

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS
DEPARTMENT OF PUBLIC UTILITIES

_____)
Petition of:)
Statewide Towing Association, Inc.)
for Amendment of 220 CMR 272.00)
_____)

D.P.U. 13-124

COMMENTS OF THE AUTOMOBILE INSURERS BUREAU

In response to the petition of the Statewide Towing Association, Inc. (STA), the Department of Public Utilities (Department) has instituted a rulemaking proceeding to amend 220 CMR 272.00 for the purposes of: (i) increasing by 20% the maximum rates and charges for involuntary towing ordered by police and other public authority in accordance with G. L. c. 159B, § 6B; (ii) establishing a 20% administrative fee for extraordinary or additional services provided in connection with an involuntary tow; (iii) increasing the base rate for the fuel price surcharge; and (iv) clarifying the regulations. The Automobile Insurers Bureau of Massachusetts (AIB) submits the following written comments on the proposed revisions to 220 CMR 272.00 solicited by the Department's order.

1. The AIB, located at 101 Arch Street, Boston, Massachusetts 02110, is an unincorporated voluntary association of all insurance companies writing motor vehicle insurance in Massachusetts. The AIB is licensed as a rating organization under G. L. c. 175A, § 8, and represents the insurers in rate and rule proceedings of the Division of Insurance and other administrative and judicial proceedings, including an earlier

proceeding on involuntary towing rates (DPU 97-37). The auto insurers collectively pay about \$35 million annually for the costs of involuntary towing arising from automobile accidents insured under the property damage liability, collision, and comprehensive coverages of Massachusetts insurance policies. An increase in the charges established by the Department for involuntary towing will necessarily increase auto insurance claim payments and the insurance premiums of four million Massachusetts insureds.

2. There is no reliable evidence or data analysis to establish that the current \$90 towing rate is inadequate and necessitates a 20% increase. The STA initiated this proceeding with a petition for a 50% rate increase to offset an estimated loss of \$32.98 for the average involuntary tow as calculated by the STA. The claimed loss was derived from the 2011 financial information reported to the Department by 198 selected towing carriers. However, the data and the STA's methodology are seriously flawed and do not support the need for a significant rate increase. The STA revised its petition to request a 20% rate increase based on its calculation of a 10-year change in a consumer price index, but it does not demonstrate any rate inadequacy which requires the Department's correction. The STA simply observes that the 2011 carrier data are widely variable, self-reported, and stale; and it states that a 20% increase in the Department's towing rate would be acceptable because of the recent increase in the statutory storage charge. In the absence of a factual basis to substantiate a deficiency in the current rate, the Department's proposed 20% increase cannot be justified.

3. The STA's calculation of a loss of \$32.98 on the average involuntary tow is the product of a faulty analysis of the available revenue and expense data which, when properly evaluated, indicate an average loss of only \$3.44 per tow. The STA's

revenue component is the average combined involuntary towing and storage revenue for each carrier and then averaged again across the 198 carriers to create a per-tow revenue of \$251.44. The expense component is the product of a factor, based on the involuntary tow and storage revenue of each carrier as a percentage of revenues from all sources, applied to the total expenses of each carrier to construct an average per-tow expense, and the per-carrier results again averaged among the 198 carriers to create a per-tow expense of \$284.42. The difference is the assumed revenue deficiency of \$32.98 per-tow. However, the STA's analysis is erroneous in several material respects.

First, the STA's calculation of the per-tow average revenue and expense misrepresents both data points by the use of the average of the per-carrier averages, rather than the simple average per involuntary tow. Instead of STA's per-tow revenue of \$251.44 for towing and storage based on the average-of-averages methodology, the simple overall average revenue is \$177.91 using the same data. The average-of-averages approach also produced the STA's average combined tow and storage expense of \$284.42 per tow, although the simple overall average expense of the same data is \$183.39. As a result, the difference between the combined towing and storage revenue and expense is a loss of \$5.48, not \$32.98 as suggested by the STA. The exhibit attached to this document outlines the more accurate calculation of average towing revenues and expenses.

Second, the STA methodology errs in combining storage revenue with the towing revenue to compute the average revenue and expense per tow. The Department's role under G.L. c. 159B, § 6B, is to establish the involuntary towing rate only, not the storage

charge associated with such tows, because that rate is independently fixed by the statute. Neither the revenue nor expense of a carrier's storage operations can lawfully be considered in the determination of a reasonable rate for involuntary towing. In addition, the use of combined storage revenue and expense to evaluate the towing rate double counts compensation for storage -- the increase in the towing rate as well as the statutory charge which is assessed in addition to the towing rate. The effect of combining towing and storage data is to overstate the difference between the revenue and expense of an involuntary tow. Excluding the storage financial information, the simple overall average tow revenue is \$110.63, not \$177.91 which is the average combined tow and storage revenue. The average per-tow expense, disregarding storage, is \$114.07 per tow, not the simple average of \$183.42 for the combined tow and storage expense. As a result, the overall difference between average towing revenue and average towing expense is a loss of \$3.44, far below the STA's assumed loss per tow of \$32.98, as outlined in the attached exhibit.

