



Mr. T.F. Scott Darling, III
Acting Administrator
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

Re: Docket No. FMCSA–2015–0481; Motor Carriers of Passengers That Serve Primarily Urban Areas with High Passenger Loads

Dear Acting Administrator Darling:

On behalf of the American Bus Association (ABA), I appreciate the opportunity to comment on the Federal Motor Carrier Safety Administration’s (FMCSA or Agency) *Notice of information and request for comments*, concerning the implementation of Section 32707 of the Moving Ahead for Progress in the 21st Century Act (MAP-21).

The ABA is a trade association representing the interests of over 750 intercity bus operators in North America, in addition to tour and travel interests, and motorcoach manufacturers and suppliers. ABA member motorcoach companies offer a variety of bus service options, including scheduled intercity service over regular routes, charter service, tour service, commuter bus service, and special operations. In this capacity, the ABA is well positioned to comment on a proposal to define a new “curbside” category of motor carriers of passengers.

In brief, ABA sees no need for creating a new definition. According to the proposal, the Agency believes it necessary to define the term “curbside” for purposes of implementing a MAP-21 provision. We respectfully disagree, for the following reasons: 1) The law does not require, let alone mention the term “curbside,” nor is the definition necessary to fulfill the MAP-21 statutory requirement; 2) For the purpose of the MAP-21 provision, location of pick-up has nothing to do with safety or high risk; and 3) based on precedent, location of pick up/drop-off of passengers is not a basis for establishing a category of motor carriers.

1. The Law

As noted, ABA and its members see no justification in law or otherwise, for the Agency to define a new class of passenger motor carriers based on pick-up/drop-off locations. The MAP-21 provision, codified at 49 U.S.C. 31144(i), makes no mention of the term “curbside.” Rather, the text explicitly identifies the motor carriers to be subject to the annual assessment as “*motor carriers of passengers that serve primarily urban areas with high passenger loads*” (emphasis added). There is no reference in the provision to the physical location of where motor carriers of

passengers pick up/drop-off passengers, let alone the term “curbside.” The Agency, instead, is choosing to interpret Congress’s intent by incorporating a concept developed by the National Transportation Safety Board (NTSB). The NTSB developed this concept in a report prepared in the wake of several motorcoach accidents that occurred in 2011.¹ However, as the NTSB report explains, the term “curbside” refers to a business model, and not actual motorcoach operations or types of service, as such it incorporates motorcoach carriers of all sizes and conducting all types of operations. This was not Congress’s intent. At the time the MAP-21 provision was developed (2012), Congress had the benefit of the NTSB report to support its deliberations (published in 2011); however, Congress chose not to adopt or reference the NTSB definition for this provision, and instead referenced passenger load and service area.

Further, FMCSA’s explanation that it does not collect information on urban area service and passenger load, is not satisfactory. If the Agency does not currently collect appropriate information to effectively implement the statute as written, then the Agency should modify its information collection activities. The ABA stands ready to assist with such an initiative. Recently, a federal indictment was issued against a number of operators who purported to be based in rural Pennsylvania, when in fact their operations actually occurred in urbanized areas. The ABA is very concerned this practice is not uncommon. The MAP-21 provision provides FMCSA a prime opportunity to take the initiative here to address these types of fraudulent activities, rather than misguidedly spin its wheels with pick-up/drop-off locations.

2. Safety

The purpose of the MAP-21 provision is to address an identified safety need by mandating annual *safety fitness* assessments. Taking into the account the Agency’s resources and the need to effectively implement the statute, ABA believes FMCSA should focus its attention strictly on safety criteria. As mentioned, the statute provides two parameters for how FMCSA should identify the appropriate carriers for annual safety fitness assessments, and these parameters can be justified in terms of safety, i.e. the amount of commodity carried (high passenger load) and the routing of travel (serve primarily urban areas). How often or to what extent an operator engages in service that may or may not use a terminal or stations, has no bearing on the safety of the operation. Thus, the Agency can provide absolutely no safety justification for using location of passenger pickup, let alone identify a percentage of fleet operations as an appropriate target. If the definition for determining who is subject to an annual safety fitness assessment incorporates the pick-up/drop off location of passengers, FMCSA will miss another opportunity to improve safety, along with failing to implement the statute.

