The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 13-124-A June 14, 2017

Petition of Statewide Towing Association, Inc. to commence a rulemaking pursuant to G.L. c. 30A, § 2, 220 C.M.R. § 2.00 et seq., and Executive Order 562, to amend 220 C.M.R. § 272.00 et seq.: Rates for the Towing of Motor Vehicles.

ORDER ADOPTING FINAL REGULATIONS

I. INTRODUCTION

On August 5, 2013, Statewide Towing Association, Inc. ("STA") petitioned the Department of Public Utilities ("Department") to amend its regulations, 220 C.M.R. § 272.00 et seq., in order to increase the maximum rates and charges allowed for police-ordered towing of motor vehicles pursuant to G.L. c. 159B, § 6B[1] and G.L. c. 266, § 120D (also including involuntary and trespass tows).[2] STA is a statewide association representing approximately 300 tow companies, a significant majority of which perform police-ordered towing pursuant to 220 C.M.R. § 272.00 et seq. (Petition, ¶ 3). The Department docketed this matter as D.P.U. 13-124, and on February 1, 2017, issued an Order instituting a rulemaking, and issued proposed regulations amending 220 C.M.R. § 272.00 et seq. The Department filed notice with the Secretary of State's Office of Regulations of the Department's intention to conduct a rulemaking proceeding, as required by 950 C.M.R. § 20.00 et seq. Massachusetts Register No. 1333, published February 24, 2017.

Pursuant to notice duly issued, on March 21, 2017, the Department held a public hearing at the Department's offices in Boston on the proposed amendments to its regulations. The Department received written comments in support of and against the proposed

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1 General Laws c. 159B, § 6B states: "The Department shall establish the maximum charges that may be made . . . when such towing is ordered by the police or other public authority."

2 General Laws c. 266, § 120D states: "[T]he registered owner of a vehicle illegally parked . . . shall be liable for charges for the removal . . . of such vehicle; . . . not [to] exceed . . . the maximum amount for towing . . . of motor vehicles established by the [D]epartment."

amendments.[3] The record consists of STA's initial petition, which contains three exhibits (Petition Exhibits A through C); STA's motion to amend its petition, which includes an affidavit from Peter J. D'Agostino ("Affidavit"), a partner with Lynch Associates, a firm providing consulting services to the STA; two exhibits to the Affidavit (Affidavit Exhibits A and B); STA's responses to four sets of information requests issued by the Department (Exhibits DPU-1-1 through DPU-1-6; DPU-2-1 through DPU-2-8; DPU-3-1 and DPU-3-2; and DPU 4-1); and written comments from the Automobile Insurers Bureau ("AIB"); the Massachusetts Insurance Federation ("MIF"); Allstate Insurance Company ("Alllstate"); Arbella Mutual Insurance Company ("Arbella"); MAPHRE Insurance ("MAPHRE"); the Property Casualty Insurers Association of America ("PCI"); state Senate President Stanley Rosenberg and state Senator Michael Moore (collectively, the "Senators"); and STA.

With this Order, the Department adopts final regulations contained in 220 C.M.R. § 272.00 et seq.: Rates for the Towing of Motor Vehicles.[4]

II. STA'S PROPOSED AMENDMENTS

A. Introduction

The Department's regulations at 220 C.M.R. § 272.00 et seq. establish maximum rates for towing and transportation of motor vehicles that have been ordered by the police or other public authorities and for trespass tows (i.e., involuntary tows), pursuant to G.L. c.

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3 Additionally, the Secretary of State of the Commonwealth of Massachusetts ("Secretary of State") provided the Department with some stylistic and formatting edits. We incorporate all of the Secretary of State's edits in the final regulations adopted in this Order.

4 The final regulations are annexed to this Order as Attachment A.

159B, § 6B, and G.L. c. 266, § 120D, respectively. The Department's towing regulations, as currently written, contain three sections: 220 C.M.R. § 272.01 (Definitions); 220 C.M.R. § 272.02 (Application of Maximum Charges); and 220 C.M.R. § 272.03 (Maximum Charges and Notes).

The Department last authorized an increase in the maximum towing rates in Statewide Towing Association, D.T.E. 03-70 (2004) (setting the current $90.00 maximum charge per involuntary tow and establishing maximum rates for other towing related charges). In 2008, the Department approved an amendment to 220 C.M.R. § 272.03 to establish a fuel price surcharge provision. See Statewide Towing Association, D.T.E./D.P.U. 06-43-A (2008).

B. STA's Initial Petition

In its initial petition, filed on August 5, 2013, STA stated that the average regulated involuntary tow in Massachusetts generated a loss of $32.98 (Petition, ¶ 10). In support, STA relied on 2011 revenue and expense information on file with the Department as provided by 198 tow companies (Petition, ¶ 10 & Petition Exhibit C at C-2, C-3; Exh. DPU 1-5).[5] STA proposed amendments to the Department's towing regulations to: (1) increase the revenues allowed for involuntary towing to eliminate the loss associated with the average

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[5] The financial statements include the number of involuntary tows performed, total involuntary tow revenue, related storage revenue and expenses, revenue from other sources (e.g., voluntary tows), and overall expenses incurred by the respective tow company. Such information was provided to the Department by the tow companies pursuant to the requirements of G.L. c. 159B, § 6B, and was not provided directly to STA by the tow companies for the purpose of seeking an increase to the maximum rates and charges set forth in 220 C.M.R. § 272.03 (Petition, Exhibit C, at C-2, C-3; Exh. DPU-1-5).

involuntary tow;[6] and (2) substitute a more current base rate for the average cost-per-gallon diesel fuel to be utilized by the Department in determining the allowable monthly fuel surcharge (see Petition, ¶¶ 11, 12). STA's proposed amendments related only to 220 C.M.R. § 272.03; STA did not propose any amendments to 220 C.M.R. § 272.01 or 220 C.M.R. § 272.02.

C. STA's Motion To Amend Its Petition

On November 8, 2016, STA filed a motion to amend its initial petition ("Motion"). In support of its Motion, STA submitted the aforementioned Affidavit from Mr. D'Agostino. According to the Affidavit, STA considered a number of factors in seeking to amend its petition, including that: (1) the data used in support of its initial petition may have become stale, was self-reported by members of the towing industry, and did not represent the data originally and customarily utilized in the rate setting process used by the Department; (2) the cost of diesel fuel has decreased significantly and tow companies are currently utilizing more fuel efficient vehicles; and (3) the amount tow companies are permitted to charge for the storage of vehicles has increased since the Department last amended the towing regulations (Affidavit, ¶¶ 4(a) through (c)). The Department granted the Motion on November 29, 2016.

