



# National Transportation Safety Board

Washington, D.C. 20594

## Safety Recommendation

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**Date:** October 4, 2011

**In reply refer to:** H-11-26 and -27  
H-09-34 and -21 (Reiteration)  
H-06-27 (Reclassification)

The Honorable Anne S. Ferro  
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On Friday, March 26, 2010, about 5:14 a.m. central daylight time, near Munfordville, Kentucky, a 1999 Freightliner truck-tractor in combination with a 1998 Strick Corporation 53-foot-long van semitrailer, owned by the motor carrier Hester, Inc., and being driven by a 45-year-old male, was traveling south on Interstate 65 (I-65) near milepost 61.5. The truck departed the left lane of southbound I-65 at a shallow angle and entered the 60-foot-wide depressed earthen median between the southbound and northbound roadways. The truck traveled across the median and struck and overrode the high-tension, four-cable, alternating-post median barrier adjacent to the left shoulder of northbound I-65. It then crossed the left shoulder and entered the travel lanes of northbound I-65.

At that time, a 2000 Dodge 15-passenger van, driven by a 41-year-old male and occupied by 11 passengers, was traveling northbound in the left lane. As the truck crossed in front of the van, its tractor was struck by the van. The van rotated clockwise and became engaged with the truck's trailer; the two vehicles continued across both travel lanes and the right shoulder of northbound I-65. As the truck and van traveled across the right shoulder, the van separated from the truck, struck the cut rock wall beyond the shoulder, and rebounded back into the travel lanes, coming to rest in the left lane of northbound I-65, facing south. The truck's tractor struck the cut rock wall, and the vehicle rolled onto its right side. As the truck came to rest across both northbound lanes, a fire ensued that destroyed the tractor and the sides and roof of the semitrailer.

As a result of the accident and subsequent truck fire, the truck driver, the van driver, and nine van passengers died. Two child passengers in the van, who were using child restraints, sustained minor injuries.<sup>1</sup>

The National Transportation Safety Board (NTSB) determined that the probable cause of this accident was the truck driver's failure to maintain control of the truck-tractor combination vehicle because he was distracted by use of his cellular telephone. Contributing to the severity of the accident were a median barrier that was not designed to safely contain or redirect the heavy vehicle and the lack of adequate guidance to the states in the form of high-performance median barrier warrants.

Among the issues the NTSB identified during its investigation were the need to prohibit the use of cellular telephones by drivers of commercial motor vehicles (CMV); the need to detect unsafe motor carriers attempting to obtain operating authority by submitting inaccurate or deceptive information to the Federal Motor Carrier Safety Administration (FMCSA); and the need to evaluate the performance of the FMCSA new entrant program.

## **Cellular Telephone Use by Commercial Drivers**

### ***Driver Distraction Due to Cellular Telephone Use***

In evaluating the possible role of cellular telephone distraction, the NTSB examined the proximity of cellular telephone use to the time and location of the accident, the nature of the cellular telephone use and how that use would affect driving performance, details about the calls based on witness interviews, and the nature of the driver error committed.

As indicated by the records of his cellular service provider, the truck driver repeatedly used his cellular telephone while driving. By mapping cellular tower service for the truck driver's telephone, investigators determined that the driver used his telephone to make calls, receive calls, send text messages, and receive text messages a total of 69 times while driving in the 24-hour period prior to the accident.

The truck driver placed four calls while driving on the morning of the accident; the first of these occurred at 4:28 a.m. He then received an incoming call at 4:51 a.m. The driver made additional outgoing voice calls at 5:03 a.m., 5:07 a.m., and 5:14 a.m. A friend of the driver said he received a call from the driver at 5:14 a.m. and talked to the driver about social plans, but he stated that the connection was dropped. According to the truck driver's cellular provider, the network did connect the two telephones, but the call duration was less than 1 second.<sup>2</sup> Consequently, the friend's recollection that he had a conversation with the driver is inconsistent with the information in the cellular telephone records. The friend's cellular records also show that he placed calls to the truck driver at 5:15 a.m., 5:16 a.m., 5:17 a.m., 5:19 a.m., 5:26 a.m., and 5:31 a.m. The persistence on the part of the friend, who made six calls in 16 minutes in an

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<sup>1</sup> For additional information, see *Truck-Tractor Semitrailer Median Crossover Collision With 15-Passenger Van, Munfordville, Kentucky, March 26, 2010*, Highway Accident Report NTSB/HAR-11/02 (Washington, DC: National Transportation Safety Board, 2011), which is available on the NTSB website at <<http://www.nts.gov/>>.

