

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 16R-0095TO

IN THE MATTER OF THE PROPOSED RULES REGULATING TOWING COMPANIES,
4 CODE OF COLORADO REGULATIONS 723-6.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
G. HARRIS ADAMS
AMENDING RULES**

Mailed Date: August 2, 2016

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I. STATEMENT

1. On February 19, 2016, the Public Utilities Commission issued the Notice of Proposed Rulemaking (NOPR) that commenced this proceeding. See Decision No. C16-0129. The Commission referred this matter to an administrative law judge (ALJ) and scheduled the first hearing for April 27, 2016. The purpose of the proposed rules is to describe the manner of regulation over those providing transportation service by motor vehicle in the State of Colorado; refine current definitions and add new ones; establish fencing, signage, and lighting requirements for storage facilities; implement maximum rates for the nonconsensual towing and recovery of motor vehicles of all weights; and deletes duplicative language in the civil penalty rules.

2. In addition to oral comments presented during the hearing, written comments were filed with the Commission by Colorado Auto Recovery Inc. (T-04561), the Colorado Motor Carriers Association, Connolly's Towing, Inc., D&J Towing & Recovery of Colorado Inc., the Owner-Operator Independent Drivers Association (OOIDA), Parking Authority, LLC (T-04164), Towing Operations, LLC doing business as Wyatt's Towing, Towing & Recovery Professionals of Colorado and the Towing Task Force (Task Force). Additional oral comments were provided during the course of the hearing.

3. Being fully advised in this matter and consistent with the discussion below, in accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record and exhibits in this proceeding along with a written recommended decision.

II. FINDINGS, DISCUSSION, AND CONCLUSIONS

4. OOIDA comments that it is the largest trade association representing the views of small-business trucking professionals and professional truck drivers. OOIDA has more than 155,000 members nationwide, including nearly 2,600 who reside in Colorado and thousands more who operate on Colorado highways every day. During hearing, it was clarified that OOIDA's interests focus on towing of commercial trucks as opposed to smaller personal vehicles.

5. The Colorado Motor Carriers Association (CMCA) for the past 76 years has represented companies involved and affiliated with trucking in Colorado. There are more than 650 companies within the organization representing an estimated 80,000 employees within those businesses in Colorado.

6. Comments filed by Wyatt's Towing (T-4269) state the position for itself, Aaliyah's Towing and Recovery, LLC (T-4151), Klaus' Towing Inc. (T-2042) and Lone Star Towing, LLC (doing business as Lone Star Towing and Boulder Valley Towing) (T-4066), all of which share some common ownership. During hearing, it was commented that these businesses focus on PPI towing along the Front Range. Their equipment is not capable of towing something heavier than a large pickup.

7. The proposed rules, provided with Decision No. C16-0129 in legislative (i.e., ~~strikeout~~/underline) format and in final format, were made available to the public through the Commission's Electronic Filings (E-Filings) system.

8. The undersigned ALJ has reviewed the record in this proceeding to date, including written and oral comments. This Recommended Decision will generally focus upon comments regarding contested issues addressed during the course of the proceeding.

Not all modifications proposed to the rules are specifically addressed herein. Any changes incorporated into the redline version of the rules appended hereto are recommended for adoption. Any specific recommendations made by interested parties that are not discussed below or otherwise incorporated into the redlined rules attached are not adopted.

A. Discussion

1. Task Force Consultation

9. Enacting § 40-10.1-403 C.R.S., the Colorado Legislature created a Task Force to make comprehensive recommendations to the Commission about the maximum rates that may be charged for the recovery, towing, and storage of a vehicle that has been towed without the owner's consent.

10. The Task Force representing consumers of towing services consists of nine members appointed by the Governor representing the Staff of the Public Utilities Commission; the Colorado State Patrol; a statewide towing association, towing carriers who are not members of an association; an association of automobile owners; insurance companies operating within the State; an association of motor carriers operating within the state; local law enforcement; and a private property owner that contracts for towing services.

11. In response to the Commission's NOPR, the Task Force filed comments including recommendations regarding proposed modifications to the Commission's Towing Carrier Rules. After consultation, the Commission need not accept recommendations of the Task Force. Section 40-10.1-403(4)(c) C.R.S.