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6 In order to determine expenses related solely to involuntary tows, STA calculated the percentage of involuntary tow revenues to total revenues for all companies, and then applied this percentage to a company's total expenses to arrive at the expenses attributable to involuntary tows. STA determined that the average revenue per involuntary tow for the 198 tow companies was $251.44. The average expense per involuntary tow for the companies was $284.42. Thus, according to STA, the average loss per involuntary tow was $32.98.

In light of the considerations raised in the Affidavit, STA sought to increase the current maximum rates and charges applicable to involuntary tows, as those rates and charges are currently set forth in 220 C.M.R. § 272.03, by approximately 20 percent, from $90.00 to $108.00 (Affidavit, ¶ 6). STA derived the proposed increase from an inflation-based analysis that calculated the percentage change in the consumer price index[7] for each year from 2004 (when the Department last authorized an increase in the maximum towing rates) through 2014 (the year subsequent to STA's initial filing) (Affidavit, ¶¶ 5, 6, Affidavit Exhibit B).

Further, STA sought to amend the fuel price surcharge provision of 220 C.M.R. § 272.03 (Affidavit, ¶ 6 (c)). The current regulations provide for a fuel price surcharge when the average cost of diesel fuel exceeds $1.7606 per gallon. 220 C.M.R. § 272.03(1). According to STA, the average cost of diesel fuel as of October 31, 2016 was approximately $2.11272 per gallon (Affidavit, ¶ 6(c), Affidavit Exhibit A). Thus, STA sought to amend the base rate for the average cost of diesel fuel that triggers the fuel price surcharge from $1.7606 per gallon to $2.11272 per gallon (Affidavit, ¶ 6(c), Affidavit Exhibit A).

III. DEPARTMENT'S PROPOSED AMENDMENTS

As stated above, on February 1, 2017, pursuant to G.L. c. 30A, § 2 and 220 C.M.R. § 2.00 et seq., the Department issued an Order instituting rulemaking with proposed

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7 STA utilized the consumer price index for all urban consumers, for the New England area, for the years 2004 through 2014, as published as published by the U.S. Department of Labor's Bureau of Labor Statistics (Affidavit, ¶¶ 5, 6, Affidavit Exhibit B).

regulations. The Department's proposed regulations sought to: (1) increase the maximum rates and charges applicable to the towing of motor vehicles when such towing is ordered by the police or other public authority (i.e., involuntary tows) pursuant to G.L. c. 159B, § 6B; (2) allow tow companies to assess a 20-percent administrative fee when extraordinary or additional services are needed; (3) increase from $1.7606 per gallon to $2.662 per gallon[8] the base rate for the average cost of diesel fuel that triggers the fuel price surcharge; and (4) eliminate duplicative regulations, update statutory and other references, and/or simplify and clarify regulations pursuant to Executive Order 562.[9]

In regards to increasing the maximum rates and charges applicable to the towing of motor vehicles when such towing is ordered by the police or other public authority pursuant to G.L. c. 159B, § 6B, the Department proposed the following amendments: (1) in the current version of 220 C.M.R. § 272.03, Table 1, Passenger Automobiles, (i) the maximum charge per tow would increase from $90.00 to $108.00, (ii) the excessive mileage rate would increase from $3.00 per mile to $3.60 per mile, and (iii) the additional labor charge would

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8 In its Order opening rulemaking, the Department based its proposed increase to $2.662 by using information obtained from the United States Energy Information Administration. The Department noted that it intended to update the average per-gallon price of diesel fuel upon the issuance of the final Order adopting the new regulations applicable to involuntary tows. D.P.U. 13-124, n.2.

9 Pursuant to Executive Order 562, the Governor's Office directed each Executive Agency, including the Department, to undertake a review of its regulations. Office of the Governor, Commonwealth of Massachusetts, Executive Order No. 562 (March 31, 2015). The Governor's Office directed agencies to rescind, revise, or simplify their regulations in accordance with the requirements of Executive Order 562, and to retain or modify only those regulations that are mandated by law or essential to the health, safety, environment, or welfare of the Commonwealth's residents. Executive Order 562, §§ 2, 3.

increase from $32.00 per hour to $38.40 per hour; (2) in the current version of 220 C.M.R. § 272.03, Table 2, Commercial Vehicles, (i) the maximum charge per tow would increase from $90.00 to $108.00, and (ii) the excessive mileage rate would increase from $4.25 per mile to $5.40 per mile; and (3) in the current version of 220 C.M.R. § 272.03, Note 1, (i) the per-half hour per vehicle charge would increase from $35.00 to $42.00, and (ii) the additional service vehicle charge would increase from $90.00 to $108.00.

The Department also proposed amending the Additional Charges provision of the current version of 220 C.M.R. § 272.03 to include a 20-percent administrative fee when a towing company is required to employ extraordinary or additional services outside of its capabilities. Further, the Department proposed amending the base rate for the average cost of diesel fuel that triggers the fuel price surcharge in the current version of 220 C.M.R. § 272.03 from $1.7606 per gallon to $2.662 per gallon to reflect the price of diesel fuel as of the end of January 2017, as determined by the United States Energy Information Administration.[10]

Finally, pursuant to Executive Order 562, the Department proposed amendments to the current regulations to eliminate duplicity, update statutory and other references, and/or simplify and clarify the regulations. In particular, the proposed regulations would revise and/or include new Definitions, reformat several provisions, and incorporate where applicable into the text of the regulations the Notes found in the current regulations.

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10 New England (PADD 1A) Gasoline and Diesel Retail Prices, found at: http://www.eia.gov/dnav/pet/pet_pri_gnd_dcus_r1x_a.htm.