<sup>2</sup> According to the cellular provider of the friend who received the call, the duration of the call was 3 seconds. The provider indicated that it is not uncommon for a slightly longer duration in this range, as a result of system disconnect processing.

attempt to reach the truck driver, suggests that the suddenly dropped call may have been a cause of concern to the friend.

Based on the timing of known cellular telephone calls, the dropped call at 5:14 a.m., the repeated callback behavior of the friend (beginning at 5:15 a.m.), and the shallow departure angle of the accident vehicle from the roadway, the NTSB concluded that because he was distracted from the driving task by the use of his cellular telephone at the time of the accident, the truck driver did not maintain control of his vehicle.

### ***NTSB Recommendation History on Cellular Telephone Use***

In 2004, the NTSB investigated an accident involving a motorcoach that crashed into a bridge overpass on the George Washington Memorial Parkway in Alexandria, Virginia.<sup>3</sup> As the bus approached the Alexandria Avenue Bridge, it passed warning signs indicating that the bridge had only a 10-foot 2-inch clearance in the right lane. Nevertheless, the driver remained in the right lane and drove the 12-foot-tall bus under the bridge, colliding with the underside of the overpass, destroying the bus roof, and injuring 11 passengers. The bus driver reported that he had been talking on a hands-free cellular telephone when the accident occurred. The NTSB determined that the probable cause of this accident was the bus driver's failure to notice and respond to posted low-clearance warning signs and to the bridge itself, due to cognitive distraction resulting from conversing on a hands-free cellular telephone while driving. The NTSB's investigation resulted in the following recommendation to the FMCSA:

Publish regulations prohibiting cellular telephone use by commercial driver's license holders with a passenger-carrying or school bus endorsement, while driving under the authority of that endorsement, except in emergencies. (H-06-27)

Safety Recommendation H-06-27 is "Open—Acceptable Response." A companion recommendation was made to the 50 states and the District of Columbia, as follows:

Enact legislation to prohibit cellular telephone use by commercial driver's license holders with a passenger-carrying or school bus endorsement, while driving under the authority of that endorsement, except in emergencies. (H-06-28)

Safety Recommendation H-06-28 is currently classified with an "Open—Acceptable Response" overall status.

On September 27, 2010, the FMCSA issued a final rule that prohibits texting by CMV drivers while operating in interstate commerce and imposes sanctions, including civil penalties and disqualification, for drivers who fail to comply with this rule. Additionally, motor carriers are prohibited from requiring or allowing their drivers to engage in texting while driving.<sup>4</sup> On December 21, 2010, the FMCSA published a notice of proposed rulemaking (NPRM) proposing to restrict the use of handheld mobile devices, including handheld cellular telephones, by CMV drivers while operating in interstate commerce as a necessary component of an overall strategy to

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<sup>3</sup> *Motorcoach Collision with Alexandria Avenue Bridge Overpass, George Washington Memorial Parkway, Alexandria, Virginia, November 14, 2004*, Highway Accident Report NTSB/HAR-06/04 (Washington, DC: National Transportation Safety Board, 2006).

<sup>4</sup> *Federal Register*, vol. 75, no. 186 (September 27, 2010), p. 59118.

reduce the number of accidents caused by distracted driving.<sup>5</sup> The FMCSA has not yet issued a final rule from this rulemaking, but, according to the FMCSA, it will issue a final rule before the end of 2011.

Other transportation modes have addressed the restriction of cellular telephone use. For example, the Federal Railroad Administration issued Emergency Order 26, which restricts railroad operating employees from using distracting electronic and electrical devices while on duty; the order took effect in October 2008 and was subsequently codified in regulation.<sup>6</sup>

### ***Research on Driving Distractions***

Research has demonstrated that distractions while driving degrade several aspects of driving performance, resulting in slower reaction times, slower driving speeds, and more frequent lapses in attention.<sup>7</sup> Further, studies have shown that conversing on a hands-free cellular telephone while driving impairs performance.<sup>8</sup> This substantial body of research indicates that changes in driving behavior occur when the cognitive distraction of a cellular telephone conversation diverts attention from driving, and that the use of either a handheld or a hands-free cellular telephone while driving can impair performance. In the case of the Munfordville truck driver, investigators could not determine whether the driver was using a handheld or hands-free device when he placed the 5:14 a.m. call that precipitated the accident; however, either action would have resulted in cognitive distraction.

