



**The Commonwealth of Massachusetts**  
**DEPARTMENT OF PUBLIC UTILITIES**

D.T.E./D.P.U. 06-43-A

February 22, 2008

Rulemaking by the Department of Public Utilities on the petition of Statewide Towing Association, Inc., to amend 220 C.M.R. §§ 272.00 et seq.: Rates for the Towing of Motor Vehicles.

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ORDER ADOPTING FINAL REGULATIONS

## I. INTRODUCTION

On May 2, 2006, Statewide Towing Association, Inc. (“STA”), petitioned the Department of Public Utilities (“Department”), formerly the Department of Telecommunications and Energy, to amend 220 C.M.R. § 272.03 (“Section 272.03”) by adding to the maximum rates and charges applicable to the towing of motor vehicles ordered by the police or other public authority pursuant to G.L. c. 159B, § 6B<sup>1</sup> (“involuntary tows”) a fuel surcharge based upon a surcharge table (Petition, exh. B at Table 3). Section 6B of G.L. c. 159B authorizes the Department to establish the maximum charges for involuntary tows. STA is a statewide association representing approximately 300 towing companies, a significant majority of which perform involuntary tows (Petition at ¶ 3). The Department last allowed an increase in the maximum involuntary towing rate in Statewide Towing Association, D.T.E. 03-70 (2004).

On July 2, 2007, in response to STA’s petition, the Department issued an Order instituting a rulemaking proceeding, pursuant to G.L. c. 30A and G.L. c. 159B, § 6B, to revise Section 272.03 by including a fuel surcharge pursuant to a formula (“Rulemaking Order”). The Department filed a notice of its intention to conduct a rulemaking proceeding with the Office of the Secretary of the Commonwealth of Massachusetts, State Publications and Regulations Division, as required by 950 C.M.R. §§ 20.00 et seq. See Massachusetts Register No. 1083, published July 27, 2007. On August 14, 2007, pursuant to notice duly issued, the

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<sup>1</sup> These rates also apply to trespass tows pursuant to G.L. c. 266, § 120D.

Department conducted a public hearing on the proposed amendments to Section 272.03 at its offices in Boston.

The Department received written comments from James Schlager of Schlager Auto Body Repair, Inc. (“Schlager Comments”) and from STA, which included a statement from its president, William E. Johnson, and three exhibits (“STA Comments”). At the public hearing, William E. Johnson made a statement on behalf of STA. Cynthia Martineau, who is the executive director of STA, made a sworn statement. The evidentiary record consists of three exhibits and testimony.<sup>2</sup>

## II. PROPOSED AMENDMENTS TO SECTION 272.03

### A. STA Proposed Fuel Surcharge Table

STA asserts that a fuel surcharge is necessary to account for the increased cost of diesel fuel, which materially affects the profitability of STA’s members (Petition at ¶ 10). According to STA, when D.T.E. 03-70 was pending, the average cost per gallon of diesel fuel in the United States was \$1.77 (*id.* at ¶ 8). Since then, STA states that the average cost of diesel fuel has increased significantly, costing \$2.88 per gallon as of April 24, 2006 (*id.* at ¶ 9).<sup>3</sup>

STA proposed to add a fuel surcharge table to Section 272.03 that would allow a per-tow fuel surcharge for involuntary tows (Petition, exh. B at Table 3). STA’s proposed table would allow the total charge for a tow of up to five miles to increase by ten cents for

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<sup>2</sup> The Department previously admitted into evidence STA’s responses to three Department information requests (DTE-1-1 through DTE-1-3).

<sup>3</sup> As of January 28, 2008, the average retail on-highway price per gallon of diesel fuel for New England was \$3.583, according to the United States Department of Energy.

every ten cents that the on-highway per gallon price of diesel fuel, as reported by the United States Department of Energy, rises over \$1.77 (id.). In addition, STA's proposed table would allow the total charge for a tow over five miles to increase by one percent of the allowable mileage charge for every ten cents that the price of diesel fuel rises over \$1.77 per gallon (id.).

