

DEPARTMENT OF TRANSPORTATION
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
MINIMUM TRAINING REQUIREMENTS FOR ENTRY-LEVEL COMMERCIAL MOTOR
VEHICLE OPERATORS

DOCKET NO. FMCSA-2007-27748

COMMENTS OF THE UTILITY LINE CLEARANCE COALITION

Melissa A. Bailey
Anthony J. Marcavage
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
2400 N Street, N.W., 5th Floor
Washington, DC 20037
(202) 887-0855

COMMENTS OF THE UTILITY LINE CLEARANCE COALITION

I. EXECUTIVE SUMMARY

The Utility Line Clearance Coalition (“ULCC”) appreciates the opportunity to comment on the Federal Motor Carrier Safety Administration’s (“FMCSA”) proposal for minimum training requirements for operators of commercial motor vehicles (“CMV”) that require a Commercial Drivers License (“CDL”).

As discussed further in these comments, ULCC member companies emphasize the importance of safe driving to their employees and use a variety of training techniques to ensure that employees have the knowledge and skills to operate CMVs safely. As such, ULCC appreciates the FMCSA’s efforts to improve safety by proposing additional training.

At the same time, the FMCSA’s proposal is clearly directed at over-the-road drivers who are engaged in long-haul trucking and are paid by the mile. Employees at ULCC member companies do not perform this type of driving because, put simply, ULCC member companies are not in the driving business. Instead, CMVs are tools of the trade that allow work crews to get to the work area, park, and perform the work. Transportation time is deliberately and strategically minimized because the business of ULCC members is providing utility line-clearance vegetation management services to the nation, not occupational driving.

In light of the focus on long-haul trucking, the training proposed by FMCSA would be of questionable utility in the line-clearance industry. Specifically, the training curricula discussed in the proposal are applicable to over-the-road, long-haul drivers of tractor trailers and passenger-transport drivers who spend the vast majority of their working time driving and face different and more significant safety issues than drivers in the utility line-clearance industry. In addition, as the FMCSA acknowledges in its proposal, none of the available studies, which are

primarily focused on long-haul trucking, show any relation between completing the types of training described in the proposal and reductions in crash rates for long-haul CMV operators or bus drivers. These studies are even less relevant to the utility line-clearance industry because of the limited driving times and distances involved. The FMCSA clearly lacks any evidence that the proposed rule will reduce crash rates or improve safety in the utility line-clearance industry, and any regulation requiring additional training would therefore be arbitrary and capricious.

In addition to providing no benefits, the proposed training would impose substantial costs on ULCC member companies. Based on information provided by ULCC member companies, the labor pool of job applicants that currently have CDLs is already small. A labor pool of drivers who have invested the time and money necessary to complete the substantial training FMCSA proposes is likely to be minimal, if not non-existent. ULCC member companies will therefore be forced to pay for training at an accredited training institute at a cost that has been vastly under-estimated by FMCSA as \$42 per hour (which does not include lost work-time) for long-haul truckers. Once employees receive their CDLs after completing training provided at the employer's expense, there is nothing to prevent them from leaving the physically demanding tree-trimming workforce for jobs that will primarily involve driving. The FMCSA failed to consider these costs or, indeed, any costs likely to be incurred by the utility line-clearance industry. Instead, the cost-benefit analysis focuses solely on long-haul trucking and passenger transport, industries that are fundamentally different than utility line-clearance and other industries where driving time is minimal. The cost-benefit analysis therefore fails to meet the statutory requirements as applied to the utility line-clearance industry.

Finally, the ULCC submits that if FMCSA believes that additional training for CMV drivers is required, this training should be provided by ULCC member companies. The

Professional Truck Driving Institute (“PTDI”)-type training envisioned by FMCSA is utterly inappropriate for drivers in the utility line-clearance industry for two reasons. First, the equipment is different. Utility line-clearance drivers are transporting equipment or driving specialized utility service vehicles with aerial lifts or similar devices. This equipment most often contains none of the equipment standard on tractor trailers, such as fifth wheels. Second, unlike the long-haul trucking or passenger transport discussed in the FMCSA proposal, employees of ULCC member companies spend very little time driving. Effective training for this type of driving is necessarily different than what may be required for long-haul trucking or passenger transport. For example, utility line-clearance drivers may benefit from training in how to drive safely in residential neighborhoods, how to pull over and park a CMV on a public highway, and how to deploy equipment like aerial lifts and temporary traffic control equipment. In fact, this is precisely the type of training that is currently provided to ULCC member company drivers. As such, given the significant differences between the driving performed by utility line-clearance workers and truckers and bus drivers, any additional training should be provided by employers using the equipment that will actually be used by the drivers.