2. Rule 6500

12. The Legislature authorized the Commission to make rules and prescribe rates regulating the "circumstances under which a towing carrier may perform a nonconsensual tow of

a motor vehicle, the responsibilities and facilities of the towing carrier for the care or storage of the motor vehicle and its contents, and the minimum and maximum rates and charges to be collected by the towing carrier for the nonconsensual towing and storage of the motor vehicle.” Section 40-10.1-106(b) C.R.S. In administering the statute, the Commission must be mindful of the express legislative purposes of ensuring public safety, financial responsibility, consumer protection, service quality, and the provision of services to the public. Section 40-10.1-106(a) C.R.S.

13. The Legislature clearly intended regulatory protection in the case of a tow where the owner or authorized operator is not in a position to research, negotiate with, and select a towing carrier to tow their motor vehicle. Rule 6511 represents statewide caps on amounts for towing and storage of a motor vehicle performed under a written agreement with someone other than the owner or operator of the motor vehicle. Additionally, comment points out that the scope of agreements with law enforcement have and may include more stringent obligations than those stated in Rule 6512.

14. Staff commented that Rule 6500(c) is now unnecessary because the rules will apply to tows greater than 10,000 pounds, in addition to those less. However, Rule 6500(c), in part, also addresses applicability of the Commission’s rules to resolve conflicts between rates in Commission rules and written agreements.

15. Competitive forces have affected towing rates, terms, and conditions. Historically, it has not uncommon for law enforcement ordered tows to be subject to further conditions agreed to by towing carriers in order to participate in a rotation of service providers for those agencies. Comparably, property owners of parking areas in high-demand areas may desire to negotiate terms and conditions for the right to provide towing services on their property.

Rule 6500 will be retained to reconcile negotiated agreements with Commission rules. The opportunity for competitive responses will also be extended to all nonconsensual tows by expressly recognizing that towing companies are permitted to contractually agree to more restrictive terms and conditions within parameters established by the Commission.

3. Rule 6501

16. Proposed Rule 6501(h) exactly duplicates the definition of motor vehicle in Rule 6001(v), which already applies to towing carriers. See Rule 6005, 4 CCR 723-6. Duplication is unnecessary and raises a potential for future conflict or unintended consequences. Thus, it will not be adopted here.

17. The NOPR includes the recommendation of the Task Force to refine the definition of “nonconsensual tow” to include all law enforcement-ordered tows; define the term “recovery”; and add the statutory definition of “motor vehicle” for clarity for those governed by the towing rules. Staff also proposes definitions for “private property impound,” “Recovery,” “Towing,” “towing facility,” and “Trailer.”

18. D&J comments that the inclusion of law enforcement ordered tows unnecessary. OOIDA supports the definition of nonconsensual tow as it correctly acknowledges that law enforcement ordered tows are nonconsensual. Parking Authority LLC also supports the proposed definitions and further proposes inclusion of the acronym “PPI” to the definition of a Private Property Impound.

19. The proposed rule will be adopted to clarify that a law enforcement tow is a nonconsensual tow. Without regard to the owner’s potential presence when a law enforcement official orders a tow, the circumstances reflect a lack of opportunity for the operator to research, negotiate terms with, and make an informed selection among towing carriers. Further, the officer’s primary goal

cannot be to research and negotiate the best alternative for the consumer or allow the consumer to do so after regaining their composure following such an emotional experience. Public safety dictates expeditious clearing of roadways. As found in the Utah study and consistent with other comment, “[o]fficers responding to crashes and disabled vehicles have set a goal to reduce secondary crashes and congestion by decreasing the response time and clear time as much as possible. Studies have shown that for every minute that passes after a crash, the chances for a secondary crash are increased by 2.8% (3). This indicates that for a 20 minute response time the chances for a secondary incident increases by 56%.” Non-Consent Towing Study in Utah at 52, *citing* Karlaftis, Latoski, Richards, Sinha: “ITS Impacts on Safety and Traffic Management: An Investigation of Secondary Crash Causes,” ITS Journal, 1999, Vol. 5, pp.39-52.

20. Staff proposed inclusion of the definition of a towing facility to make clear that Staff could access records without regard to their storage location. Comment also raised concern as to the consistency of reference to storage facilities in the language as compared to Rule 6507. Article 10.1 also includes references to towing facilities, which are not defined in statute. See §§ 40-10.1-106 and 40-10.1-401 C.R.S.