As NTSB noted in its executive report, the concept of “curbside” takes into account all types of motorcoach carriers, with varying characteristics, and all forms of motorcoach services.² The report also states, reviewing the safety records of motorcoach operators that fit within their curbside concept, the safety record of individual curbside carriers vary, “with some carriers

¹ Note: FMCSA points out in the NPRM that *only some* of the motorcoach crashes in 2011 involved “curbside” carriers, per NTSB’s description, see 81 Fed. Reg., No. 26, p. 6925, further undermining the agency’s attempt to tie “curbside” to the MAP-21 provision.

² See, “Executive Report on Curbside Motorcoach Safety”, National Transportation Safety Board, Special Report, NTSB/SR-11/02, PB2011-917003, adopted October 11, 2011, p. 2.

having very good safety records and others having worse safety records.”³ Finally, the report concludes “[m]otorcoach safety is not a function of whether passengers are picked up and dropped off at a curbside or a terminal,”⁴ but instead is influenced by operational management and drivers.

The NTSB findings and conclusion are not surprising. Consider the Fung Wah Bus Company (U.S. DOT # 954317, now inactive), a prime example of the type of operations over which Congress is seeking to increase oversight⁵. Yet, it is unclear whether Fung Wah would even fall within FMCSA’s proposed definition because the company operated at a terminal; specifically, it maintained two gates at the Massachusetts Bay Transportation Authority’s South Station in Boston. In short, the location of passenger pick-up/drop-off has nothing to do with motor carrier safety. Instead, as the NTSB concludes, it is the individual company and drivers that deserve scrutiny. For this reason, the Agency is misguided in its attempt to establish a “curbside” definition for the purpose of implementing a statute intended to advance safety.

3. Categories of Motor Carriers

The purpose of the MAP-21 provision, as previously noted, is to address a safety concern. However, FMCSA’s proposed “curbside” definition is not in line with precedent, in terms of distinguishing a category or class of motor carriers for safety purposes. Based on precedent, the purpose for distinguishing a specific class of carriers relates to either the commodity being transported or the vehicle used to transport the commodity. These two distinctions are justified in terms of safety. For example, transporters of hazardous materials often carry commodities that pose a danger to the public if not properly contained, and therefore the operations of transporters of such commodities are distinguished in terms of oversight and regulation, as warranted by requiring a higher standard of care. In terms of transporters of passengers, by virtue of carrying people versus cargo, there is also justification for requiring a higher standard of care through tailored oversight and regulation. This is evidenced, by the fact passenger carriers are subject to additional reviews, as compared to property carriers. The federal scheme also recognizes the need for a distinction in oversight and regulation for certain types of vehicles due to their size and nature. These vehicles pose a higher risk to the public when operating on shared roads and so warrant distinct oversight and regulation.

However, in terms of pick-up/drop-off locations, there is no basis for making a distinction among motorcoach operations. Or, in other words, the standard of care is the same. Whether a motor carrier of passengers picks up passengers at a station or terminal or from a public street or parking lot, the carrier is using the same type of vehicle and the “commodity” is people. The operations are indistinguishable, other than the location of pick-up/drop-off. In fact, an operator may use all three locations, in a single trip. In the case of charter and tour operators, curbside pick-up/drop-off of passengers is a routine practice. For that matter, it would be a rare occasion when a motorcoach is *not*, literally, picking up passengers from a curb.

³ Ibid.

⁴ Ibid. p. 18.

⁵ <http://newyork.cbslocal.com/2013/02/26/us-dot-orders-fung-wah-bus-to-immediately-cease-passenger-service/>

Alternatively, the MAP-21 provision identifies two criteria that align with precedent for distinguishing a category of motor carriers based on safety. The provision identifies motor carriers of passengers with “high passenger loads.” This distinction is specific and, contrary to FMCSA’s interpretation, means more than simply a motorcoach. As Section 31144(i)(B) indicates, the entire MAP-21 provision applies to motorcoaches, whereas Congress explicitly calls out motor carriers with “high passenger loads” in §31144(i)(4)(B). This distinction clearly expresses the intent for a specific group of motorcoach operators to be subject to the annual safety assessment requirement, and not simply all motorcoach operators by virtue of operating a motorcoach. Further, Congress explicitly calls out operations that “serve primarily urban areas,” again, clearly expressing Congressional intent to target a specific group of operators. Based on precedent, these criteria have served as safety justification for distinguishing transportation operations in terms of oversight and regulation. Under the hazardous materials regulatory scheme, the amount of a hazardous material to be transported, determines the appropriate level of regulatory oversight. As well, within the hazardous materials regulatory scheme and elsewhere, transportation routing, or where the commodity or vehicle will be traveling, has been used as a factor in determining appropriate regulatory oversight.