IV. COMMENTS

A. Automobile Insurers Bureau

AIB opposes the Department's proposed amendments to its towing regulations (AIB Comments at 1). According to AIB, any increases in charges related to involuntary towing will increase insurance premiums for four million Massachusetts drivers (AIB Comments at 2). AIB also argues that STA's initial petition, where STA calculated a loss of $32.98 on the average involuntary tow, was based on faulty analysis. According to AIB, when the data provided by STA is properly analyzed, the average loss per tow is only $3.44 (AIB Comments at 2, 11). AIB included an exhibit to its comments that it argues more accurately represents average towing revenues and expenses (AIB Comments at 11).

AIB also argues that there is no reliable evidence or data analysis to establish that the current towing rate is inadequate and necessitates at 20-percent increase as proposed by the Department ($90.00 to $108.00) (AIB Comments at 2, 4). AIB contends that, although utilizing a consumer price index analysis represents a simple and convenient method to calculate a price change, it does not demonstrate the rate inadequacy that would compel the Department's adjustment (AIB Comments at 4). AIB asserts that STA's own data demonstrates a rate deficiency of less than four percent, in contrast to the 20-percent deficiency assumed by STA's reliance on a consumer price index (AIB Comments at 4,11). AIB argues that only reliable data and a true cost-of-service study, as suggested by the Department in its most recent towing rate decision, can substantiate the current rate and the amount of any increase required (AIB Comments at 5, citing D.T.E./D.P.U. 06-43-A at 11).

AIB also asserts that the use of a consumer price index to calculate increases in rates ignores material modifications, technological advances, and improved efficiencies applicable to the particular business at issue (AIB Comments at 5). According to AIB, the proposed 20-percent 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 (AIB Comments at 5). Further, AIB argues that STA's submissions indicate its perception that the inadequacy of the current towing rate may be attributable, in part, to revenue shortfalls in other elements of the towing carriers' business (AIB Comments at 9). AIB argues, however, that the view is contrary to well established principles of ratemaking that related rates must stand alone, without the subsidization of unregulated services (AIB Comments at 9-10).

AIB contends that 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 (e.g., administration, gate access, and site clean-up) that already are accounted for in the established rate (AIB Comments at 5). AIB argues that because the rate necessarily accounts for ancillary charges, a carrier's additional fee for the same service produces duplicative compensation that is not warranted (AIB Comments at 6).

In regards to the Department's proposal to allow a carrier to assess a 20-percent administrative fee for extraordinary or additional services outside its capabilities, AIB argues

that the Department's proposal is ambiguous and factually unjustified (AIB Comments at 6). AIB argues that the lack of a particularized definition of the services covered by the 20-percent fee offers perverse incentives as carriers are free to engage additional services, regardless of the circumstances, in order to secure a 20-percent bonus (AIB Comments at 7). Additionally, AIB asserts that a towing carrier's minor role in securing additional services by an outside organization cannot justify an arbitrary 20 percent fee (AIB Comments at 7). AIB argues that 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 (AIB Comments at 8).

Finally, in regards to the proposed increase in the base rate for the average price of fuel for the surcharge, AIB argues that the Department has failed to consider the proper balance in the surcharge formulation (AIB Comments at 8-9). According to AIB, 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 (AIB Comments at 9). AIB argues that 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 (AIB Comments at 9).

B. Massachusetts Insurance Federation

MIF opposes the Department's proposed changes to its involuntary towing regulations (MIF Comments at 1). MIF agrees with AIB's argument that the data submitted by STA is unreliable and cannot serve as a factual basis to substantiate a deficiency in the current rate

(MIF Comments at 2). Moreover, MIF argues that STA's filing demonstrates that many tow companies do not comply with statutory filing requirements related to completing and submitting financial disclosures to the Department (MIF Comments at 3, citing G.L. c. 159B, § 6B). According to MIF, the Department should not reward the failure of tow companies to comply with the legal requirement to file complete and accurate financial statements (MIF Comments at 3).

C. Allstate Insurance Company

Allstate opposes the Department's proposed changes to its towing regulations (Allstate Comments at 1). Allstate concurs with the comments filed by AIB and MIF (Allstate Comments at 2). Allstate separately argues that tow carriers sometimes include egregious charges when performing involuntary tows (Allstate Comments at 2). Further, Allstate argues that in instances where a tow company needs to employ extraordinary services, the tow company often refers business to a related business entity (Allstate Comments at 3). Allstate provided three "scenarios" to demonstrate how calculations of consumer price index and fuel cost changes do not tell a complete story of the costs that insurance carriers bear on behalf of their customers for towing services (Allstate Comments at 3-4).[11]

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[11] In the first and second scenarios, in addition to paying for the towing and storage charges for a vehicle following an accident, Allstate also paid for "fluid and remediation charges" even though the tow company in question owned the remediation company that was hired for the cleanup (Allstate Comments at 3-4). In the third scenario, a tow company originally sought $6,100 for recovery of a vehicle with a specialized truck (Allstate Comments at 4). The tow company in question refused to provide a written invoice for these charges and eventually accepted $1,037.56, which Allstate contends was a figure still above market value (Allstate Comments at 4).

D. Arbella Mutual Insurance Company

Arbella opposes the Department's proposed changes to its towing regulations (Arbella Comments at 1). Arbella shares the concerns expressed by AIB and MIF (Arbella Comments at 2). Arbella argues that the STA has provided insufficient information to determine whether a rate increase is warranted (Arbella Comments at 2). Arbella also argues that the Department's proposed regulations fail to take into account the significant fees that the tow industry charges in excess of the allowable maximum rates (Arbella Comments 2). Arbella also argues that STA has failed to provide the Department with a cost-of-service study even though the Department expressly stated that the towing industry must provide a cost-of-service study as part of the next rate proceeding (Arbella Comments at 3-4, citing D.T.E./D.P.U. 06-43-A at 11-12).

In regards to a 20-percent administrative fee, Arbella adopts the concerns raised by AIB (Arbella Comments at 6). According to Arbella, this type of provision will only encourage the use of third-party services (Arbella Comments at 6).

Finally, Arbella argues that any proposed amendments on rates must take into account that ordinary expenses incident to towing already are accounted for in the maximum tow rate (Arbella Comments at 7-8). According to Arbella, involuntary tow invoices are rarely limited to $90 because the companies routinely include additional fees and charges (Arbella Comments at 8). Arbella asserts that charges for ancillary fees, including administrative fees, gate fees, and yard fees, are integral to the towing and should be regulated by the

Department (Arbella Reply Comments at 3, citing Modzelewski's Towing and Recovery, Inc. v. Commission of Motor Vehicles, 322 Conn. 20 (2016); 49 U.S.C. § 14501).