21. Comment points out that the Commission imposes obligations upon towing carriers with regard to storage facilities (e.g. Rule 6507); however, the term is not defined in rule. Comment suggests adoption of a definition. Illustratively, applicability is questioned as to a large parcel of property where only a small portion is used to provide storage of vehicles towed as a nonconsensual tow. Comment demonstrated need for definition of the term.¹

¹ The undersigned also notes that no basis whatsoever have been shown in comment to deny Staff access to records based upon their storage location – whether a towing facility or not. Rule 6005 authorizes Staff to interview personnel and inspect records, vehicles, and facilities. As to records, there is appropriately no reference to location (i.e. including the proposed definition of towing facility) because it matters not where they are stored.

4. Rule 6506

22. Rule 6506(e) defined rescue and recovery operations and requires a minimum set of equipment necessary to conduct such operations. The Task Force is proposing to refine Rule 6506(e) by moving the definition of recovery to the definition section, and eliminating the equipment requirements because they are incomplete and add little value in the way of enforceability. The proposals are reasonable and will be adopted.

5. Rule 6507

23. Rule 6507 currently establishes disclosure requirements regarding towing carriers' storage facilities. Proposed Rule 6507(d) regarding security and safety of vehicles requires: (1) security barriers or safety apparatus suitable to insure the security of the property contained therein. (2) enclosure by solid walls at least six feet high or fencing of chain link or other material of equal or similar strength sufficient to reasonably protect against loss, trespass or vandalism.

24. Staff is proposing fencing, lighting, and signage requirements for storage facilities. Several commenters oppose the requirements and the potential burden resulting. Comment is based upon differing foundational assumptions for the security and safety of vehicles stored by a towing carrier.

25. D&J Storage generally comments that regulation of storage facilities is best left to local governments and facilities should only be required to comply with governing zoning requirements and local ordinances. Further, it is unnecessary for the Commission to regulate these matters and inappropriate for carriers complying with local requirements to be subject penalty by the Commission.

26. Parking Authority LLC generally supports secure facilities to mitigate risks. However, it contends no facility can be 100% secure and is unrealistic to require property owners “to ‘insure’ the security of property within a facility.” An alternative is proposed to impose a standard upon reasonableness.

27. Some contend that the towing carrier is not responsible for all damage occurring while stored property is in its care, custody, and control.

28. Section 40-10.1-106 provides that the Commission:

has the authority and duty to prescribe such reasonable rules covering the operations of motor carriers as may be necessary for the effective administration of this article, including rules on the following subjects:

(a) Ensuring public safety, financial responsibility, consumer protection, service quality, and the provision of services to the public;

(b) The circumstances under which a towing carrier may perform a nonconsensual tow of a motor vehicle, the responsibilities and facilities of the towing carrier for the care or storage of the motor vehicle and its contents, and the minimum and maximum rates and charges to be collected by the towing carrier for the nonconsensual towing and storage of the motor vehicle. In setting the rates and charges pursuant to this section, the commission may require towing carriers performing nonconsensual tows to submit financial statements or other financial information to determine the costs associated with the performance of nonconsensual towing and any motor vehicle storage incident thereto.

Section 40-10.1-106(1) C.R.S.

29. The Commission has adopted rules pursuant to its jurisdiction and regulates storage as an inherent part of a nonconsensual tow. Decision No. C05-1037, issued August 30, 2005. It is notable that no comment addresses specific losses during storage and the undersigned is not aware of any complaints filed with the Commission regarding the same. The undersigned finds no Commission decision directly addressing anyone claiming damages to property in storage.

30. The Commission imposes many obligations upon towing carriers choosing the benefits of performing nonconsensual tows, specifically including demonstrating financial responsibility at all times relevant to a nonconsensual tow.² Those burdens provide important service quality and consumer protections for the public. The lack of any comment addressing availability of providers of nonconsensual tows suggests the Commission has struck an appropriate balance historically. When a towing carrier performs a nonconsensual tow, the carrier undertaking the regulated tow, must take special care of the property of another entrusted to them, including while stored, until it is released in accordance with Commission rules.