4. The STA's amended petition for a 20% rate increase recognized the limited value of its initial data analysis, but it too provides no evidence of a rate deficiency. Although a consumer price index can represent a simple and convenient method to calculate a price change, it does not demonstrate the rate inadequacy which compels the Department's adjustment. Despite its flaws, the STA's financial information, as reported to the Department, shows a rate deficiency of \$3.44, or less than 4%, in marked contrast to the 20% deficiency assumed by the STA's reliance on a consumer price index. Only reliable data and a true cost-of-service study, as demanded by the Department in the most recent towing rate decision (DPU 06-43-A, at 11), can

substantiate an inadequacy in the current rate and the amount of any increase required. The STA has not conducted such a study; and a general consumer price index is not an appropriate substitute for that common practice and fails to establish either a rate inadequacy or the necessary adjustment.

A flat rate increase based on an external index also perpetuates the faulty assumptions and analytical errors which may underlie the current rate, and it fails to account for changes in the business environment. The simple use of a consumer price index ignores material modifications, technological advances, and improved efficiencies applicable to the particular business at issue. The proposed 20% increase assumes that the fundamentals of involuntary towing have remained static since the Department's prior analysis, even though vehicle changes, fuel efficiencies, business management tools, and other improvements may well have altered the factual predicates for the current rate. The data and cost-of-service study required by the Department is necessary to account for the internal changes which may significantly influence the rate, unlike an external index.

The assumption that the factual basis for the current rate remains constant is especially unwarranted in this instance because the Department now permits a carrier to impose additional charges for ancillary towing services which are already accounted for in the established rate. The Department expressly allows towing carriers to charge for certain additional services with established rates for additional mileage, time, labor, equipment, and fuel; but it also authorizes a carrier to impose the fees established by the carrier for other ancillary services such as administration, gate access, yard service, site clean-up, and absorbent materials. However, the revenue and expenses

associated with these common services are already part of the established rate because it was calculated from the gross revenue and expenses supplied by the carriers without allocation to particular services.¹ Since the rate necessarily accounts for ancillary charges, a carrier's additional fee for the same service produces duplicative compensation which is not warranted by the statute or common sense.² A flat 20% increase in the basic rate, while also allowing additional towing charges at the carrier's discretion, continues these double payments without any analysis of the merit of such charges or the adequacy of the underlying rate.

5. The proposal to allow a carrier to assess a 20% administrative fee for "extraordinary or additional services outside its capabilities" in towing passenger vehicles, 220 CMR 272.03(6), is prohibitively ambiguous and factually unjustified. The concept of "extraordinary or additional services" is undefined and overly broad. The attempt to narrow the objective of the new fee offers little assistance because it explicitly provides that the phrase includes "but [is] not limited to" a few listed services. Presumably, additional waiting time, vehicles, and labor are not subject to the 20% fee because such services are expressly governed by the regulations. Similarly, ancillary services such as gate fees, site cleaning, account administration, and other common

¹ DTE 03-70, at 8-9 (STA survey of revenues and expenses of members "who do not maintain records at the level of detail and sophistication necessary to perform an in-depth cost of service study").

² The Department recognized this self-evident proposition in its June 1, 2007, bulletin which notified towing carriers that ancillary or additional charges were not permitted under 220 CMR 272.00. However, that directive was inexplicably rescinded by Department counsel in 2013 to enable carriers to impose gate and yard fees and other ancillary charges as each chooses. The only justification provided for the change in the Department's position was that G. L. 151B, § 6B, does not directly address the subject of ancillary services. Of course, that assumed limitation on the Department's statutory authority would also invalidate the longstanding allowance for additional charges for extra fuel, mileage, labor, and equipment, which are also not mentioned in the statute.

tasks would seem to be exempt from the new fee because there is nothing “extraordinary or additional” about these routine services and are, or should be, covered by the basic rate, as discussed above. However, there are also a variety of additional services, particularly in the areas of vehicle recovery and clean-up, which are outside a common understanding of “extraordinary” but will present substantial problems in interpretation and implementation if a carrier seeks to enhance its revenues. The lack of a particularized definition of the services covered by the 20% fee offers perverse incentives as carriers are free to engage additional services, regardless of the circumstances, in order to secure the 20% bonus. Without clear articulation of its objectives and limitations that permit a fair and uniform application, the 20% administrative fee is fundamentally flawed and contrary to the public interest.

In addition to its fatal ambiguity, the proposed administrative fee is unsupported because neither Department’s rulemaking notice nor the STA’s petition suggests any rational basis for the new fee. A towing carrier’s minor role in the provision of additional services by an outside organization cannot justify an arbitrary 20% bonus. The Department has long allowed a towing carrier to charge for the cost of extraordinary or additional services, but at the exact amount assessed by the outside company. 220 CMR 272.02, Additional Charges. A carrier faced with a task it is unable or unqualified to perform in the course of the towing operation, such as hoisting a vehicle or treating hazardous material, may contact a specialized company for that service. In that event, the carrier’s role is limited to summoning the outside company which then performs the specific work to allow the carrier to complete the tow. The carrier’s telephone call to the other company and forwarding its bill cannot plausibly justify adding a 20% bonus.