E. MAPHRE Insurance

MAPHRE opposes the Department's proposed changes to its towing regulations (MAPHRE Comments at 1). MAPHRE argues that STA's petition for a rate increase is not supported by reliable data (MAPHRE Comments at 2). Further, MAPHRE argues that the Department's proposed changes to its tow regulations fail to take into account the lucrative, and unchecked, revenue sources that arise from the ancillary services that are not otherwise regulated (MAPHRE Comments at 2).

According to MAPHRE, the Department should establish a process by which it may obtain reliable data from the towing industry regarding actual expenses and all current revenue from involuntary tows (MAPHRE Comments at 3). MAPHRE contends that both state and federal law contemplate that the involuntary tow rate include all charges related to the tow – including gate, wrapping fees, and other fees – even if such fees are incurred after a vehicle is transported back to the company's facility (MAPHRE Reply Comments at 3).

In regards to the 20-percent administrative fee, MAPHRE argues there is nothing in the record to support STA's clam that tow companies have an increased cost of liability as a result of utilizing third-parties (MAPHRE Reply Comments at 1)

MAPHRE does not object to the proposed changes insofar as the Department seeks to comply with Executive Order 562 (MAPHRE Comments at 3). MAPHRE also states that it

does not object to the Department taking a comprehensive review of the fuel price surcharge as recommended by AIB (MAPHRE Comments at 3).

F. Property Casualty Insurers Association of America

PCI opposes the proposed increases to the maximum charges for involuntary tows and the proposed new 20-percent administrative fee (PCI Comments at 1). PCI states that it concurs with the comments filed by AIB and MIF (PCI Comments at 1-2).

G. Senate President Stanley Rosenberg and Senator Michael Moore

The Senators support the Department's proposed changes to its towing regulations (Senators Comments at 1). According to the Senators, the current rates for involuntary towing have not been changed since 2004, despite cost increases faced by tow operators (Senators Comments at 1). The Senators argue that increasing the tow rate by 20 percent is a modest increase when divided over all the years that there were no increases (Senators Comments at 1).

H. Statewide Towing Association, Inc.

STA supports the Department's proposed amendments to its towing regulations (STA Reply Comments at 1). According to STA, in making its initial filing in 2013, it utilized the most extensive data available to it by analyzing the information submitted to the Department on financial statements submitted by carriers that perform involuntary tows (STA Reply Comments at 2). STA further states that even AIB noted that the towing industry was sustaining a loss on each tow (STA Reply Comments at 2).

In regards to utilizing an inflation based index in calculating applicable increases, STA argues that there is no binding statute or regulation requiring the use of a particular analysis model (STA Reply Comments at 3). STA contends that the Department can choose its own method for determining rates in any given rulemaking proceeding (STA Reply Comments at 4).

Additionally, with respect to the towing industry comments about tow companies' ability to charge additional fees for ancillary services, STA argues that this issue should not be a subject for this proceeding (STA Reply Comments at 4-5). STA notes that the Department has previously issued bulletins regarding this issue, where the Department stated ancillary fees are not regulated by the Department and thus tow carries may charge for them in addition to the specific fee set forth in regulation (STA Reply Comments at 5, citing Department of Public Utilities' Bulletin Regarding Maximum Charges for Involuntary Towing and Storage of Motor vehicles, September 12, 2012). Moreover, STA argues that Massachusetts case law specifically holds that certain ancillary fees may be added to regulated tow charges (STA Reply Comments at 6, citing Statewide Towing Association, Inc. v. City of Lowell, 68 Mass. App. 791, 792 n.5 (2007).

In addressing the Department's proposed 20-percent administrative fee for extraordinary or additional services outside a carrier's capabilities, STA argues that there are real costs and risks associated with utilization of third-party providers that are not built into the allowable involuntary tow rates (STA Reply Comments at 6-7). STA contends that unless tow carriers are allowed to charge an administrative fee, they will suffer a loss whenever

they have to utilize the services of a third-party provider for extraordinary services (STA Reply Comments at 7).

Finally, in regards to the Department's proposed changes to the fuel price surcharge provision of the towing regulations, STA asserts that the Department incorrectly calculated the embedded fuel charge (STA Reply Comments at 7 n.4). STA refers so testimony provided at the Department's public hearing by one of its representatives, Kimberly Lowell (STA Reply Comments at 7 n.4). According to Ms. Lowell, because use of the consumer price index provides for a 20-percent increase across the board, the embedded fuel cost should only increase by 20 percent (i.e., to $5.89), not to the proposed $7.42) (Tr. at 14).

V. ANALYSIS AND FINDINGS

A. Introduction

The purpose of this rulemaking is to establish the maximum rate allowed to be charged by Massachusetts towing operators for involuntary tows. See G.L. c. 159B, § 6B; 220 C.M.R. § 272.00. In setting maximum rates, the Department seeks to enable all tow operators, operating under efficient management, to earn a reasonable amount for towing services. D.T.E. 03-70, at 7; Statewide Towing Association, D.P.U. 97-37, at 6 (1997).

While the Department sets maximum rates allowed to be charged for towing services, tow companies are encouraged to charge a lower rate. For example, in many municipalities, police-ordered towing is subject to a contract rate based on bids, or on a negotiated rate between the municipality and the tow operator doing business in a municipality. D.T.E. 03-70, at 8; D.P.U. 97-37, at 7. These contractual or negotiated rates can result in a rate lower

than the maximum rate set by the Department. D.T.E. 03-70, at 8; D.P.U. 97-37, at 7. The Department encourages municipal efforts to reduce towing costs to the general public.