31. Towing carriers providing storage must maintain garage keeper's liability coverage on file with the Commission. This coverage insures a motor vehicle that is the subject of a nonconsensual tow against loss while in the care, custody, or control of the towing carrier. See Rule 6007. Being responsible for the property, towing carriers providing storage have an incentive to secure storage facilities based upon the applicable facts and circumstances (e.g. surrounding populations, geography, and topography).

32. Some comment contends that the towing company is not responsible for the actions of others while in the storage lot. The hypothetical provided is where one customer causes damage to the property of another customer perhaps while driving their car out of the storage lot. This comment incorrectly attempts to allocate responsibility of one party to the exclusion of the other (i.e. to the driver causing damage). Analogy is attempted to any other location where an accident might occur (i.e. a publicly available parking lot or roadway). However, such an analogy fails. The obligations necessarily undertaken in connection with a

² Illustratively, it is upon this basis that the reasonable cost of insurance is appropriately considered in establishing maximum rates.

nonconsensual tow of another's property distinguishes a nonconsensual tow from two hypothetical customers operating their own car in a parking lot, as offered in comment.

33. A towing carrier is responsible for storing a motor vehicle as an inherent part of the nonconsensual tow. If damage occurs to the motor vehicle in the towing carriers' care, others may very well be responsible; however, the towing carrier's responsibility remains. As commented, the towing carrier is in the best position to protect property within its care, custody, and control.

34. The proposed rules will be considered in light of these considerations. Approximately 20 years ago, Commission rules included specific fencing requirements for outdoor storage facilities: "723-9-12.2. Outside Storage Facilities. An outside storage facility shall be secured by enclosing it in any combination of wood, metal, masonry, or other fencing material that is at least six feet high with a locked gate." That requirement has not continued to current rule.

35. The undersigned is concerned as to the scope of burden and application of the proposed rule. Carriers have a proper incentive to protect property stored. It is less than clear that resulting benefit from the proposed rule would exceed the cost. Illustratively as to application of specific proposals, a theoretical towing carrier might secure property using several surveillance cameras, personnel, and a five foot fence. In such circumstance, would the facility not be more secure than if protected with a six foot fence alone without supplemental measures? In light of the lack of any demonstrated problem in comment to be solved and the towing carrier's underlying obligation to care for stored motor vehicles, the undersigned will not recommend imposing all proposed state-wide burdens upon towing carriers at this time.

36. In light of the adoption of proposed rule 6507(e) and the context of this discussion, it will briefly be addressed specifically. Proposed rules serve an important role in protecting consumers. When someone is seeking to retrieve their vehicle that has been towed, they may have no other information than the company name and street address of a storage facility. That information may lead only to a tall unmarked perimeter fence. There is currently no assurance that the entrance is easily identifiable or that a stored vehicle will be visible to passersby. Also, the area of the community may be unfamiliar, remote, poorly lit, and sparsely populated. Requiring minimum signage provides an important consumer protection to ensure timely and efficient return of vehicles.

37. Finally, the proposed rule requires adequate illumination levels for nighttime release of vehicles. The proposed language attempts to define what is adequate as “sufficient to allow inspection of a vehicle for damage at the time of release.” Additionally, a minimum requirement would be included.

38. Comment opposes application of the specific proposed language. As expressed during hearing, the undersigned understands the proposed rule was intended to ensure adequate illumination to permit inspection of vehicles when possession is transferred, rather than a requirement that would necessarily apply to the entirety of storage facilities. The rule will be modified to ensure applicability to an area sufficient for this purpose. Based thereupon concerns addressing the potential burden of illuminating an entire storage facility will be alleviated.

6. Rule 6508

39. Rule 6508(a)(I) establishes the authorization requirements for towing carriers acting as an agent of a property owner. Staff is proposing that the date required signage was placed on the property be included as part of the authorization agreement.

40. Several commenters respond that the proposal is not feasible to implement as signage is not posted until after contracts are executed. Further, clarification would also be needed to address replacement of signs over time.

41. Logistical and chronological concerns in comment overcome the potential benefit of the attempt to improve compliance with Commission rules. The undersigned is particularly concerned whether the desired benefit would even be achieved. While it may initially inform property owners of notice requirements, the Commission imposes obligations upon the towing carrier as to the circumstances of the nonconsensual tow, not property owners. Additionally, the fact that signage was posted to provide notice at one point in time alone does not necessarily demonstrate notice at another point in time. Due to any number of circumstances, signs may be removed or damaged to the point that they are not readable. The proposed addition will not be adopted at this time.