The NTSB firmly believes that commercial drivers must focus their attention on operating their large, heavy commercial vehicles rather than switching their attention between driving tasks and telephone use. The NTSB does not differentiate between handheld and hands-free devices because research shows that both types of cellular telephones produce performance degradation. The NTSB restated this position in its response to the December 2010 NPRM by the FMCSA that proposed prohibiting the use of handheld mobile devices, including handheld cellular telephones, by drivers of CMVs. In its response to the proposed rulemaking, the NTSB asked the FMCSA to go beyond the prohibition on handheld mobile device use proposed in the NPRM and to develop a final rule that would prohibit drivers' use of a handheld

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<sup>5</sup> *Federal Register*, vol. 75, no. 244 (December 21, 2010), p. 80014.

<sup>6</sup> Federal Railroad Administration docket FRA-2009-0118 and 49 *Code of Federal Regulations* Part 220.

<sup>7</sup> (a) D.L. Strayer and F.A. Drews, "Profiles in Driver Distraction: Effects of Cell Phone Conversations on Younger and Older Drivers," *Human Factors*, vol. 46, no. 4 (2004), pp. 640–649. (b) K.E. Beede and S.J. Kass, "Engrossed in Conversation: The Impact of Cell Phones on Simulated Driving Performance," *Accident Analysis and Prevention*, vol. 38, no. 2 (2006), pp. 415–421. (c) D.L. Strayer and W.A. Johnston, "Driven to Distraction: Dual-Task Studies of Simulated Driving and Conversing on a Cellular Phone," *Psychological Science*, vol. 12 (2001), pp. 462–466. (d) J.L. Harbluk, Y.I. Noy, and M. Eizenman, *The Impact of Cognitive Distraction on Driver Visual Behavior and Vehicle Control*, TP#13889E (Ottawa, Canada: Transport Canada, 2002). (e) D.L. Strayer, F.A. Drews, and W.A. Johnston, "Cell Phone-Induced Failures of Visual Attention During Simulated Driving," *Journal of Experimental Psychology-Applied*, vol. 9, no. 1 (2003), pp. 23–32.

<sup>8</sup> (a) C.J.D. Patten and others, "Using Mobile Telephones: Cognitive Workload and Attention Resource Allocation," *Accident Analysis and Prevention*, vol. 36, no. 3 (2004), pp. 341–350. (b) J.E.B. Tömros and A.K. Bolling, "Mobile Phone Use—Effects of Handheld and Handsfree Phones on Driving Performance," *Accident Analysis and Prevention*, vol. 37, no. 5 (2005), pp. 902–909. (c) D.A. Redelmeier and R.J. Tibshirani, "Association Between Cellular-Telephone Calls and Motor Vehicle Collisions," *The New England Journal of Medicine*, vol. 336, no. 7 (1997). (d) S. McEvoy and others, "Role of Mobile Phones in Motor Vehicle Crashes Resulting in Hospital Attendance: A Case-Crossover Study," *British Medical Journal* (July 2005).

or hands-free wireless device while operating a CMV. The NTSB took the same position in its comments on a recent Pipeline and Hazardous Materials Safety Administration NPRM proposing to prohibit the use of handheld mobile telephones, including handheld cellular telephones, by drivers during the operation of motor vehicles containing certain quantities and types of hazardous materials.<sup>9</sup> Therefore, the NTSB concluded that because changes in driving behavior occur when the cognitive distraction of a cellular telephone conversation diverts attention from driving, use of either a handheld or a hands-free cellular telephone while driving can impair driver performance.