B. Proposed Changes To Maximum Rates And Charges For Involuntary Tows, As Set Forth In 220 C.M.R § 272.03, Tables 1 and 2, And Applicable Notes

1. Introduction

For the involuntary tow of a passenger automobile, motorcycle, motor bike, or motor scooter, a tow company currently is permitted to assess a maximum charge of $90.00 for the first five miles of the tow, and $3.00 per mile thereafter. 220 C.M.R. § 272.03, Table 1. The maximum charge of $90.00 includes one hour of service for waiting time at the scene by the tow truck operator. 220 C.M.R. § 272.03, Table 1. If the tow company remains on the scene for more than one hour, an additional charge of $35.00 per half hour may be assessed.[12] 220 C.M.R. § 272.03 Note 1. If the subject tow requires more than one service vehicle on scene, an additional charge of $90.00 will apply, accompanied by a $35.00 per half-hour charge if the tow company remains at the scene for more than one hour.[13] 220 C.M.R. § 272.03, Table 1. Finally, should the subject tow require additional labor, the current rate per man hour is $32.00, or any fraction thereof, and a one hour minimum charge applies to the additional labor. 220 C.M.R. § 272.03, Table 1.

For the involuntary tow of a commercial vehicle, a tow company currently is allowed to assess a maximum charge of $90.00 for the first five miles of the tow, and $4.25 for each

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12 This charge does not apply to trespass tows or snow removal tows. 220 C.M.R. § 272.03, Note 1

13 Likewise, these charges do not apply to trespass tows or snow removal tows. 220 C.M.R. § 272.03, Note 1.

mile thereafter. 220 C.M.R. § 272.03, Table 2. None of the aforementioned additional charges applicable to non-commercial vehicles applies to an involuntary tow of a commercial vehicle. 220 C.M.R. § 272.03, Table 1.

2. Proposed Changes

The Department proposed the following amendments in its Order instituting a rulemaking: (1) in the current version of 220 C.M.R. § 272.03, Table 1, Passenger Automobiles, the maximum charge per tow would increase from $90.00 to $108.00, the excessive mileage rate would increase from $3.00 per-mile to $3.60 per-mile, and the additional labor charge would increase from $32.00 per-hour to $38.40 per-hour; (2) in the current version of 220 C.M.R. § 272.03, Table 2, Commercial Vehicles, the maximum charge per tow would increase from $90.00 to $108.00, and the excessive mileage rate will increase from $4.25 per-mile to $5.40 per-mile; and (3) in the current version of 220 C.M.R. § 272.03, Note 1, the per-half hour per vehicle charge would increase from $35.00 to $42.00, and the additional service vehicle charge would increase from $90.00 to $108.00.

Several commenters argue that the record is insufficient to support any increase in the rates and charges applicable for involuntary tows. See e.g., AIB Comments at 2,11; Arbella Comments at 3-4; MAPHRE Comments at 2. These commenters argue that the information provided by STA in its initial petition – consisting of financial statements from 198 tow operators - is insufficient to provide a factual record for any rate increase. See e.g., AIB Comments at 2,11; Arbella Comments at 3-4; MAPHRE Comments at 2. Additionally, other

commenters argue that STA should have performed a cost-of-service study as a prerequisite to requesting that the Department increase maximum rates and charges.[14] AIB Comments at 5; Arbella Comments at 3-4.

The Department acknowledges that in D.T.E./D.P.U. 06-43-A at 11, we determined that as part of the next towing rate proceeding, it was necessary for the towing industry to provide the Department with a cost-of-service study comparable to those provided in similar tow rate proceedings. However, the Department also has recognized that the towing industry consists primarily of small-business tow operators who do not maintain records with the level of detail and sophistication necessary to perform an in-depth cost-of-service analysis. D.T.E. 03-70, at 8; see also Police-Ordered Towing, D.P.U. 20148, at 12-18 (1980). As noted above, in support of its initial petition, the STA relied on 2011 revenue and expense information on file with the Department as provided by 198 tow companies Petition, ¶ 10 & Petition Exhibit C at C-2, C-3; Exh. DPU- 1-5). Irrespective of whether STA's submissions constitute a cost-of-service analysis comparable to those provided in similar tow rate proceedings, we find that the financial statements filed by the various tow companies do not

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14 Some commenters also argue that the Department should consider, as part of this proceeding, the various ancillary charges that sometimes are imposed by tow companies when performing involuntary tows. The Department notes that it previously issued bulletins regarding this issue, where the Department stated ancillary fees are not regulated by the Department and thus tow companies may charge for them in addition to the specific fee set forth in the Department's regulations. Department of Public Utilities' Bulletin Regarding Maximum Charges for Involuntary Towing and Storage of Motor vehicles, (September 12, 2012). Accordingly, it would be improper for the Department to consider these charges when establishing appropriate rates for involuntary tows.

provide adequate information to accurately determine the level of surplus or deficiency experienced by the tow companies for each involuntary tow. In particular, the financial statements do not provide the expenses associated solely with involuntary tows, and STA's method of apportioning a percentage of overall expenses to involuntary tow expenses skews STA's analysis and raises serious concerns about its accuracy. Because the sizes of the 198 tow companies and their associated revenues and expenses associated with involuntary tows vary widely, the simple averaging method skews the results toward the larger tow companies. Indeed, STA acknowledged some of these issues in its motion to amend its petition and proposed utilizing an inflation-based analysis to calculate proposed increases (Affidavit, ¶¶ 5, 6, Affidavit Exhibit B). As such, the Department will not rely on the analysis provided by STA in its initial filing.

However, given that the current rates and charges applicable to involuntary tows are more than 13 years old, we find that it is reasonable and appropriate in this instance to adjust the rates and charges as necessary to allow tow operators, operating under efficient management, to earn a reasonable amount for towing services. In this regard, we find that a reliable measure of evaluating a tow company's surplus or deficiency for involuntary tows since the last rate increase is the overall rate in inflation during that period. D.T.E. 03-70, at 9.[15] We find that the use of an inflation-based index is reasonably objective and reflects an

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15 In D.T.E. 03-70, the Department relied on an inflation-based index where the record, which included a cost-of-service study, was insufficient to support STA's requested increase to one of the towing related charges. Relying on the 2004 Northeast Consumer Price Index, as published by the U.S. Department of Labor's Bureau of

appropriate cost-based increase to rates.[16] Where alternative methods of setting rates are available, the Department is free to select or reject a particular method as long as its choice does not have a confiscatory effect or is not otherwise illegal. Massachusetts Electric Company v. Department of Public Utilities, 376 Mass. 294, 302 (1978); New England Telephone and Telegraph Company v. Department of Public Utilities, 372 Mass. 678, 683-684 (1977); Fitchburg Gas and Electric Light Company v. Department of Public Utilities, 371 Mass. 881, 886 (1977); New England Telephone and Telegraph Company v. Department of Public Utilities, 371 Mass. 67, 71 (1976); Boston Gas Company v. Department of Public Utilities, 367 Mass. 92, 98 (1975).