42. Rule 6508(b)(VI)(A) requires that towing authorizations be filled out in full and be signed by the property owner before a motor vehicle is removed from the property. It also authorizes a property owner to use an ID number or code to sign the authorization. Staff is proposing language to clarify that if the authorization is signed by the towing company as agent for the property owner, an ID number or code shall not be used.

43. Rule 6508(b)(VI)(B) requires that a towing carrier shall not accept or use blank authorizations pre-signed by the property owner. Staff is proposing to include a requirement that towing carriers may not have such authorizations in their possession.

44. Rule 6508(b)(VI)(C) allows the required written authorization to be incorporated with the tow record/invoice. Staff is proposing to expand this to any other type of document.

45. Except as to the proposed additions regarding security and fencing, addressed above, the proposed modifications are reasonable and will be adopted.

46. OOIDA propose including a clarifying provision that reads as follows: “Except as authorized by law enforcement officers, no towing service shall engage in the removal of a commercial motor vehicle that requires a commercial driver’s license to operate the vehicle under its own power on a highway.” In short, this would prevent “drive-away” tows.

47. While the circumstances described clearly could be problematic, the situation is not limited to towing carriers and cannot be comprehensively addressed within the scope of the Commission’s jurisdiction. Generally speaking, the Commission has jurisdiction over nonconsensual towing. OOIDA attempts to equate driving a motor vehicle away as a tow. However, in such event, the conduct can be done by anyone and no tow truck is used. The provision will not be added at this time.

7. Rule 6509

48. Rule 6509(b) governs the maintenance and distribution requirements of the tow record/invoice. Staff is proposing language to allow the tow record/invoice to be either electronic or a multi-copy form. And, if electronic forms are utilized they must be able to be reproduced in their original format. Comment applauds this expanded flexibility for business process and supports more global adaptation. Some comment requested recognition of the use of electronic records.

49. The General Provisions of the Rules 6000 – 6099 of the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6, apply to towing carriers. Rule 6000, 4 CCR 723-6. Accordingly, towing carriers are permitted discretion to choose the format of tow record/invoice when not specifically limited in rule:

(a) Unless a format or period of record retention is specified in a rule:

(I) motor carriers shall maintain all records required by these rules for three years. For the first year, the records must be maintained in their original format. The format may be changed after one year (i.e., converting original paper to electronic format for storage);

50. Some clarification will be adopted in rule, but the entire proposal will not be adopted.

8. Rule 6511

51. Rule 6511 governs the rates a towing carrier may charge for nonconsensual tows. Proposed Rule 6511 contains the recommendations of the Task Force. This proceeding came about as a result of the passage of H.B. 14-1031. Prior to passage, the Commission only regulated towing rates for nonconsensual tows of vehicles with a gross weight of less than 10,000 pounds. Implementing § 40-10.1-403 C.R.S., rates will be regulated for nonconsensual tows of all vehicles.

52. The Task Force recommends a tiered rate structure for private property impounds and an hourly rate structure for law enforcement tows and recovery operations.

53. Current Rule 6511(a)(I) expressly excludes from the requirements of this rule, the towing of a motor vehicle abandoned on public property weighing in excess of 10,000 pounds GVWR for which the charges are determined by negotiated agreement between the towing carrier and the responsible law enforcement agency as provided in § 42-4-1809(2)(a), C.R.S. Current Rule 6511(a)(II) excludes from the requirements of this rule, the towing of a motor vehicle abandoned on public property under a written agreement between the towing carrier and the responsible law enforcement agency as provided in § 42-4-1809(3), C.R.S. By passage of HB14-1031 the legislature removed the provision within § 42-4-1809(2)(a) restricting the Commission's authority for governing the rates of such tows. The referenced provisions within

§ 42-4-1809(3) apply to the sale of vehicles abandoned on and subsequently towed from public property. The law applies to the associated cost recovery by a law enforcement agency operating under a towing contract. The Task Force recommends current rule 6511(a) be stricken in its entirety.