II. THE UTILITY LINE CLEARANCE COALITION

ULCC members comprise approximately ninety percent of all utility line-clearance tree-trimming work performed in the nation. ULCC is therefore the authoritative voice of the utility line-clearance tree trimming and vegetation management industry with respect to this proposed regulation.

A. ULCC Members

The ULCC is composed of: Asplundh Tree Expert Co., The Davey Tree Expert Co., Lewis Tree Service, Inc., Lucas Tree Experts, Inc., McCoy Tree Surgery, Inc., Nelson Tree

Service, Inc., Tamarack Tree Service, Inc., Townsend Tree Service Inc., Trees, Inc., and Wright Tree Service, Inc. Each of these companies engages in vegetation management for electric utility, municipal and commercial customers. This work includes electric utility “right of way” clearance to create or maintain electric power line rights-of-way as specified by the electric utility or other customer. ULCC members use specialized techniques that allow utility line-clearance to be done safely and consistently without the de-energization of electric supply to communities.

B. ULCC Members Are Not in the Business of Driving and Use Different Equipment than Long-Haul Trucking or Passenger Transport Companies.

ULCC members are not in the business of driving. Rather, employees at ULCC member companies drive CMVs to a specific location, park the CMV, and engage in utility line-clearance work. As such, a CMV is simply a necessary tool of the trade that allows employees to transport equipment to the location where the work will be performed. On average, ULCC employees drive only 10 to 90 miles a day, with approximately half driving less than 25 miles per day. Per week, ULCC employees drive between 25 and 250 miles on average, with approximately half of all drivers logging less than 50 miles behind the wheel. Almost all of this driving occurs on local roads close to the areas where the crews will work. Most importantly, ULCC employees spend over 90 percent of all working hours performing utility line-clearance work and only 10 percent driving. In addition, driving is typically performed in 15 to 30 minute increments because most customers of ULCC member companies are only willing to pay for limited transportation time for work crews. Because of these limitations, work crews are strategically deployed so as to minimize driving time.

Utility line-clearance drivers also use different equipment than long-haul truckers and bus drivers. In 2006 and 2007, ULCC members operated over 22,000 CMVs. Very few of these

vehicles are Class A tractor trailers. Rather, the majority are Class B utility service vehicles or Class C trucks, which do not meet the criteria for a CDL. These utility service vehicles include aerial lift trucks, chip trucks, spray trucks, tree spade trucks, and some semis used for moving equipment to job sites. This equipment is fundamentally different than the tractor trailers FMCSA focuses on in considering the need for training and appropriate training curricula.

Utility line-clearance drivers encounter different safety hazards than long-haul truckers. In its 2006 Large Truck Crash Causation Study (“LTCCS”), the Agency noted speeding, unfamiliarity with the road, and fatigue as three of the top five driver-related “associated factors” that increased the risk of being in a crash.¹ None of these factors are prevalent in the utility line-clearance industry. Given the short distances driven, fatigue is not a factor. Utility line-clearance drivers also typically operate locally or regionally, and are therefore more familiar with their driving terrain. Finally, the incentives to speed that exist in the long-haul industry are not present in utility line-clearance because workers are paid by the hour, not the mile.

C. Utility Line Clearance Drivers Currently Receive Training Appropriate to the Type of Driving They Perform.

Despite the small percentage of time that employees spend driving, ULCC member companies nonetheless provide extensive training in light of the types of CMVs operated and their driving frequency. Over 99 percent of ULCC employees who drive receive company-sponsored behind-the-wheel training, and over 95 percent of new drivers must pass a company driving test. ULCC members employ a myriad of training methods and materials tailored to their individual needs, including in-house driver proficiency tests, “800” safe driver programs that target unsafe drivers and result in re-training, annual reviews of motor vehicle records and follow-up training, National Safety Council training, and various other third-party training

¹The Large Truck Crash Causation Study, Analysis Brief, <http://www.fmcsa.dot.gov/facts-research/research-technology/analysis/FMCSA-RRA-07-017.htm>

curricula and training courses. As a result, ULCC drivers have a far lower incidence of crashes than over-the-road motor carriers.²

III. ULCC'S SUBSTANTIVE COMMENTS

The ULCC offers the following comments on the substantive provisions of the proposed regulations.