Accordingly, using the United States Department of Labor, Bureau of Labor Statistics' "Consumer Price Index – All Urban Consumers," for the area "Boston-Brockton-

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Labor Statistics In June 2004, the Department found it appropriate to include a 145.28-percent increase for excess mileage charges. D.T.E. 03-70, at 9.

16 The consumer price index measures inflation experienced by consumers by calculating the average changes in price paid by consumers. The consumer price index is used by governmental agencies to adjust such items as payment amounts, tax and interest rates, and maximum values for regulatory programs. For example, the Census Bureau uses the consumer price index to adjust the official poverty measure for inflation each year (42 U.S.C. § 9902(2)); the Social Security Administration uses the consumer price index to adjust annually benefits paid to Social Security beneficiaries and Supplemental Security Income recipients (42 U.S.C. § 1395(h)(2)(A)(i)); the Department of Housing and Urban Development establishes the rent adjustment factors on the basis of the consumer price index (24 C.F.R. § 888.113(3)(2)); and the Internal Revenue Service annually adjusts more than 40 tax provisions using the consumer price index (IRS Revenue Procedure 2016-55 (October 25, 2016)). Also, some jurisdiction use the consumer price index to set towing rates, see, e.g., Louisiana Public Service Commission, Docket R-33105, General Order (April 2, 2014).

Nashua, MA-NH-ME-CT," for the years 2004 (the year that current rates went into effect) through 2014 (the year after STA made it initial filing),[17] the Department finds that increasing the basic tow rate by 20 percent, to $108.00, is reasonable and appropriate and result in just and reasonable rates, as it would enable tow operators, operating under efficient management, to earn a reasonable amount for towing services. Similarly, the Department finds that the Department's proposed increase to all other related charges are reasonable and appropriate and result in just and reasonable rates.

C. Proposed Changes To 220 C.M.R § 272.03, Additional Charges

1. Introduction

In the current version of 220 C.M.R § 272.03, the "Additional Charges" section provides that if a tow operator needs to employ any extraordinary or additional services outside of its capabilities, the maximum charge will be exactly equal to those charges that have been levied by the outside organization on the tow operator. STA did not seek any changes to this provision in its initial petition or in its motion to amend.

2. Proposed Changes

In its Order opening rulemaking, the Department proposed amending the Additional Charges provision of the current version of 220 C.M.R. § 272.03 to include a 20-percent administrative fee when a tow company is required to employ extraordinary or additional services outside of its capabilities. D.P.U. 13-124, at 5. In addition to the inclusion of a 20-percent administrative fee, the Department proposed an amendment to include as an

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[17] Available at http://data.bls.gov/cgi-bin/surveymost.

example of extraordinary or additional services: the utilization of services to handle hazardous material or dangerous goods (i.e., HAZMAT) . D.P.U. 13-124, n.10.

Several commenters opposed the Department's proposal to include an administrative fee for extraordinary or additional services. AIB Comments at 6-8; Arbella Comments at 6; Allstate Comments at 3. According to these commenters, allowing such a fee would incentivize tow companies to utilize services of third parties when no such service is actually needed. AIB Comments at 6-8; Arbella Comments at 6; Allstate Comments at 3. Further, commenters suggest that tow companies play a relatively minor role in securing third-party services and should not be rewarded for such efforts with what is tantamount to a 20-percent bonus. MAPHRE Reply Comments at 1; AIB Comments at 6-8.

After review of the aforementioned comments, and upon further consideration of the proposed Additional Charges provision, we are persuaded that such a fee could provide an inappropriate financial incentive to tow operators to secure third-party services where they are otherwise not needed. Further, we recognize that such a fee could result in increased costs to Massachusetts drivers. Accordingly, we decline to amend the Additional Charges provision to allow a 20-percent administrative fee.

D. Proposed Changes To 220 C.M.R § 272.03, Fuel Price Surcharge

1. Introduction

In 2008, the Department amended its involuntary towing regulations to provide for a fuel price surcharge adjustment. See D.T.E./D.P.U. 06-43-A. The surcharge, expressed as a percentage, is the result of mathematical formula that considers a number of factors,

including the current price of fuel and a separately calculated "embedded cost of fuel," which represents the cost of fuel applicable to the first five miles of a tow. Under the current regulations, a tow company may assess a fuel price surcharge when the average price of diesel fuel (as determined by the United States Energy Information Administration exceeds $1.7606 per gallon, which was the average price of diesel fuel in 2003, when STA last requested an increase in the maximum rates for involuntary tows. D.T.E./D.P.U. 06-43-A at 13; D.T.E. 03-70, at 5.

Currently, the surcharge is applicable to commercial and non-commercial involuntary tows if the price of diesel fuel exceeds $1.7606 per gallon. 220 C.M.R. § 272.03 Fuel Price Surcharge, ¶ (1). Once calculated, the surcharge is added to "the sum of the applicable rates and charges relating to fuel-burning operations of the service vehicles." 220 C.M.R. § 272.03 Fuel Price Surcharge, ¶ (4). These rates and charges include the basic tow rate and, if applicable, the rate for tows in excess of five miles and the rate for an additional service vehicle to assist in the tow.[18] 220 C.M.R. § 272.03 Fuel Price Surcharge, ¶ (4).

2. Proposed Changes

The Department proposed amending the base rate for the average cost of diesel fuel that triggers the fuel price surcharge in the current version of 220 C.M.R. § 272.03 from $1.7606 per gallon to $2.662 per gallon to reflect the price of diesel fuel as of the end of

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18 The Transportation Oversight Division makes the surcharge calculation monthly and issues an Administrative Order for any new surcharge amount. 220 C.M.R. § 272.03 Fuel Price Surcharge, ¶ (5).

January 2017, as determined by the United States Energy Information Administration.[19] The Department received no objections to raising the threshold for triggering the fuel price surcharge or, in doing so, relying on the price of diesel fuel as reported by the United States Energy Information Administration. According to the United States Department of Energy records, the average price of diesel fuel in New England at the end of May 2017 was $2.622 per gallon. Accordingly, we find that $2.622 per gallon represents the appropriate fuel surcharge threshold.