54. Rule 6511(b) defines a drop charge and restricts its applicability to motor vehicles with a GVWR of less than 10,000 pounds. The current rule sets this drop charge at \$70 for vehicles with a GVWR of under 10,000 pounds. This is 43% of the current base maximum towing charge of \$160 for vehicles in the same weight class. The Task Force recommends that the language of the current rule be stricken and that the Commission determine the allowable drop charges by applying the same percentage (43%) to the base rates for each of the proposed weight classes.

55. Current rule 6511(c) governs the methodology towing carriers must use for charges applied during recovery operations, but not the rates. The Task Force recommends replacing Rule 6511(c) and that statewide rate caps be established.

56. Current rule 6511(d) sets the base towing rate for the nonconsensual towing of a motor vehicle with a GVWR of less than 10,000 pounds to \$160. It also lists allowable exceptions which effectively authorize the charging of additional fees. The Task Force recommends striking this rule in its entirety and replacing it with a new rule that establishes five rate tiers based on a cost model implemented by the Task Force. They also recommend clearly identifying all authorized fees and charges in the same rule.

57. The Task Force recommends changing the unit of measure for its proposed weight tiers from the current gross vehicle weight rating of the towed vehicle to the gross vehicle weight of a towed vehicle.

58. Staff is recommending the addition of language setting the minimum drop charge to \$0.00 and adding a requirement that the required notification to the owner or operator of the vehicle be completed by means of a charge notification card.

59. Staff proposes adding rule 6511(i)(I) to clarify that no additional fees may be charged by a towing carrier for the towing of a power unit and trailer in combination as a single motor vehicle.

60. Staff proposes adding rule 6511(i)(II) to clarify that a vehicle in or on a trailer is considered cargo, and no additional fees may be charged by a towing carrier for the transportation of cargo.

61. Significant comment generally supports adoption of reasonable comprehensive hourly rates in lieu of ancillary itemization of billing elements. It is commented that the proposed hourly rates are reasonable and preferable to past billing abuses by some towing carriers, including extensive itemization of general overhead expenses and unreasonable expenses.

62. Comment also addresses practical concerns around attempts to strike a fair balance in the carrier's appropriate recovery of costs versus the potential for abuse due to the inability to objectively determine or verify billing elements. Is cleaning one's truck ordinary maintenance or part of a recovery? Does it matter? How long should it reasonably take to complete a given recovery? While the undersigned agrees with the difficulties described by the comment, one proffered solution, leaving matters to law enforcement agencies, does not in fact solve the difficulties raised. Rather, it disregards the Commission's jurisdiction and furthers the status quo without providing an efficient forum to resolve differences.

63. Conflicting comment addresses maximum hourly rates. On the one hand, limits are viewed as a means to avoid abuses. On the other hand, limits are overly burdensome in considering the extraordinary circumstances that may arise during recovery efforts. Clarification is requested that hourly rates should include the services of one person (i.e. the driver or the operator).

64. OOIDA would propose adding language to section 6511(c)(I) to read, in part: “The time of dispatch; the time the tow truck leaves the yard or other staging location; and the time the tow truck arrives on scene; and the time the tow truck leaves the scene and returns to the yard.” This will ensure that consumers have a better idea of exactly how long the towing carrier was working to determine if the towing carrier’s charges are in compliance with the approved rates.

65. Comment suggests clarification of the referenced elements in Rule 6511(b) as compared to charges relating to vehicle storage (e.g. after hours release)

66. This rulemaking implements § 40-10.1-403 C.R.S., adding consultation with the Task Force. While the scope of the task force’s statutory authority encompasses rates for towing vehicles in excess of 10,000 pounds GVWR for the first time, the Commission has substantial experience regulating the towing industry for vehicles with a GVWR of less than 10,000 pounds. The Commission’s rules have included a maximum rate that may be charged for a private property tow of a vehicle with a GVWR of less than 10,000 pounds for more than 20 years.

67. The focus of many comments addresses towing of large vehicles, not inconsistent with weight of the Task Force membership and the expanded regulatory authority. Other than Staff, there is an absence of comment and apparent direct representation or advocacy on the

Task Force by owners of motor vehicles with a GVWR of less than 10,000 pounds not having any potential conflict of interest (e.g. an association's representation of its membership as opposed to others). Thus, the Commission must remain diligent in furthering its statutory purposes as well as the Department of Regulatory Agencies' mission of consumer protection.