A. **The Agency Has Not Demonstrated That Additional Training Requirements are Warranted for the Utility Line-Clearance Industry.**

As the proposed rule acknowledges time and again, the FMCSA's evidence does not demonstrate any correlation between increased driver training hours and reductions in crashes. The proposed rule states that the training standards in the 1985 "Model Curriculum for Training Tractor-Trailer Drivers," which continues to constitute the core of the proposed training requirements, "are not based on any specific research showing that drivers who received training of a particular type or duration are less likely to be involved in crashes than drivers receiving other kinds of training, or no systematic training at all." *72 Fed. Reg.* 73225, 73227 (December 26, 2007). The proposed rule also acknowledges that in the 1992 Adequacy Report, the sampled groups concluded that formal training is key to adequate training "[w]ithout much analysis or data," and that "[e]vidence of the relationship, if any, between certain types of training and a reduction in crashes was scarce and statistically questionable." *72 Fed. Reg.* at 73228. Not only did the Adequacy Report find "no evidence of a relationship between adequacy of the training the driver reported receiving and his/her frequency of crashes," it also reached no conclusion as

² This conclusion is supported by the FMCSA's 2006 Large Truck Crash Overview, which calculated over 2.1 fatal vehicular crashes per 100 million miles driven for each of the last three years of the study. The Tree Care Industry Association, a related industry with overlapping membership whose employees are also not in the driving business, estimated 0.049 fatal vehicular crashes per 100 millions miles driven, an incidence rate approximately 43 times lower than the large truck crash average.

to whether “testing-based,” “training-based,” or “performance-based” training would be more effective. 72 *Fed. Reg.* at 73229.

Since completing the Adequacy Report, the Agency has continued to research the issue of training for commercial vehicle operators by sponsoring the writing of Synthesis 5 and Synthesis 13. This research continues to show no correlation between training and crash rates. Specifically, the 2006 Synthesis 13 acknowledged that “there are no general data linking decreased crash rates to formal training programs.” 72 *Fed. Reg.* at 73230. Similarly, the proposed rule states that its 2006 Large Truck Crash Causation Study was “inconclusive and did not identify any statistically significant difference between trained and untrained drivers with regard to crash frequency.” 72 *Fed. Reg.* at 73231.

After 20 years of inconclusive studies on the question of the correlation between new driver training and the frequency of crashes, the Agency appears to be attempting yet another wide-scale research study, this time in the form of the proposed rule itself. Specifically, the FMCSA states that the “proposed rule would provide the baseline data needed to begin to study the effectiveness of the training when compared to the actual crash experience of the drivers.” 72 *Fed. Reg.* at 73231. In other words, the FMCSA proposes mandating substantive training requirements to gather data supporting the need for those same training requirements.

A regulation based upon this type of circular reasoning would clearly constitute an arbitrary and capricious agency action because of the lack of evidence to support the need for and benefits of the additional training. *See, e.g., Center for Biological Diversity v. National Highway Traffic Safety Administration*, 508 F.3d 508, 526 (9th Cir. 2007) (finding that the agency “must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made’” (internal

citations omitted)).³ This is all the more so for the utility line-clearance industry, whose employees, as noted above, perform limited driving over small areas and have better industry-wide safety records than tractor trailer drivers. While the “intuitive,” data-less approach taken by the Agency may bear some relation to the realities of the long-haul trucking industry, it bears little or no relation to drivers in the utility line-clearance industry and may not legally bind it.

At least as to the utility line-clearance industry, these conclusions are not affected by the Court’s decision in *Advocates for Highway and Auto Safety v. FMCSA*, 429 F.3d 1136 (D.C. Cir. 2005). The Adequacy Report upon which the Court based its decision that FMCSA should have mandated behind-the-wheel training focused on long-haul trucking and passenger transport, not on the type of incidental driving performed by utility line-clearance driving. Inasmuch as the Court directed FMCSA to consider the Adequacy Report in promulgating additional training standards, the Court did not mandate that the findings of the Adequacy Report be applied to industries other than long-haul trucking and passenger transport.⁴

B. The Proposed Rule Places a Substantial Economic Burden on the Utility Line-Clearance Industry that is Not Accounted for in its Cost-Benefit Analysis.