STA asserts that the Department incorrectly calculated the embedded fuel charge (STA Reply Comments at 7 n.4). According to STA, because use of the consumer price index provides for a 20-percent increase across the board, the embedded fuel cost should increase only by 20 percent (i.e., to $5.89), not the proposed $7.42 (Tr. at 14). We disagree.

The current embedded cost of fuel is set at $4.91. This amount was approved in D.T.E./D.P.U. 06-43-A and was derived based on STA's representations that the average tow was nine miles in distance and the overall cost of gas for the average tow was $8.84 (thus, 5/9 * $8.84 = $4.91). Given that diesel fuel is an essential component of towing expense, and that the average mileage per tow remains unchanged, it is reasonable to conclude that the level of fuel costs embedded in the revised basic tow rate of $108.00 is not a direct function of inflation. As noted above, the appropriate fuel price surcharge threshold is $2.622. Thus, the percentage increase in the cost of diesel fuel from the amount approved

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[19] New England (PADD 1A) Gasoline and Diesel Retail Prices, found at: http://www.eia.gov/dnav/pet/pet_pri_gnd_dcus_r1x_a.htm.

in D.T.E./D.P.U. 06-43-A is approximately 49 percent (i.e., the percentage difference between $1.7606 to $2.622). In turn, the cost of gas applicable to a nine mile tow increases from $8.84 to $13.17 ($8.84 + 49 percent). This results in an increase in the embedded cost of fuel from $4.91 to $7.32 (5/9 * $13.35). Further, an increase in the embedded cost of fuel, coupled with the increase in the basic tow rate to $108.00, also changes the embedded fuel cost percentage in the current regulations from 5.5 percent to 6.8 percent ($7.32/$108).

E. Proposed Changes to 220 C.M.R § 272.00 et seq. Pursuant To Executive Order 562

Pursuant to Executive Order 562, the Governor's Office directed each Executive Agency, including the Department, to undertake a review of its regulations.[20] The Governor's Office directed agencies to rescind, revise, or simplify their regulations in accordance with the requirements of Executive Order 562, and to retain or modify only those regulations that are mandated by law or essential to the health, safety, environment, or welfare of the Commonwealth's residents. Executive Order 562, §§ 2, 3.

Pursuant to Executive Order 562, the Department proposed amendments to the current regulations to eliminate duplicative regulations, update statutory and other references, and simplify and clarify the regulations. No party filed comments in opposition to the Department's proposed changes pursuant to Executive Order 562. Accordingly, the Department adopts the proposed amendments to eliminate duplicative regulations, update statutory and other references, and simplify and clarify regulations.

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[20] Office of the Governor, Commonwealth of Massachusetts, Executive Order No. 562 (March 31, 2015).

VI. ORDER

Accordingly, after notice, comment, hearing, and due consideration, it is

ORDERED: That 220 C.M.R. § 272.00 et seq. be amended to incorporate the revisions contained in this Order and that the regulations attached hereto be effective upon publication in the Massachusetts Register; and it is

FURTHER ORDERED: That the Secretary of the Department of Public Utilities attest a true copy of the regulations and transmit said attested true copy to the Office of the Secretary of the Commonwealth of Massachusetts, State Publications and Regulations Division, for publication in the Massachusetts Register for inclusion in the Code of Massachusetts Regulations and that said 220 C.M.R. § 272.00 et seq. be effective upon publican in the Massachusetts Register.

By Order of the Department,

/s/
Angela M. O'Connor, Chairman

/s/
Jolette A. Westbrook, Commissioner

/s/
Robert E. Hayden, Commissioner

220 CMR: DEPARTMENT OF PUBLIC UTILITIES

220 CMR 272.00: RATES FOR THE TOWING OF MOTOR VEHICLES

Section

272.01: Definitions
272.02: Scope
272.03: Maximum Charges for Passenger Automobiles, Motorcycles, Motor Bikes or Motor Scooters
272.04: Maximum Charges for Commercial Motor Vehicles
272.05: Fuel Price Surcharge

272.01: Definitions

Commercial Motor Vehicle. A motor vehicle or combination of motor vehicles used to transport passengers or property. This shall include:

(a) a bus or van used in commerce, having the manufacturer's rated seating capacity of at least nine passengers and a driver;
(b) a truck used to transport property; or
(c) any other vehicle which may display a plate other than a passenger or motorcycle plate.

Fuel-burning Operations. The services included in the basic tow rate, rate for tows in excess of five miles or the charges otherwise established in sections 220 CMR 272.03(1) through (4).

Passenger Automobile. A motor vehicle capable of transporting not more than eight passengers and a driver displaying a passenger or motorcycle plate.

Recovery. Wrecker working, winching, Waiting Time, clean up time and the provisions of special equipment needed to place a disabled motor vehicle in position to be towed.

Service Vehicle. The vehicle used to tow or transport the disabled vehicle.

Service or Waiting Time. Elapsed time the Service Vehicle is waiting to provide service at the scene, winching or utilizing Service Vehicle equipped industry standard tools or equipment.

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272.02: Scope

The maximum charges established in 220 CMR 272.00 shall only apply to the towing and transportation of motor vehicles when said transportation is ordered by the police or other public authority pursuant to M.G.L. c. 159B, § 6B or for trespass pursuant to M.G.L. c. 266, § 120D. Rates stated in 220 CMR 272.00 shall not apply to towing which results from a call made by a police officer or other public employee at the request of the owner/operator to transport the vehicle to a location other than the carrier's garage.

If, at the scene, the owner/operator requests that the vehicle be transported to a location other than the carrier's garage, the maximum tow rate may not apply.

272.03: Maximum Charges for Passenger Automobiles, Motorcycles, Motor Bikes or Motor Scooters

(1) For all Passenger Automobiles, motorcycles, motor bikes, motor scooters and all vehicles capable of being transported by crane and dolly or on a ramp truck, the maximum charge for towing up to five miles shall not exceed $108.00 per vehicle towed regardless of day of week or time of day; provided however that, the maximum charge shall include one hour of Service or Waiting Time. The Service or Waiting Time shall be computed from the time of arrival at the scene.