68. The Task Force recommendations largely provide the foundation of the NOPR to entirely replace the existing rate structure. Those recommendations are based upon a study performed of the towing industry in Utah, adapted to Colorado by the Task Force. While many similarities support the Task Force's position, there are also aspects of the study warranting further analysis and consideration.

69. Considering the body of comment as a whole, the undersigned perceives material differences in size and scope of towing operations and is concerned whether distinctions based upon the businesses operating within each class have been fully considered. Tow volumes are much greater in the light duty category than other categories. Larger categories require significantly greater capital and training (see e.g. Task Force assumptions of a rotator purchase price of \$450,000 versus a light-duty purchase of \$60,000 and estimated tows of 90 versus 10). The cumulative effect and risk of inaccuracy can vary greatly as to these different types of businesses when rates are based applied per tow.

70. As to larger vehicles being towed, the informed consensus of the Task Force recommendations in the NOPR represents much work on a clean canvas. The Task Force reviewed towing rules and rate structures in place in other states, counties, and cities across the United States. Tiered rates were adopted by nearly all regulatory bodies. However, except as to Utah, no methods or formulas for developing the resultant rates were published and available for review. Joined by a body of largely uncontested comment by other interested persons,

the Task Force comments provide a reasonable basis to begin implementation of the expanded regulation by the Commission.

71. Much of the Task Force's work, particularly as to larger vehicles, stands unopposed. No comment challenges the per-hour estimates derived by the task force as being outside of any general range of reasonableness for categories above light duty. In light of the lack of prior Commission regulatory experience and the broad scope of interest represented in the unanimous support for the Task Force proposals, the recommendations as to the larger classes of tows will largely be incorporated in the rules recommended for adoption. Three areas received substantial comment addressing recovery incidental to a tow. Primarily, those paying for services believe there are excessive and abusive billings in some circumstances by bad actors and they desire a cost-efficient forum to resolve differences. Secondly, there is a chicken-and-egg dilemma between expediting retrieval of a towed motor vehicle by the owner and the interests of towing operators in recovering appropriate costs incurred. Finally, there are a large number of variables facing a tow company, particularly as to recovery.

72. As to tows of smaller vehicles, much comment addresses the circumstances and uncertainty involved with recovery efforts, in addition to distinctions based upon carrier size and scope. Comment specifically addressing PPI towing encourages the Commission not to abandon longstanding regulation of existing business practices. The Commission should carefully consider the significant differences in the type of businesses and the historical regulatory environment.

73. The task force proposes hourly rates for all non-PPI tows and keeping PPI tows as a fixed fee. Prior Commission experience and comment supporting continuation of prior

regulatory practice must be reconciled with the expanded scope of regulatory authority and different circumstances.

74. Notably, towing carriers are not public utilities. However, they are affected with a public interest. Section 40-10.1-103(2) C.R.S. They are neither subject to all regulatory burdens nor entitled to all regulatory benefits of a fully regulated public utility. Towing carriers are not entitled to exclusive authorities. They are not subject to traditional rate regulation. Prices for consensual towing are established in the marketplace. They do not undertake common carrier obligations to serve the general public.

75. As to nonconsensual towing, a towing carrier chooses to subject itself to regulation. If a particular carrier finds the circumstances under which nonconsensual tows must be performed to be unacceptable for any reason, no regulatory obligation requires them to perform such services.

76. The Legislature clearly contemplated that the Commission may consider financial information in establishing rates, including financial statements to determine costs associated with the performance of nonconsensual towing. Section 40-10.1-106(b) C.R.S. However, in doing so, the Commission must also be careful as to availability of comparable, consistent, financial information applying uniform methods of accounting (e.g. utilizing reporting for income tax reporting or other purposes). Even with such information, allocations or separations for regulated and unregulated activities and cross subsidies might be considered.

77. In Utah, prior to the study, the rate for private-property-impound tows of a motor vehicle with a GVWR of less than 10,000 pounds was \$145. Towing companies frequently charge the maximum permitted rate. Utah Study at 61.

78. Many local government agencies impose further limits on fees “to protect their residents from excessive charges when a nonconsensual tow is necessary. Tow companies that are dispatched from a significant distance away tend to charge a higher fee to the vehicle owner than more local tow companies.” Utah Study at 53.