B. Department Proposed Fuel Surcharge Formula

In its Rulemaking Order, the Department proposed amending Section 272.03 by adding a fuel surcharge pursuant to a formula instead of a table, which is based upon an average involuntary tow of nine miles (Rulemaking Order at 2).<sup>4</sup> Under this proposal, each month the Department would calculate a flat fuel surcharge allowed per tow when the average retail on-highway price per gallon of diesel fuel exceeds \$1.77 (id.). Specifically, the Department would determine the average retail on-highway price per gallon of diesel fuel for New England, as reported by the United States Department of Energy, subtract \$1.77, which was determined to be the embedded fuel expense in D.T.E. 03-70, at 5, and multiply the difference by 1.65 gallons, representing the average gallons of fuel used per tow (id. citing Exhs. DTE-1-1; DTE-1-2).<sup>5</sup>

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<sup>4</sup> In its last rate case, STA reported that the average length of an involuntary tow was nine miles (Exh. DTE-1-2 citing D.T.E. 03-70).

<sup>5</sup> The Department arrived at the factor of 1.65 gallons by dividing the average nine-mile length of tow by 5.44, which is the average miles per gallon of fuel for tow trucks (Exh. DTE-1-1).

### III. POSITION OF THE COMMENTERS

#### A. STA

##### 1. Introduction

STA objects to the Department's proposed fuel surcharge formula as flawed. First, STA contends that the Department's formula uses a low average fuel use per tow. Second, STA contends that the Department failed to consider the actual lengths of tows. Finally, STA argues that the Department's method fails to distinguish between commercial and non-commercial vehicle tows (STA Comments at 1-4).

##### 2. Fuel Use Per Tow

According to STA, the Department's proposed fuel surcharge formula uses an unreasonably low fuel factor of 1.65 gallons per tow (STA Comments at 2; Tr. at 5-6). STA asserts that the Department's approach does not consider other necessary elements that increase the actual average use of fuel per tow, such as service vehicle start-up and shut down, waiting time, and powering the equipment used for the winching and unwinching of vehicles (STA Comments at 2; Tr. at 6). STA also asserts that the Department's approach fails to account for fuel costs associated with requests for involuntary tows that cannot be performed because the vehicles have been either driven away or privately or involuntarily towed by another carrier ("dry tows") (STA Comments at 2; Tr. at 6-7).

STA argues that the Department's formula would more accurately reflect fuel expenses if it used a factor of 5.02 gallons per tow instead of 1.65 gallons per tow (STA Comments at 2-3; Tr. at 7). STA states that during the D.T.E. 03-70 proceeding in 2003, when the

average cost of diesel fuel was \$1.77 per gallon, the actual average fuel cost per tow was \$8.84, yielding a real average fuel usage of 5.02 gallons per tow (STA Comments at 2-3, exhs. A, B and C; Tr. at 7). STA therefore concludes that the correct multiplier for the Department's formula should be 5.02, not 1.65 (STA Comments at 3; Tr. at 7).

### 3. Lengths of Tows

STA maintains that the Department's failure to consider the actual length of a particular tow in calculating a fuel surcharge would cause an injustice to both tow operators and to vehicle owners (STA Comments at 3, Statement of William E. Johnson at 2-3; Tr. at 7, 14). STA agrees that the average length of an involuntary tow is nine miles, but claims actual tow lengths vary, with every tow company having its own average length of tow (STA Comments at 3; Tr. at 8). STA contends, from statistics for fifteen different Massachusetts tow companies, that average round-trip tows vary from two miles to 20 miles (STA Comments at 3, exh. C; Tr. at 8). In addition, STA asserts that using the Department's proposed surcharge would greatly penalize a rural tow company with an average 20-mile tow (STA Comments at 3; Tr. at 8). Further, STA points out that the Department's proposed surcharge would give a potentially unfair windfall to an urban tow company with a two-mile per tow average, while unfairly charging the vehicle owner a significant surcharge (STA Comments at 4; Tr. at 8-9).