### ***Safety Benefit of Prohibiting Cellular Telephone Use***

Wireless device use is pervasive in our society.<sup>10</sup> Although the use of cellular devices by accident drivers can be documented through records from cellular service providers, the distracting effect of these devices as a contributing factor in highway accidents is difficult to determine. It is usually necessary to attempt to obtain driver or eyewitness testimony. Beyond that evidence, which is rare, police officers must subpoena the billing records of the cellular service provider and analyze the time sequences for cellular use in relation to the accident timelines. Consequently, it is certain that accidents in which distraction due to use of wireless devices played a role are under-reported. NTSB analysis of Fatality Analysis Reporting System data (2005–2009) of fatal cross-median accidents on interstates determined that among vehicles that crossed the median, police cited cellular telephone use or presence as a potential contributing factor for 3.1 percent of passenger vehicles and 6.1 percent of truck-tractors.

The NTSB considers that driver education and rulemaking prohibiting the use of mobile cellular devices by commercial drivers would improve safety on the nation's highways by reducing the likelihood of, or preventing, accidents, as well as reducing the injuries and fatalities associated with distracted driving. This opinion is shared by the Motor Carrier Safety Advisory Committee (MCSAC), which has recommended rulemaking to ban the use of handheld and hands-free cellular telephones and text messaging by commercial driver's license (CDL) drivers.<sup>11</sup> Similarly, since January 2009, the National Safety Council has advocated a total ban on wireless device use while driving, saying that the practice is clearly dangerous and leads to fatalities.<sup>12</sup>

The research examining the expected efficacy of bans on cellular telephones has been mixed. The Insurance Institute for Highway Safety (IIHS) recently conducted a study assessing the safety outcomes, as measured by insurance collision loss rates, for both handheld telephone bans and texting bans.<sup>13</sup> The IIHS found that state bans on the use of handheld cellular

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<sup>9</sup> "Hazardous Materials: Restricting the Use of Cellular Phones by Drivers of Commercial Motor Vehicles in Intrastate Commerce," *Federal Register*, vol. 76, no. 83 (April 29, 2011), p. 23923.

<sup>10</sup> As of June 2010, there were 292.8 million wireless subscribers, and the U.S. population had a wireless penetration of 93 percent, according to midyear estimates by CTIA–The Wireless Association. See <[http://www.ctia.org/media/industry\\_info/index.cfm/AID10323](http://www.ctia.org/media/industry_info/index.cfm/AID10323)>, accessed March 6, 2011.

<sup>11</sup> This position was reflected in a March 27, 2009, letter from the MCSAC chairperson to the FMCSA concerning the MCSAC National Agenda for Motor Vehicle Safety.

<sup>12</sup> For additional information concerning the position of the National Safety Council, see <<http://www.nsc.org/Pages/NationalSafetyCouncilCallsforNationwideBanonCellPhoneUseWhileDriving.aspx>>, accessed July 25, 2011.

<sup>13</sup> See <[http://www.iihs.org/research/topics/pdf/HLDI\\_Bulletin\\_27\\_11.pdf](http://www.iihs.org/research/topics/pdf/HLDI_Bulletin_27_11.pdf)>, accessed July 5, 2011.

telephones have not decreased insurance claim rates. In a similar IIHS study of four states (California, Louisiana, Minnesota, and Washington) where the effect of texting bans could be evaluated, three of the four states experienced a statistically significant increase in insurance collision rates. In July 2011, the Governors Highway Safety Association (GHSA) released a report reviewing distracted driver research.<sup>14</sup> In part, the report was based on a search of 8 major research databases that included over 350 scientific papers on distracted driving published in the past decade. The GHSA report concluded that there was no evidence that cellular telephone laws have reduced crashes. (One limitation of these studies is that none of the bans examined included hands-free cellular telephone use.)

The NTSB examined research on the effectiveness of company policies in limiting cellular telephone use by commercial drivers. The FMCSA considered the prevalence of crashes and near-crashes related to telephone use in a naturalistic study of commercial truck and bus drivers.<sup>15</sup> Unlike previous naturalistic research on commercial drivers, company cellular telephone policy was included as a variable. The study found that a company's cellular telephone policy was effective in reducing cellular telephone use by drivers. Further, the FMCSA study found that drivers working for companies with a cellular telephone policy also had fewer cellular telephone-related safety-critical events than drivers working for a company with no cellular telephone policy. Additional research supporting the benefits of company cellular telephone policy was conducted by the Network of Employers for Traffic Safety, which considered the crash rates per million miles of 45 companies from diverse industries.<sup>16</sup> The study included approximately 400,000 vehicles that logged more than 8 billion miles during 2009. This study found that company vehicle fleet crash rates were lowest at companies that had policies prohibiting cellular telephone use (both handheld and hands-free) and that had established strong consequences, including termination, for employees who violated such policies.