As discussed in this section, the proposed rule would impose substantial costs on the utility line-clearance industry with no discernible benefits.

³ The Court further noted that an agency rule is “arbitrary and capricious” if it “has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.* at 526 (internal citations omitted). In this case, the FMCSA has failed to consider the relationship of its proposed regulations to industries in which the primary function is not driving.

⁴ Given the lack of evidence that additional training requirements will reduce crash rates in the utility line-clearance industry, the FMCSA should exempt utility service vehicles. Utility service vehicles are exempted from hours of service requirements, and should also be exempted from any additional training requirements. *See* The Safe Accountable, Flexible, Efficient Transportation Equity act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, Section 4132.

1. The proposed rule places an unjustified financial burden on the utility line-clearance industry.

The proposed rule does not require employers to provide any training. Instead, the proposal places the burden on the driver by requiring completion of a mandatory number of training hours at an accredited institution. In reality, however, employers will be required to pay for this training. Based on information from ULCC members, the current labor pool of employees who already have a CDL when they apply for a job is small. The labor pool of employees who have invested the substantial time and financial resources to complete the requisite training at an accredited institution is undoubtedly smaller, even assuming it exists.

As a result, utility line-clearance companies will be forced to pay for employees to attend the training. This will result not only in tuition costs, but in substantial lost opportunity costs as utility line-clearance companies are forced to have employees on their payroll while other employees are performing the actual work.

Furthermore, turnover is frequent in the utility line-clearance industry because of the physical labor involved. This results in two significant burdens. First, the additional training requirements would greatly impede the industry's ability to replace lost workers quickly, reducing the flexibility, efficiency, and profitability of the industry. Second, employees who have completed the substantial training necessary to obtain a CDL would be at a premium. Once an employee received the training at his or her employer's expense, he or she could easily obtain a job that does not require the physical labor required in utility line-clearance, such as long-haul trucking, passenger transport, or any other similar job that primarily involves driving.

2. The proposed rule's cost/benefit analysis is insufficient and inaccurate as applied to the utility line-clearance industry.

The FMCSA's cost-benefit analysis does not consider the potential burdens of the proposed rule on the utility line-clearance industry or any industry where the primary function is not driving. Specifically, the proposed rule's "estimated costs" for driver training are based on scenarios entirely inconsistent with those present in the utility line-clearance industry. The estimation considers "employment trends" and "industry demand for transportation," but clearly examines those concepts through the lens of industries whose employees' primary job function is *driving*. That is not the case with the utility line-clearance industry, so the regulatory analysis is inadequate as applied to the industry.

For example, the cost estimation assumes that "30 percent of the drivers would have received [the required] training regardless of whether this rule was in place or was not..." 72 *Fed. Reg.* at 73237. This is a false assumption for the utility line-clearance industry, in which a far lower percentage of potential employees would have undertaken the training process for commercial driving before applying for the position of tree-trimmer. Likewise, the estimations regarding the number of entry-level drivers required economy-wide will not correlate to the utility line-clearance industry because the demand for labor will be based on factors unrelated to those that will affect the demand for motor carriers. Similarly, the cost/benefit analysis does not account for differing turnover rates in industries whose primary function is driving compared to those for which driving is a secondary function.

The cost estimation also correctly notes that "employer-based training would most likely be less expensive" than the estimation for training conducted at an outside school. Due to the differing economies of scale between a company dedicated to driving and one for whom driving is a secondary job function, it would not be feasible for many ULCC member companies to

develop in-house training programs of the scope required by the proposed rule or to complete the accreditation process. Companies where the primary function is driving will have the advantage of organizing in-house training programs around their highly experienced, current employees. Most utility line-clearance companies will be required to rely on the more expensive outside training schools to comply with the new regulation.

Like the costs, the “estimated benefits” of the proposed rule focus solely on companies engaged primarily in driving and do not account for the circumstances for companies for which driving is a secondary function. The proposed rule relies on statistics based on the number of “large truck” crashes (along with projected reductions in crashes not statistically substantiated), but does not in any way relate these figures to specific industries or types of driving. For example, the LTCCS shows that tractor trailers accounted for over 67% of the crashes included in the study.⁵ This has little relation to ULCC member companies because few of their vehicles are Class A, and not all of these are tractor trailers. In the utility line-clearance industry, therefore, the type of truck used, the duration of travel, and the percentage of travel time spent on high-speed roads are starkly different than in industries dedicated to driving. The proposed rule makes no account of these differences when it applies its benefit figures to every industry that uses CMVs in any capacity.