### 4. Distinction Between Commercial and Non-Commercial Tows

STA claims that the Department's proposal underestimates fuel costs by making no distinction between commercial and non-commercial vehicle tows, the former of which involve

heavier equipment that use more fuel (STA Comments at 4, Statement of William E. Johnson at 2; Tr. at 9, 14). STA observes that these fuel usage differences are recognized by Section 272.03, which allows a rate per mile over five miles of \$3.00 in Table 1 for non-commercial tows and of \$4.25 in Table 2 for commercial tows (STA Comments at 4; Tr. at 9). STA asserts that the Department's proposed flat surcharge for all tows would penalize commercial tow operators and favor non-commercial tow operators, while having the converse effect on their customers (STA Comments at 4).

B. Martineau

At the public hearing, Cynthia Martineau supported the comments of STA and the testimony of William E. Johnson (Tr. at 16, 18). Ms. Martineau noted that she is the co-owner of Colson's Auto Parts in Lunenburg, Massachusetts, a rural area (id. at 17-18). She stated that the average tow for her company is anywhere from 15 to 40 miles and asserted that her company, as well as other tow companies in her area, would be penalized by the Department's proposed fuel surcharge formula (id. at 18).

C. Schlager

James Schlager requests that the Department consider the 30 percent rise in the cost of ramp trucks and service vehicles since 2004, as well as the tremendous increase in the cost of fuel since 2004, when setting the fuel surcharge (Schlager Comments at 1). He also notes that Massachusetts's new health insurance requirement has put a tremendous burden on small businesses (id.).

#### IV. ANALYSIS AND FINDINGS

##### A. Introduction

The purpose of this rulemaking is to determine whether the maximum rate allowed to be charged by Massachusetts towing operators for involuntary tows should include a fuel surcharge (Rulemaking Order at 2-3). In setting maximum rates, the Department seeks to enable all tow operators, operating under efficient management, to earn a reasonable amount for towing services. Statewide Towing Association, D.P.U. 97-37, at 6 (1997).

Notwithstanding the maximum allowable rates for involuntary tows, towing companies and municipalities are encouraged to reduce towing costs to the general public through negotiated or contractual rates. D.T.E. 03-70, at 8.

In setting maximum rates for involuntary tows, the Department recognizes that a single maximum rate may not be appropriate for every firm operating in the towing industry. D.P.U. 97-37, at 6. As towing companies range in size from a single service vehicle operating within a single community to multiple service vehicles operating throughout the Commonwealth, so too do towing industry costs. Id. Depending on specific labor and equipment costs, some towers could charge less than the maximum and still earn a reasonable profit, and they are encouraged to do so. Id.

The cost of diesel fuel has escalated rapidly since the last increase to the maximum allowable charge for involuntary tows in 2004. Under similar circumstances in 1979, the Department approved the use of a fuel surcharge mechanism for motor vehicle common carriers and contract carriers in Fuel Surcharges, D.P.U. 20095, at 1 (1979). The Department



determined that “the procedure for these regulated entities to file increased rates reflecting greater fuel costs creates economic inefficiencies within the industry.” Id. Specifically, the Department found that by the time these regulated entities filed a rate increase to reflect changes in fuel costs, the rate increase “lags behind additional fuel cost increases and further rate increases are needed.” Id.

The Department similarly finds that a fuel surcharge is warranted in this case to implement rates that reflect rapidly increasing fuel costs as expeditiously as possible. The Department finds that a fuel surcharge that adjusts to recognize fuel cost changes on a monthly basis will reduce the regulatory lag and economic inefficiencies that may result from the standard procedure for requesting towing rate increases. The Department finds that a fuel surcharge is necessary to alleviate increasing fuel expenses and avoid any curtailment of service.

A fuel surcharge should recognize how changes in fuel prices affect overall towing costs, and at the same time be administratively efficient to understand and apply. While the Department’s proposed fuel surcharge formula is administratively efficient to apply, it fails to capture sufficiently fuel cost changes. Conversely, while STA’s proposed fuel surcharge table appears to recover fuel costs associated with the first five miles of a tow, the nexus between fuel costs and STA’s fuel surcharge for tows in excess of five miles is unclear. Therefore, the Department neither adopts its proposed fuel surcharge formula nor STA’s proposed fuel surcharge table.