The efficacy of company cellular telephone policies may be related to the safety culture the company projects by employing such a policy. Further, companies with cellular telephone policies can provide a strong deterrent to violating the policy, through negative performance evaluations or employment termination. A prohibition on cellular telephones for commercial drivers would require all carriers affected by the ban to develop effective cellular telephone policies.

The circumstances of the Munfordville accident illustrate that the prohibition against cellular telephone use—both handheld and hands-free—should apply to all operators of CMVs, not just passenger-carrying drivers, as was recommended in Safety Recommendation H-06-27. No professional CDL driver should be using a cellular telephone, even in a hands-free mode, while operating a CMV. Commercial drivers, as evidenced by their required training, medical certification, and Federal oversight, are held to a higher safety standard than are private drivers.

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<sup>14</sup> E. Williams-Bergen and others, *Distracted Driving, What the Research Shows and What the States Can Do* (Governors Highway Safety Association, July 2011). The full text of the report is available at <<http://statehighwaysafety.org/html/publications/pdf/sfdist11.pdf>>, accessed July 22, 2011.

<sup>15</sup> J.S. Hickman, R.J. Hanowski, and J. Bocanegra. *Distraction in Commercial Trucks and Buses: Assessing Prevalence and Risk in Conjunction With Crashes and Near-Crashes*. Report No. FMCSA-RRR-10-049 (September, 2010).

<sup>16</sup> *Fleet Safety Benchmark Report Data Year 2009*, Network of Employers for Traffic Safety and SMS/FleetRisk Advisors (October 2010).

These factors indicate that CMV drivers should be required to maintain a higher degree of safety with respect to cellular telephone use, as well. Therefore, the NTSB reclassifies Safety Recommendation H-06-27 to the FMCSA “Closed—Superseded.” To supersede Safety Recommendation H-06-27 with a broader recommendation, the NTSB recommends that the FMCSA prohibit the use of both handheld and hands-free cellular telephones by all CDL holders while driving in commercial operations, except in emergencies. Similarly, the NTSB reclassified Safety Recommendation H-06-28 to the 50 states and the District of Columbia “Closed—Superseded.” The NTSB recommended that the 50 states and the District of Columbia prohibit the use of both handheld and hands-free cellular telephones by all CDL holders while driving in commercial operations, except in emergencies.

In addition to cellular telephone use and distraction, the NTSB investigation of this accident addressed FMCSA oversight of motor carriers.

## **FMCSA Motor Carrier Oversight**

### ***Motor Carrier Safety Assessment***

Between starting operation in March 2004 and the date of the accident, the accident motor carrier, Hester, Inc., had not undergone an FMCSA compliance review. The FMCSA conducted a safety audit of Hester in November 2005 before granting the carrier permanent operating authority. The Safety Status Measurement System (SafeStat) oversight program in effect for 2004–2010 identified some problems with Hester. As a result, the carrier was rated “inspect” for roadside driver/vehicle safety inspections. Hester’s vehicle out-of-service rate was similar to industry averages, and its accident rate was below 1.5 accidents per million miles traveled (the rate the FMCSA deems deficient for the purposes of compliance review ratings). However, Hester’s driver out-of-service rate was 11.0 percent, more than twice the industry average (5.3 percent). Hester had a safety rating of “E” as a result of roadside inspections. This rating corresponded to a low priority for compliance review.

Following the accident, the FMCSA conducted a compliance review of Hester in April 2010 that resulted in an “unsatisfactory” rating based on three critical violations and one acute violation. Violations were associated with driver and operational areas. The FMCSA did not accept Hester’s corrective action plan, and it issued a cease operations order, to be effective June 5, 2010, and fined the carrier \$13,950 for violations.

The NTSB notes that the postaccident compliance review affirmed what was indicated by roadside inspections, that Hester had inadequate safety controls related to drivers. As a matter of resource allocation, the FMCSA prioritizes compliance reviews, and Hester’s overall rating did not call for a compliance review. The NTSB remains concerned that a carrier can perform poorly in one safety area and not be required to address this poor performance.