Also, in response to FMCSA’s request and in support of ABA’s position opposing the Agency’s action to establish a new category of passenger carrying motor carriers based on pick-up/drop-off location, ABA responds to the following questions:

1. *Should FMCSA identify all motor carriers of passengers that have both curbside operations and operations that originate/terminate at a traditional bus terminal as curbside bus operators requiring an annual safety assessment?*

The FMCSA should not be establishing a definition for curbside, but look to the statutory text and existing definitions and methodologies. At most, it should consider modifying its information collection activities.

2. *Should a motor carrier of passengers that uses 25% or more of its motorcoaches for curbside operations be identified by FMCSA as a curbside bus operator requiring an annual safety assessment?*

The FMCSA provides no justification for choosing 25% as a threshold or target to support a new definition. Rather, the Agency should rely on the statutory text and existing definitions and methodologies to support implementing the MAP-21 provision.

3. *Should FMCSA base the percentage of curbside operations on the number of motorcoaches used in that type of service? If not, then what measure should be used?*

The FMCSA should not be establishing a category of passenger motor carriers based on a business model that bears no relation to safety, when implementing a safety statute.

4. *Should FMCSA include passenger carrier operations that pick up passengers at the curbside in vehicles smaller than motorcoaches with the intent of transferring the passengers*

to a larger passenger vehicle such as a motorcoach as curbside bus operators requiring an annual assessment (sic)?

In terms of implementing the statute, there is no justification for using the location of pick-up/drop-off of passengers as a basis for determining motor carriers of passengers that should undergo an annual safety fitness assessment. Further, FMCSA is misguided by interpreting “high passenger load” as synonymous with the term “motorcoach.” If Congress had intended this outcome, it could easily have used the term “motorcoach” in this subparagraph, as it did in Section 31144(i)(B).

5. Should a motor carrier of passengers applicant be required to self-identify as a curbside operator during registration with FMCSA?

See previous answers.

6. Should a motor carrier of passengers previously registered with the FMCSA be required to self-identify as a curbside operator when updating its registration information as required by 49 CFR 390.201?

See previous answers.

7. Should FMCSA base the definition of an urban area on population, incorporated land area, defined commercial zones, urbanized area as defined by the U.S. Census Bureau, or some other criteria?

The ABA believes the Agency should rely on the established definition of urban area as defined by the U.S. Census Bureau.

8. Should a motor carrier of passengers with 25% or more of its motorcoach operation taking place in primarily urban areas be identified by FMCSA as a curbside bus operator requiring an annual safety assessment?

The FMCSA should not be establishing a category of passenger motor carriers based on a business model that bears no relation to safety, when implementing a safety statute.

9. Is there any additional criteria we should consider to identify which motor carrier of passenger should be defined as a curbside bus operator requiring an annual safety assessment?

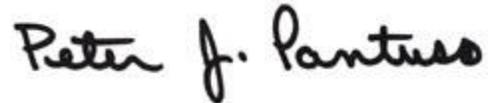
The FMCSA should not be establishing a category of passenger motor carriers based on a business model that bears no relation to safety, when implementing a safety statute.

In sum, the MAP-21 provision does not mention or reference the location for where a motor carrier picks up or drops off its passengers. The provision was intended to address a safety need, but, as supported by the NTSB, motorcoach safety is not a function of passenger pick-up/drop-off locations. Further, the basis for distinguishing motor carriers for purposes of safety reasons,

historically, has related to the type of commodity and vehicle involved and the need to establish a higher standard of care. However, with regard to FMCSA's proposed curbside definition, there is no distinction between a commodity or a vehicle, in terms of curbside versus non-curbside operations. In short, the proposal to establish a definition of curbside for purposes of implementing the MAP-21 provision is misguided. The Agency should instead rely on statutory text to implement the provision. If it then needs to supplement the statute, rather than creating a new definition or using random percentages, it should instead look to existing vernacular and methodologies. For example, FMCSA has already established a carrier prioritization process to identify high risk carriers. To be consistent, the Agency could use this methodology to support its determinations for annual safety fitness assessments.

ABA appreciates the opportunity to submit these comments and is available to answer any follow-up questions concerning this submission.

Sincerely,

A handwritten signature in black ink that reads "Peter J. Pantuso". The signature is written in a cursive, slightly slanted style.

Peter J. Pantuso
President & CEO