a sufficient surrogate for providing adequate public notice and sufficient time for public comment. Even though the agency may consider comments filed after the close of the announced public comment period, now July 9, 2007, it is entirely inappropriate for the agency to provide two short comment periods, of 20 and 11 days respectively, and then to expect the public to rely on submitting comments prior to an undetermined and unknown date after which the agency decides that comments can no longer be considered. In fact, instead of extending the period for public comment as a matter of right, FMCSA has stated that it will probably consider public comment for some unspecified period of time following the close of business on July 9, 2007.⁴ Even so, the agency provides no guarantees that comments will be considered.

the interested public, this action is highly suspect and may have been intended avoid negative reaction and publicity as well as to delay public notice of the belated agency filing. By contrast, when FMCSA chooses to do so, the agency does notify some members of the interested public of its actions. *See* DOT Docket No. FMCSA-2007-28055-1987 (notifications of re-opening of the public comment period).

³ Members of the public who were not directly contacted by FMCSA and notified of the re-opening of the comment period on June 29, 2007, received only seven days notice of the re-opening of the comment period from the date the notice was published in the *Federal Register*. 72 Fed. Reg. 36543 (July 3, 2007).

⁴ In responding to a request by Advocates and other safety organizations seeking an extension of the public comment period until August 31, 2007, on the basis that there is no statutory deadline for action requiring truncating public comment, an FMCSA official responded that "it is likely

While continued review by an agency “to the extent practicable” is in order after the agency has provided the public with sufficient notice and an adequate period of time for public comment, this is not a reasonable practice where the agency has not afforded the public with a reasonable time period in which to comment. The 15-day period allotted by the agency in this instance for the review of over 350 pages is unreasonably short and insufficient. This would have been true if the full 15-day time period was known to the public at the start. But in this case, FMCSA did not make the documents available to the public until there were only 4 working days remaining in the public comment period and only after that public comment period expired to the agency then re-open the docket for public comment as a matter of right for the other 11-day comment period.

The actions of FMCSA reflect a haphazard approach to due process considerations for informal rulemaking proceedings and a lack of concern for fairness involving public notice and comment. This is especially true where, as in this case, Congress specifically directed that the public be given “*sufficient opportunity for public notice and comment*[.]”⁵ in regard to the publication of information about the proposed demonstration project.

The first in the series of 19 documents submitted by FMCSA, docket item number FMCSA-2007-28055-1639, is merely a list of the records that FMCSA has placed in the docket. The agency makes the claim, however, that it is introducing these documents “to assist parties interested in evaluating and commenting upon the project.” FMCSA-2007-28055-1639 at 1. As we have made clear, this statement is actually contrary to the truth since the late submission of the documents did not provide sufficient time for the public to be able to evaluate and comment on the documents prior to the close of the public comment period, either on June 28th or July 9th, 2007. In point of fact, FMCSA received no substantive comments on the documents by the closing date of the public comment period for the very simple reason that the agency did not provide the public with sufficient opportunity to prepare comments in response to the document dump of June 22, 2007. Thus, FMCSA’s statement, quoted above, directly conflicts with the directive from Congress in section 6901(b)(2)(B) of the Iraq Accountability Act. The late submission of the documents without providing adequate time for their review violates this statutory mandate.

that the Agency will have the opportunity to review and consider comments after July 9 before initiating the demonstration project.” Letter from Pamela M. Pelcovits, FMCSA Acting Associate Administrator for Policy and Program Development, to Judith L. Stone, President, Advocates for Highway and Auto Safety, page 2, dated July 6, 2007. It is clear from the letter that the agency is not awaiting public comment, and will not be swayed by public comment, and has already determined to initiate the demonstration project.

⁵ Section 6901(b)(2)(B), U.S. Troop Readiness, Veterans’ Care, Katrina Recovery and Iraq Accountability Appropriations Act, 2007, Pub. L. 110-28 (May 25, 2007) (Iraq Accountability Act) (emphasis added).

In addition, the first three items listed in the first document (Item #1639), Section 6901 of Pub. L. 110-28 and two reports issued by the U.S. Department of Transportation, Office of Inspector General, dated June 25, 2002 and January 3, 2005, were all submitted prior to the publication of the supplemental rulemaking notice on June 8, 2007, and before the other 19 documents were submitted to the docket on June 22, 2007. In fact, these three first-mentioned documents were all matters of public knowledge and readily available to the public prior to their submission by the agency. Thus, while the appearance of these documents in the agency docket may be a convenience for some of the public, it provides no new information that had not previously been disclosed and available to the public.

The listing of the other 18 documents submitted by FMCSA to the docket is not, itself, a substantive matter that provides the public with any insight regarding the remaining 18 documents. Advocates is in the process of reviewing those documents and will comment further as that process is completed for the various documents.

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