Instead, having considered the record evidence and comments submitted, as well as the record in D.T.E. 03-70, the Department will adopt a fuel surcharge that better captures fuel costs related to the operation of service vehicles in excess of those already embedded in rates. Given that Section 272.03 allows various maximum rates and charges, for ease of application, the Department will 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 (i.e., basic tow rate, rate for tows in excess of five miles, and Note 1 charges). The fuel surcharge will be computed monthly by the Department as described below, and the resulting factor will be made publicly available via a recorded telephone message and on the Department's website. To apply a fuel surcharge, the towing slip must record the following: (1) each applicable rate and charge relating to fuel-burning operations of the service vehicles (i.e., basic tow rate, rate for tows in excess of five miles, and Note 1 charges) and a sum total; (2) the amount of the authorized fuel surcharge factor; and (3) the amount of the applicable surcharge (the product of multiplying the sum total from item (1) by item (2)). The Department has previously approved fuel surcharge factors and this type of surcharge formula is familiar to the towing industry. D.P.U. 20095, at 1-4.

The Department finds that the fuel surcharge formula adopted herein will recognize changes in fuel costs through a method that is more administratively efficient and more readily understood by towers and the general public than the fuel surcharge table proposed by STA. Furthermore, the fuel surcharge formula approved herein addresses the inherent variables in the towing industry better than the flat fuel surcharge originally proposed by the Department

by taking into account actual mileage for involuntary tows over five miles and a reasonably accurate measure of a tower's fuel expenses. However, given that the first five miles of a tow are subject to a fixed basic rate, urban towing companies with an average tow length of less than five miles may overrecover their fuel costs. The Department intends to examine this issue as part of the next towing rate proceeding.

As stated above, the fuel surcharge will apply to those rates and charges allowed by Section 272.03 that relate to fuel-burning operations of the service vehicles (i.e., basic tow rate, rate for tows in excess of five miles, and Note 1 charges).<sup>6</sup> Although STA advocates for the inclusion of fuel expenses related to service vehicle start-up and shut down, waiting time, winching equipment and dry tows, Section 272.03 does not permit these charges to be added as line items to the cost of an involuntary tow. These are matters that are beyond the scope of this rulemaking, which was initiated to review the propriety of instituting a fuel surcharge in the face of escalating fuel costs and within the existing regulatory framework.

#### B. Fuel Surcharge Formula

Because the fuel surcharge formula is designed to recover changes in fuel costs in excess of those fuel costs already embedded in current tow rates, it is first necessary to determine the level of embedded fuel costs. In D.T.E. 03-70, STA reported an average fuel cost per tow of \$8.84, with an average fuel cost in 2003 of \$1.7606 per gallon. D.T.E. 03-70, Exh. STA-1, Sch. 3. STA also reported that an average tow covered nine miles on a

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<sup>6</sup> The Department's fuel surcharge factor will not apply to non-fuel-related charges, such as, by way of example rather than limitation, those related to labor hours, postage, administrative costs, or vehicle or private-property security.

round-trip basis. D.T.E. 03-70, Exh. STA-1, Schs. 5, 6. These fuel costs and mileage components were accepted by the Department in determining the current basic involuntary tow charge of \$90 for the first five miles and, for those tows in excess of five miles, a per mile surcharge of \$3.00 for non-commercial vehicles and \$4.25 for commercial vehicles.

D.T.E. 03-70, at 9-10. Because most involuntary tows do not require a per mile surcharge, and because the cost data used to derive the basic tow rate are generally available and applicable to both commercial and non-commercial tows, the Department finds that the data for basic tow rates are suitable to derive a fuel surcharge factor. The fuel surcharge factor can then be multiplied by the sum of the applicable rates and charges allowed by Section 272.03 that relate to fuel-burning operations of the service vehicles (i.e., basic tow rate, rate for tows in excess of five miles, and Note 1 charges).