The NTBS has two open recommendations related to the safety rating and the compliance system that the FMCSA is currently revising and implementing, Safety Recommendations H-99-6 and H-07-3:

Change the safety fitness rating methodology so that adverse vehicle and driver performance-based data alone are sufficient to result in an overall unsatisfactory rating for the carrier. (H-99-6)

To protect the traveling public until completion of the Comprehensive Safety Analysis 2010 Initiative, immediately issue an Interim Rule to include all *Federal Motor Carrier Safety Regulations* in the current compliance review process so that all violations of regulations are reflected in the calculation of a carrier's final rating. (H-07-3)

The current status of both recommendations is "Open—Unacceptable Response." The NTSB understands that the FMCSA is currently revising its safety rating and compliance system as it implements the Compliance, Safety, and Accountability (CSA) program, and the Board anticipates that, when fully implemented, the program will address these two recommendations.

The NTSB is concerned that the CSA program, which supersedes the oversight functions of the FMCSA's previous programs, has been in development for years and has only been partially realized. Based on the FMCSA Administrator's June 23, 2010, testimony before Congress, the NTSB anticipates a final rule on the CSA program's Carrier Safety Fitness Determination to be published for comment by the end of 2011.<sup>17</sup>

#### ***Hester's Postaccident Relationship With FTS Fleet Services***

Hester had a business relationship with the transportation broker FTS Fleet Services. Following the March 2010 accident, the president of Hester approached the owner of FTS Fleet Services about the possibility of its buying Hester. Both principals subsequently told the FMCSA that a purchase transaction had taken place, resulting in FTS Fleet Services becoming the new owner of Hester. The FMCSA put Hester out of operation on June 5, 2010; but on June 7, 2010, the FMCSA unknowingly granted the business operation that had been Hester authority to operate as a motor property common carrier under the name FTS Fleet Services. This firm was placed in the FMCSA new entrant program and continued its trucking operations throughout the summer.

Between May and October 2010, five MCS-150 forms were filed indicating significant changes in the operations of FTS Fleet Services. All five submissions were signed by the principal owner of Hester; three indicated that the carrier's vehicles were addressed in Fayette, Alabama; two gave the address as Little Rock, Arkansas. The number of vehicles and trailers differed on each submission, ranging from 26–52 trucks and 60–126 trailers. Media attention in September 2010 prompted the FMCSA to initiate an investigation into the business relationship between FTS Fleet Services and Hester. In late October 2010, the FMCSA conducted a compliance review of FTS Fleet Services in Fayette, Alabama, at the physical location that had been the business premises of Hester.

FMCSA management in Washington, DC, began investigating Hester's affiliation with FTS Fleet Services. The principals of the original FTS Fleet Services and of Hester told the FMCSA that a purchase transaction had taken place. However, FTS Fleet Services was unable to produce a purchase contract for Hester. The vehicles and the physical location of the carrier

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<sup>17</sup> As of July 22, 2011, the regulatory calendar on the FMCSA website identified the publication date for the CSA final rule as December 29, 2011.



FTS Fleet Services were the same as those of Hester, and the names of company officials for both Hester and FTS Fleet Services appeared in the application documents of the “new” motor carrier. On November 1, 2010, a week after the October compliance review, the FMCSA investigators returned and conducted an additional investigation, which eventually resulted in a “non-rated” status determination for the carrier. The FMCSA ultimately determined that FTS Fleet Services had not purchased Hester.

A settlement agreement was reached in January 2011, which indicated that the FMCSA determined that the FTS Fleet Services operation was a continuation of Hester’s operation. As a result of the continuing operation of Hester and FTS Fleet Services (referred to jointly in the settlement as the “respondent”), the FMCSA issued a pending claim for \$35,080 against the respondent for violations.<sup>18</sup> However, the FMCSA and the respondent agreed to a settlement of \$13,950, and the FMCSA agreed to review the respondent’s safety rating on or before February 4, 2011. Although the FMCSA eventually identified the Hester/FTS Fleet Services relationship, the identification was made only because of a special examination, not through the usual oversight methods.