The administrative fee is also abusive in light of the exceptional costs for the additional services provided by specialized companies. For example, the personnel charge alone for hoisting or recovering an automobile is typically in excess of \$200 per hour (with a four hour minimum), and the charge for environmental clean-up is more than \$400 per hour (with a four hour minimum), producing an additional charge of at least \$2,400 when both services are summoned. The 20% bonus for the carrier will add \$480 to the total cost, almost five times greater than the basic charge for an involuntary tow. In the absence of any evidence of the carrier's significant contribution to the provision of additional services, as well as the cost and frequency of such services, an administrative fee of that magnitude cannot reasonably be mandated by the Department.

The purpose of the statutory requirement for the Department's establishment of a maximum rate for involuntary towing is to protect consumers from excessive charges for services outside their control and to ensure reasonable compensation for towing carriers. The 20% administrative fee proposed for additional services achieves neither objective. The fee will produce only an unwarranted benefit for towing carriers and inappropriate financial incentives that will drive up the costs of involuntary towing for consumers and insurers.

6. The proposed increase in the base rate for the average price of fuel for the surcharge established in DPU 06-43-A may not be objectionable standing alone. The price of fuel, however, is only one element of the surcharge formula and any adjustment in that factor requires reevaluation of the other components. Following STA's lead, the Department has failed to consider the proper balance in the surcharge formulation,

despite its demand for a cost-of-service study and expressed intention to “reassess the continuing need for a fuel surcharge.” DPU 06-43-A, at 14.

The proposed base fuel price does not account for other potential changes in the fuel costs embedded in the current towing rate or the fuel efficiency of the vehicles used for involuntary towing. The embedded fuel costs per tow were derived from information reported by STA in DTE 03-70 and include an average mileage estimate of nine miles per tow. That particular factor may well have changed over the past ten years and now distorts an important predicate of the surcharge factor. Similarly, the fuel efficiency of tow vehicles may have improved significantly, as with automobiles, to alter the appropriate balance of another important component of the surcharge. By failing to consider all material changes in the average fuel cost for an involuntary tow, the increase in fuel prices alone cannot justify a significant revision in the surcharge factor.

7. Although not apparent in the across-the-board 20% rate increase proposed by the Department, the STA’s submissions indicate that its perception of inadequacy of the current towing rate may be attributable, in part, to revenue shortfalls in other elements of the towing carriers’ business which justify an increase in the statutorily prescribed rate. That view, however, is contrary to the well-established principles of ratemaking that regulated rates must stand alone, without the subsidization of unregulated services. Just as the revenues and expenses of storage cannot be used to establish the involuntary towing rate, the financial impact of unregulated business operations affiliated with a carrier’s involuntary towing cannot be employed to assess the adequacy of the regulated rate. The statutorily mandated towing rate is not intended to subsidize unregulated towing operations or any other business of a towing

carrier. The economic efficiencies or deficiencies in other enterprises can have no legitimate bearing on the adequacy of the involuntary towing rate required by statute.

Conclusion

For the foregoing reasons, the proposed amendments to 220 CMR 272.00 increasing the rates and charges for involuntary towing under G. L. c. 159B, § 6B, should be rejected by the Department.

Automobile Insurers Bureau
By its attorney,



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Dated: March 13, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Comments of the Automobile Insurers Bureau upon the parties of record in this proceeding by electronic mail and by UPS (Next-day Delivery) to James A. Castleman, Paster, Rice & Castleman, 24 Adams Street, Quincy, MA 02169.



E. Michael Sloman

Dated: March 13, 2017

EXHIBIT

Estimated Net Revenue from Involuntary Towing

(1) Average Revenue

	<u>Towing</u>	<u>Storage</u>	<u>Combined</u>
Total Revenue	\$10,302,671	\$6,266,524	\$16,569,195
	(\$52,033.69 x 198) (\$31,649 x 198) (average revenue per carrier x 198 carriers)		
Total Tows	(average # tows per carrier x 198)		93,131
Average Revenue	\$110.63	\$67.29	\$177.91
	(tow revenue / total tows)	(combined revenue / total tows)	
% Towing	62.2%		

(2) Average Expense

	<u>Towing</u>	<u>Storage</u>	<u>Combined</u>
Total Expense	\$10,623,400		\$17,079,421
	(combined expense x 62.2 %)		(\$86,259.70 x 198) (average expense per carrier x 198)
Average Expense	\$114.07		\$183.39
	(tow expense / total tows)	(combined expense / total tows)	

	<u>Towing</u>	<u>Combined</u>
(3) Net Profit (Loss) [(1) – (2)]	(\$3.44)	(\$5.48)

Data: STA compilation of 2011 annual reports to DPU of 198 towing carriers