While the available data is suitable for the derivation of the fuel surcharge factor, the Department nevertheless recognizes that there are data limitations because of the absence of a fully-allocated cost-of-service study. The Department acknowledges that a fully-allocated cost-of-service study for the towing industry may not be realistic given the diverse nature of the towing industry, including the scale of the towers' respective operations, the services rendered, and the degree of business sophistication among them. Police-Ordered Towing, D.P.U. 20148, at 12-18 (1980). However, as part of the next towing rate proceeding, the towing industry must provide the Department with a cost-of-service study comparable to those provided in similar rate proceedings, such as D.P.U. 20148. The cost-of-service study must be based on a representative sample of towing companies, and provide cost data in sufficient

detail to allow the Department to assess towing costs. The study must explain fully how the towing revenue requirement is allocated among the various towing charge components (e.g., basic tow rate, rate for tows in excess of five miles, and Note 1 charges). Additionally, the cost-of-service study must explain how the towing revenue requirement is apportioned between commercial and non-commercial vehicle tows.

Because the \$8.84 average fuel cost per average tow of nine miles is recovered through both the basic tow charge (covering the first five miles of a tow) and the rate per mile over the first five miles (covering, in this case, four miles), it is necessary to determine the portion of the average fuel cost that is recovered through the basic tow rate. Using the mileage data provided by STA, the Department determines that  $5/9$ , or 55.56 percent of the average fuel cost per tow, is a reasonable estimate of the percentage of fuel costs that are embedded in the basic tow charge. D.T.E. 03-70, Exh. STA-1, Schs. 5, 6. Application of the 55.56 percent factor to the average fuel cost per tow of \$8.84 produces an embedded fuel cost of \$4.91, or 5.5 percent of the basic tow rate of \$90.

Increases or decreases in the price of fuel will affect the fuel cost as a percentage of the overall basic tow revenue requirement of \$90. Both the numerator and the denominator used in the percentage factor will change, because any change in fuel price will also trigger the need to impute a fuel-adjusted basic tow revenue requirement to recognize the higher fuel cost as a percentage of the total basic tow revenue requirement. The Department's fuel surcharge formula, as discussed below, accounts for these effects.

To determine the appropriate fuel surcharge factor, the Department will first calculate the average retail on-highway price per gallon of diesel fuel for New England as reported by the United States Department of Energy for the first three Mondays of the current month (“Average Cost”). The Department will then divide the Average Cost by \$1.7606, which is the average cost per gallon of diesel fuel effective at the time of the last rate case, to produce a multiplication factor (“Fuel Multiplication Factor” or “FMF”). The Fuel Multiplication Factor is then multiplied by \$4.91, the embedded fuel cost in the basic tow rate as determined above, 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 \$90 basic tow rate, plus the product of the Fuel Multiplication Factor multiplied by \$4.91, minus the embedded fuel cost of \$4.91 (“Fuel-Adjusted Revenue Requirement”). Dividing the Current Fuel Cost by the Fuel-Adjusted Revenue Requirement and subtracting the current embedded 5.5 percent 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 allowed by Section 272.03 relating to fuel-burning operations of the service vehicles (i.e., basic tow rate, rate for tows in excess of five miles, and Note 1 charges).<sup>7</sup>

For example, if the fuel price increased to \$3.52 per gallon, i.e., a 100 percent increase over the fuel price used in D.T.E. 03-70, the required fuel cost would increase from \$4.91 to \$9.82, and the basic tow revenue requirement would increase to \$94.91. Thus, a doubling of

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<sup>7</sup> This formula is mathematically represented as:  $((\$4.91 \times \text{FMF}) \div (\$90.00 + ((\$4.91 \times \text{FMF}) - \$4.91))) - .055 = \text{Fuel Surcharge Factor}$ .

fuel prices would translate into an adjusted fuel cost factor of 10.3 percent. Subtracting the embedded fuel factor of 5.5 percent from 10.3 percent produces a Fuel Surcharge Factor of 4.8 percent.<sup>8</sup> The Department finds that this method produces a Fuel Surcharge Factor that reliably represents the resulting changes in costs incurred by towers as a result of changes in fuel prices. This fuel surcharge will remain in effect until the time of the next towing rate proceeding, at which time the Department will reassess the continuing need for a fuel surcharge.

#### IV. ORDER

Accordingly, after due notice, hearing, and 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

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<sup>8</sup> This example is mathematically represented as:  $((\$4.91 \times 2) \div (\$90.00 + ((\$4.91 \times 2) - \$4.91))) - .055 = .048$ .