In effect, Hester operated as a motor carrier for months after receiving the FMCSA’s cease operations order. FTS Fleet Services tried to assist in Hester’s circumvention of the oversight system and eventually was operating from the Hester facility with many of the same trucks and drivers that Hester had used. Consequently, the NTSB concluded that the postaccident continuation of Hester’s operations, despite a cease operations order against the firm, shows that FMCSA oversight was inadequate to detect a deceptive and unsafe carrier in a timely manner.

### ***NTSB Past Recommendations on Oversight of New Motor Carriers***

The NTSB has issued many recommendations concerning FMCSA oversight of new motor carriers. Some are relevant to the discussion of Hester.

In its report on an accident that took place in Victoria, Texas,<sup>19</sup> the NTSB recommended that the FMCSA take action to deter falsification of applicant filings, as stated in Safety Recommendation H-09-34:

Seek statutory authority to deny or revoke operating authority for commercial interstate motor carriers found to have applications for operating authority in which the applicant failed to disclose any prior operating relationship with another motor carrier, operating as another motor carrier, or being previously assigned a U.S. Department of Transportation number. (H-09-34)

The FMCSA has indicated that it is using its New Applicant Screening (NAS) Program tool, as well as manual research, to identify passenger carriers that may be trying to use the new entrant process to evade outstanding enforcement orders. On this basis, and while awaiting information as to whether the reauthorization legislation under consideration by Congress will allow the FMCSA to deny or revoke operating authority for commercial interstate motor carriers

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<sup>18</sup> FMCSA case number AL-2011-0182-US1225, January 7, 2011.

<sup>19</sup> *Motorcoach Rollover on U.S. Highway 59 Near Victoria, Texas, January 2, 2008*, Highway Accident Report NTSB/HAR-09/03/SUM (Washington, DC: National Transportation Safety Board, 2009).

that have submitted fraudulent applications, the NTSB classified Safety Recommendation H-09-34 “Open—Acceptable Response” on September 9, 2011.

The FMCSA’s NAS Program uses data to identify newly registered carriers that may have a history of enforcement problems. The screening process seeks matches between new registrants and information provided by previously registered motor carriers. In a series of MCS-150 filings during summer 2010, Hester and FTS Fleet Services provided the FMCSA with false and incomplete information. The result was that FTS Fleet Services was included in the \$13,950 fine associated with Hester’s April 2010 compliance review, but the FMCSA imposed no other penalty on either firm with respect to their efforts at falsification and deception. The NTSB concluded that if no significant consequences result when motor carriers intentionally provide false information to the FMCSA, noncompliant motor carriers will continue to try to evade the system and reregister as reincarnated carriers. In a June 13, 2011, oral statement regarding bus safety before the U.S. House of Representatives Committee on Transportation and Infrastructure, the FMCSA Administrator stated that the FMCSA had “provided technical assistance to Congress for authority” to deal with unsafe bus operators, including establishing a “successor liability” standard for reincarnated companies and substantially higher penalties for companies that attempt to operate illegally. The FMCSA must develop similar capabilities for all motor carriers, not just bus operations. Consequently, the NTSB reiterates Safety Recommendation H-09-34 to the FMCSA.

Further, this accident and the associated investigation illustrate that the FMCSA must develop additional means of identifying unsafe motor carriers trying deceptively to re-enter the industry. The FMCSA has been using the NAS Program to identify passenger carriers with histories of poor safety performance. The agency has been applying the NAS Program screening process to newly registered passenger carriers before granting them operating authority. Had the NAS Program screening process been applied to the “FTS Fleet Services” cargo carrier that sought operating authority in summer 2010, its system of inspecting, comparing, and matching corporate identification information might have detected the suspicious relationship between this “new” carrier and the “out-of-business” Hester, which had an outstanding fine for safety compliance violations. Thus, the NTSB concluded that expanding the NAS Program to include all new motor carrier entrants, rather than limiting it to passenger-carrying operations, could help the FMCSA detect reincarnated and unsafe cargo carriers. Therefore, the NTSB recommends that the FMCSA apply the vetting criteria of the NAS Program to the information submitted by all new entrant motor carriers.

As a result of its investigation of a 2008 motorcoach accident near Sherman, Texas,<sup>20</sup> the NTSB made a recommendation to the FMCSA to determine the efficacy of its NAS Program. Specifically, Safety Recommendation H-09-21 asked the FMCSA to take the following action:

Develop an evaluation component to determine the effectiveness of your New Applicant Screening Program. (H-09-21)

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<sup>20</sup> *Motorcoach Run-Off-the-Bridge and Rollover, Sherman, Texas, August 8, 2008*, Highway Accident Report NTSB/HAR-09/02 (Washington, DC: National Transportation Safety Board, 2009).