The FMCSA’s failure to prepare a cost-benefit analysis applicable to the utility line-clearance industry and other industries where driving is not a central part of the business violates section 6(a)(3) of Executive Order 12866 and the Department of Transportation’s own regulatory policies and procedures regarding the determination of cost and benefits for significant regulatory action. 44 *Fed. Reg.* 11034 (Feb. 26, 1979); Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*

⁵ Report to Congress on the Large Truck Causation Study, <http://www.fmcsa.dot.gov/facts-research/research-technology/report/ltccs-2006.pdf>

C. If Additional Training is Necessary for CMV Drivers in the Utility Line-Clearance Industry, Employers Are in the Best Position to Determine the Type and Scope of Training.

As stated, ULCC members drive CMVs under conditions very different from those in long-haul trucking. Utility line-clearance work typically requires driving in developed areas at low speeds with short distances between jobs over familiar terrain. The requirements currently in place that drivers must meet to qualify for a CDL, along with the significant individualized training provided by industry members, successfully prepares utility line-clearance employees for the limited driving they will be required to perform.

As the proposed rule acknowledges, the standard curriculum proposed by the FMCSA is designed for tractor trailer drivers, and even in the long-haul trucking industry, the FMCSA lacks any evidence that additional training would reduce the frequency of crashes. For utility line-clearance employees, who drive under circumstances vastly different from long-haul drivers, the benefit of the proposed training is even more attenuated. The utility line-clearance industry should not be required to bear the substantial costs that these regulations would impose for a merely hypothetical benefit.

1. Given the lack of evidence that training is currently inadequate for drivers in the utility line-clearance industry, the FMCSA must conduct a separate rulemaking.

If the FMCSA determines that additional training is required for those industries in which driving is not a principal job function, then the Agency must assess the costs and benefits of the training and conduct a separate rule-making. The ULCC and other industry groups could then provide data about the training curricula that has been successful and targeted to the types of driving done in these industries.

2. If the FMCSA concludes that additional training is required in utility line-clearance and other industries where driving is not a primary function, then in-house trainers and curricula should be permitted.

As discussed, ULCC member companies already provide substantial driving training to employees, including behind-the-wheel training. The FMCSA provides no evidence that these types of in-house training programs are ineffective. More specifically, the FMCSA provides no evidence – and does not even make the assertion – that these in-house training programs are less effective than PTDI or similar curricula. Indeed, the FMCSA could not credibly make this claim because the curricula discussed in the proposal are designed for long-haul trucking and passenger transport and are therefore likely less effective than in-house programs designed by safety professionals who understand the equipment and types of driving utility line-clearance drivers perform. In-house programs such as those used by ULCC member companies also allow employees to operate the actual equipment they will be using rather than the tractor trailers used for long-haul trucking that are used by PTDI.

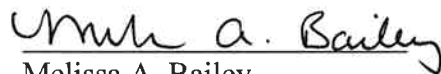
Similarly, the FMCSA lacks any evidence that in the utility line-clearance industry, training from an accredited institution results in safer driving. In fact, the ULCC questions whether the accredited institutions discussed in the proposal even offer the type of training that would be beneficial to utility line-clearance drivers given that the equipment trainees practice on consists of tractor trailers and other straight trucks of a design not used by the utility line-clearance industry.

Given the lack of evidence on these issues, any regulation requiring utility line-clearance drivers to receive training from an accredited training institution would be arbitrary and capricious.

IV. CONCLUSION

The ULCC submits that the FMCSA has not provided sufficient evidence showing that additional training will improve safety in the utility line-clearance industry. The FMCSA has also failed to properly assess and consider the costs of providing training in an industry like utility line-clearance where driving is incidental. As a result, any regulation requiring additional training in the utility line-clearance industry would be arbitrary and capricious. In the event the FMCSA determines that additional training for utility line-clearance drivers is necessary, in-house programs should be permitted because they emphasize the actual driving conditions drivers are likely to face and are conducted using the same equipment the driver will use.

Respectfully submitted,



Melissa A. Bailey
Anthony J. Marcavage
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
2400 N. Street, 5th Floor
Washington, DC 20037
202/887-0855

Counsel to the Utility Line Clearance Coalition