(2) If Service or Waiting Time exceeds one hour, a $42.00 per half-hour charge may be assessed for each vehicle towed when the additional time is necessary to remove the disabled vehicle or if requested by the police or other public authority; provided however that this charge shall not apply to trespass tows or snow removal tows. The starting and ending time shall be recorded on the tow slip at time of service for 220 CMR 272.03(2) to be applicable.

(3) If an additional Service Vehicle or Vehicles is required, the maximum additional Service Vehicle charge shall not exceed $108.00 per additional Service Vehicle; provided however that this charge shall not apply to trespass tows or snow removal tows. The starting and ending time shall be recorded on the tow slip at the time of service for 220 CMR 272.03(3) to be applicable. Time shall be computed from the time the Service Vehicle is dispatched until it returns to the carrier's garage or is back in service.

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(4) For miles towed in excess of five miles, a surcharge of $3.60 per mile for each mile over the five miles may be assessed.

(5) When additional labor is required and supplied because it is necessary to remove the disabled vehicle from the scene or is required by the police or other public authority, a maximum rate of $38.40 per man hour, or any fraction thereof, shall apply. The additional labor shall be computed from the time of leaving the carrier's garage until return to the garage. A minimum charge of one hour may be assessed when additional labor is supplied under 220 CMR 272.03(5).

(6) If the carrier has to employ any extraordinary or additional services outside of its capabilities, including but not limited to, renting cranes, renting bulldozers, employing specialized labor, or utilizing services to handle hazardous material or dangerous goods (HAZMAT), the maximum charge shall not exceed the amount of such extraordinary or additional services.

(7) When determining fractions of mileage under 220 CMR 272.03(1) and (4), omit fractions of less than 5/10 and increase fractions of 5/10 or more to the next whole figure.

(8) Mileage shall be based on round trip mileage from the carrier's garage to return thereto. If the Service Vehicle is dispatched from a location other than the carrier's garage, the one-way mileage may be doubled. The carrier shall establish the mileage from the Service Vehicle odometer and shall include the odometer readings on the tow slip.

(9) When more than one vehicle is transported on a Service Vehicle between municipalities and a mileage charge would result in a charge greater than five miles, the mileage charge shall be computed according to a commercial global positioning system (GPS) tracking application and then doubled to arrive at the round trip mileage.

(10) The owner/operator shall be responsible for all toll charges.

272.04: Maximum Charges for Commercial Motor Vehicles

(1) For all Commercial Motor Vehicles, the maximum charge for towing up to five miles shall not exceed $108.00 per tow regardless of day of week or time of day.

(2) For services necessary to the Recovery of a disabled Commercial Motor Vehicle, the carrier shall establish the charges.

(3) For miles towed in excess of five miles, a surcharge of $5.40 per mile for each mile over the five miles may be assessed.

(4) When determining fractions of mileage under 220 CMR 272.04(1) and (3), omit fractions of less than 5/10 and increase fractions of 5/10 or more to the next whole figure.

(5) Mileage shall be based on round trip mileage from the carrier's garage to return thereto. If the Service Vehicle is dispatched from a location other than the carrier's garage, the one-way mileage may be doubled. The carrier shall establish the mileage from the Service Vehicle odometer and shall include the odometer readings on the tow slip.

(6) The owner/operator shall be responsible for all toll charges.

272.05: Fuel Price Surcharge

(1) When the average cost of diesel fuel in New England exceeds $2.622 per gallon, the Department shall authorize a fuel surcharge under 220 CMR 272.00. The Department shall calculate the fuel surcharge as a factor that may be multiplied by the sum of those applicable rates and charges relating to Fuel-burning Operations of the Service Vehicles.

(2) The Department shall obtain the retail on-highway price per gallon of diesel fuel for New England as reported by the Energy Information Administration of the U.S. Department of Energy on its website, www.eia.doe.gov, for the first three Mondays of each month (Retail Prices).

(3) The Department shall calculate the average cost of diesel fuel by taking the average of the Retail Prices as determined in 220 CMR 272.05(Average Cost).

(4) To determine the appropriate fuel surcharge factor, the Department shall divide the Average Cost by $2.622 to produce a multiplication factor (Fuel Multiplication Factor or FMF). The Fuel Multiplication Factor is then multiplied by $7.32, the embedded cost of fuel in the basic tow rate, to arrive at the current fuel cost per basic tow (Current Fuel Cost). The Current Fuel Cost is then divided by the fuel-adjusted basic tow revenue requirement, which

is the sum of the $108.00 basic tow rate, plus the product of the Fuel Multiplication Factor multiplied by $7.32, minus the embedded fuel cost of $7.32 (Fuel-Adjusted Revenue Requirement). Dividing the Current Fuel Cost by the Fuel-Adjusted Revenue Requirement and subtracting the current embedded 6.8 % yields a fuel surcharge factor (Fuel Surcharge Factor) that may be applied in the next month to the sum of the applicable rates and charges relating to Fuel-burning Operations of the Service Vehicles. This formula is mathematically represented as: (($7.32 x FMF) ÷ ($108.00 + (($7.32 x FMF) - $7.32))) - .068 = Fuel Surcharge Factor.

(5) On the fourth Monday of each month (or the next business day if this falls on a holiday) preceding a month in which the Department will authorize a surcharge, the Transportation Oversight Division will issue an Administrative Order setting forth the amount of the Fuel Surcharge Factor effective for the following calendar month by:

(a) posting on the Department's website the Fuel Surcharge Factor and the month and year for which it applies, where it will remain at least until the expiration of the month to which it relates; and

(b) recording a message accessible by telephone stating the Fuel Surcharge Factor and the month and year for which it applies, where it will remain at least until the expiration of the month to which it relates.

(6) To apply a fuel surcharge, the towing slip shall record the following:

(a) each applicable rate and charge relating to Fuel-burning Operations of the Service Vehicles and a sum total;

(b) the amount of the authorized Fuel Surcharge Factor; and

(c) the amount of the applicable surcharge (the product of multiplying the sum total from 220 CMR 272.05(6)(a) by 220 CMR 272.05(6)(b)).

(7) The authorization of the Fuel Surcharge Factor shall expire on the last day of the calendar month for which it is authorized.

(8) The application of the surcharge is voluntary.

REGULATORY AUTHORITY

220 CMR 272.00: M.G.L. c. 159B, § 6B; c. 266, § 120D