Safety Recommendation H-09-21 is classified “Open—Acceptable Response,” pending implementation of a system for state agencies to conduct background investigations on applicants and to effectively screen new applicants. The FMCSA has made a host of programmatic changes in the last year; however, the performance of the newly instituted changes has not yet been assessed. A program such as NAS, which seeks to identify unsafe motor carriers, cannot be adequately measured by how many unsafe carriers are identified—it is also important to know how many are not detected. The NTSB recognizes that the FMCSA does not have the resources to conduct periodic compliance reviews of all motor carriers. However, the compliance review process offers the FMCSA the opportunity to evaluate how well the NAS Program worked in characterizing any motor carrier that underwent the initial screening process. For example, the NTSB conducted a comparison between the elements of Hester’s 2010 postaccident compliance review and the 16 automatic failure regulations established in the 2008 new entrant final rule and determined that the FMCSA would have failed the carrier in a safety audit under that rule.<sup>21</sup> By comparing the failed elements of a compliance review against the results of the NAS Program screening for that carrier, the effectiveness of the NAS Program can begin to be assessed. The NTSB concluded that failure to compare the data obtained from the NAS Program review of a motor carrier with subsequent compliance review data for that carrier represents a missed opportunity to assess the effectiveness of the NAS Program. Consequently, the NTSB reiterates Safety Recommendation H-09-21 to the FMCSA.

As a result of the investigation, the National Transportation Safety Board makes the following safety recommendations to the Federal Motor Carrier Safety Administration:

Prohibit the use of both handheld and hands-free cellular telephones by all commercial driver’s license holders while operating a commercial vehicle, except in emergencies. (H-11-26) [This recommendation supersedes Safety Recommendation H-06-27.]

Apply the vetting criteria of the New Applicant Screening Program to the information submitted by all new entrant motor carriers. (H-11-27)

The National Transportation Safety Board also reiterates the following recommendations to the Federal Motor Carrier Safety Administration:

Seek statutory authority to deny or revoke operating authority for commercial interstate motor carriers found to have applications for operating authority in which the applicant failed to disclose any prior operating relationship with another motor carrier, operating as another motor carrier, or being previously assigned a U.S. Department of Transportation number. (H-09-34)

Develop an evaluation component to determine the effectiveness of your New Applicant Screening Program. (H-09-21)

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<sup>21</sup> Failure would have resulted for Hester’s not being in compliance with 49 *Code of Federal Regulations* 383.37(a), “Knowingly allowing, requiring, permitting or authorizing an employee with a CDL which is suspended, revoked, or cancelled by a State or who is disqualified to operate a commercial motor vehicle.”

The National Transportation Safety Board reclassifies the following recommendation to the Federal Motor Carrier Safety Administration:

Publish regulations prohibiting cellular telephone use by commercial driver's license holders with a passenger-carrying or school bus endorsement, while driving under the authority of that endorsement, except in emergencies. (H-06-27)

Safety Recommendation H-06-27 is reclassified "Closed—Superseded."

The NTSB also issued safety recommendations to the Federal Highway Administration, the National Highway Traffic Safety Administration, the 50 states and the District of Columbia, the Commonwealth of Kentucky, the American Association of State Highway and Transportation Officials, and the Governors Highway Safety Association.

In response to the recommendations in this letter, please refer to Safety Recommendations H-11-26 and -27, H-09-34 and -21, and H-06-27. If you would like to submit your response electronically rather than in hard copy, you may send it to the following e-mail address: [correspondence@ntsb.gov](mailto:correspondence@ntsb.gov). If your response includes attachments that exceed 5 megabytes, please e-mail us asking for instructions on how to use our secure mailbox. To avoid confusion, please use only one method of submission (that is, do not submit both an electronic copy and a hard copy of the same response letter).

Chairman HERSMAN, Vice Chairman HART, and Members SUMWALT, ROSEKIND, and WEENER concurred in these recommendations.

*[Original Signed]*

By: Deborah A.P. Hersman  
Chairman