

represent a significant portion of the affected population. For instance, in the 1987 through 1989 model years, chassis-cabs represented 86 percent of sales of incomplete trucks with a GVWR above 10,000 pounds. Based on inquiries with manufacturers, NHTSA believes that this percentage is now much larger. Finally, even where pass-through certification is not available, incomplete vehicle manufacturers provide certification data for specific Federal motor vehicle safety standards that can be used by the final stage manufacturer to certify compliance without having to do any testing. Examination of this documentation shows that final stage manufacturers are usually provided with an envelope within which the vehicle center-of-gravity can be located and the axle loadings that can be used in order for the vehicle to meet either Standard No. 105 or Standard No. 121. Incomplete vehicle manufacturers strive to make this information as complete as possible in order to serve their customers. Therefore, NHTSA believes that occurrences where final stage manufacturers may not rely on pass-through certification or vehicle certification data from the incomplete vehicle manufacturer will be rare and would represent a significantly smaller percentage of the affected vehicles than the 20 percent claimed by NTEA.

NTEA also argues that the tremendous variety of vehicle configurations produced by its members compels the conclusion that NHTSA cannot require these member companies to perform the braking-in-a-curve test. This argument is based on two assertions. The first is that its members who do not use chassis-cabs and do not have pass-through certification have no choice but to perform compliance testing to demonstrate compliance with FMVSS Nos. 105 and 121. The second is that for those manufacturers, the costs of testing are so great as to make it impracticable. As testing must be both objective and practicable and NTEA's members have no choice but to test, the costs of the braking-in-a-curve test, in NTEA's view, preclude use of the test.

The NTEA position relies heavily on the decisions in two prior challenges the agency final rules, *Paccar, Inc. v. National Highway Traffic Safety Administration*, 573 F.2d 632 (9th Cir.), cert. denied, 439 U.S. 862, 99 S. Ct. 184, 58 L. Ed. 2d 172 (1978) and *NTEA v. National Highway Traffic Safety Administration*, 919 F.2d 1148, 1152–53 (6th Cir. 1990) where the courts rejected the agency's argument that compliance could be demonstrated by a showing of due care when tests are not performed. In both cases, NHTSA had conceded

that the required tests were impracticable. This left the courts to consider the question of whether the due care standard provided sufficient guidance to manufacturers when no compliance test was available. The *Paccar* court, describing the due care standard as "amorphous," found that NHTSA's "suggestions" of what constituted due care to be too imprecise to assist those trying to meet the standard at issue. In the *NTEA* case, the court followed the earlier *Paccar* decision and held that NHTSA could not impose a due care requirement on final stage manufacturers for whom the designated test was impracticable. NTEA argues that imposing the braking-in-a-curve test to final stage manufacturers is equally impracticable as the tests involved in both the *Paccar* and *NTEA* decisions. As the agency has not proposed any alternative to the test other than to establish compliance through due care, NTEA contends that NHTSA cannot now apply the braking-in-a-curve test to final stage manufacturers.

NHTSA does not agree with NTEA's analysis. We note first that NTEA did not provide any data supporting its position that the braking-in-a-curve test is so costly as to be impracticable. In fact, NTEA's comments do not contain any cost estimates for this test. In the absence of any cost estimates, NTEA stresses that the tremendous variety of vehicles made by final stage manufacturers who cannot rely on pass-through certification supports the premise that the braking-in-a-curve test is impracticable. According to NTEA, requiring final stage manufacturers to perform the braking-in-a-curve test is tantamount to requiring that every vehicle produced by these manufacturers must undergo this test. However, as is the case with cost estimates for the test itself, NTEA does not provide any data on the production of final stage manufacturers, including how many manufacturers produce models in extremely low volumes. In some instances, final stage manufacturers will be able to spread the cost of testing over the production run of similar vehicles. In other instances, manufacturers may have to perform testing of a single vehicle. Unlike the tests involved in both the *Paccar* and *NTEA* cases, the braking-in-a-curve test simply adds a new component to a braking test sequence that manufacturers are already required to perform. This incremental addition to the existing test sequence does not, in contrast to the test in the *NTEA* case, damage the test vehicle.

We estimate that the incremental cost of performing the braking-in-a-curve test to be approximately \$1000.00. Manufacturers, even final stage manufacturers producing specialized vehicles on a bare chassis, rarely produce just one example of a particular design. The incremental cost of the braking-in-a-curve test is therefore likely to be spread over a production run of many vehicles. Even in the case of a production run of just one vehicle, we do not believe that this additional test cost is so high as to make the braking-in-a-curve test impracticable, particularly since a buyer seeking a highly specialized vehicle is likely to be willing to pay more for the special features it offers.

NHTSA also believes that final stage manufacturers are capable of determining what constitutes the exercise of due care when certifying a vehicle and may rely on the exercise of that care in establishing certification without testing. While we must concede that NHTSA cannot make a single pronouncement of what constitutes due care for every circumstance in which a manufacturer certifies a vehicle, manufacturers, even final stage manufacturers, should be able to make this determination themselves. Vehicle manufacturers, both large and small, must make similar determinations for liability purposes every day. In so doing, they are aided by the application of industry and professional standards of care.

Final stage manufacturers are also provided with considerable guidance by the incomplete vehicle documents and body builder's guides provided by chassis manufacturers. Even where pass-through certification cannot be used, incomplete vehicle documents provide assurance of compliance if the completed vehicle meets the axle loading and center-of-gravity specifications provided by the incomplete vehicle manufacturer. If the final stage manufacturer stays within the guidelines provided by the incomplete vehicle manufacturer, the certification information supplied with the chassis can be used to certify compliance without doing any actual testing. Moreover, each chassis-cab manufacturer has an incentive to make the requirements for pass-through certification as broad as possible. The final stage manufacturer can then select from a variety of readily-available chassis-cab configurations and options (e.g., wheelbase, front and rear axle ratings) that can predictably meet the pass-through certification criteria.

When a final stage manufacturer completes a vehicle in a way that takes