79. The study finds: “[s]ome local agencies have lower maximum rates for light vehicle towing than the \$145 maximum set by state rules. A few have rates of \$120 as a maximum rate. The cost analyses in this report indicate that most companies on these rotations can make a profit if the numbers of tow calls they receive are high enough.” Utah Study at 52.

80. Many agencies impose a strict one-hour charge for a tow. Utah Study at 5.

81. “The current maximum tow fee of \$145 for a Light Duty vehicle was found to be slightly higher than the estimated costs to perform the towing operations based on both analysis methods using the data gathered in this study.” Utah Study at 60. The study finds a majority of towing companies operate profitably (see Utah Study at 44) and the recommendation is that rates not be changed. Utah Study at 61.

82. Factors external to the study make it difficult to analyze the impact of any particular factor. The report does not indicate separations between nonconsensual tows, consensual tows, and other lines of business. It does not appear from the study that Utah has a required drop fee comparable to that in Colorado.³

83. It is also unknown whether recommended regulations from the Utah Study were implemented, including: “[c]hange the PPI tow fee from a flat fee to an hourly fee with a one-hour maximum, and actual time charged for tows less than an hour. This will reduce the cost of

³ The Utah Study addresses dropped rotation calls; however, they are addressed as a loss when responding to a call and services are not needed. No revenue is apparent in the study. See Utah Study at 15.

the towing if the drop location is nearby. It could also reduce the aggressive towing practice of quickly towing multiple vehicles in a short period of time for the full fee.” Utah Study at 49.

84. The Task Force adapted the Utah study to Colorado carriers based upon an average-size towing business. Dividing the number of stamps purchased in 2015 by the number of towing carriers, the Task Force found the average carrier had 3.25 vehicles in the less than 10,000 pounds GVWR category. Using Colorado data from the towing representatives on the task force, the insurance industry, Colorado State Patrol, or the Commission, the adapted study found an estimated cost of \$177 for a one-hour tow. The Task Force recommends setting an hourly rate of \$180 – representing a 12.5% increase assuming that a tow will last one hour.⁴

85. The Commission most recently adopted \$160.00 as the rate for nonconsensual tows of a motor vehicle with a GVWR of less than 10,000 pounds based upon an economic analysis of 73 Colorado tow companies performed by the Commission’s Economics Unit in 2012 that concluded this to be an approximate average total cost per tow. See Decision No. R12-0350 at 225 and Attachment B to Decision No. R12-0080-I.

a. GVW vs GVWR

86. The Task Force proposes adoption of categories based upon gross vehicle weight rather than gross vehicle weight rating. In fact, tow equipment must be capable of towing amounts towed rather than rated amounts. However, the Commission has used GVWR in towing regulation for at least twenty years. Comment supports continued use. GVWR is easily ascertainable, objectively determined, and easily verified after the fact.

⁴ It is unclear as to the comparability of the data sources used to either a towing company operating 3.25 vehicles or past analysis by the Economics Unit. Solely for illustration, analysis assumes the annual cost of a business manager with a salary of \$85,000 before benefits. Is this a reasonable assumption for an ordinary and necessary salary for a towing company in Colorado operating 3.25 tow trucks? How does that assumption compare to the costs reported by Colorado carriers in 2012?

87. The undersigned agrees with concerns expressed in comment as an objective means for definition and delineation based upon GVWR as has previously been applied by the Commission. To the extent it is even possible that someone could be trained or experienced to estimate gross vehicle weight for all circumstances with any specified degree of accuracy, it is far from clear the standard could be generally imposed across the state and has not been shown of sufficient benefit to change the current rules. Further, practical logistical concerns would prohibit administrative enforcement due to a lack of any means to verify opinions reached after the fact due to changes in circumstance and time. The undersigned agrees that the rules should continue to rely upon GVWR as a tried and true process to accurately, efficiently, fairly and consistently without introduction of unnecessarily additional complexity. While it is also true that the tow truck must be adequate to tow the actual weight of a vehicle, no amount of experience or training would allow a tow truck driver to determine the actual vehicle weight before arriving at the site in any event.

b. Drop fee

88. After proposing rates based upon costs to provide a tow, maximum drop fees are proposed based upon a portion of the fee for a nonconsensual tow. Comment establishes drop fees as a percentage of rates, but does not explain a basis for continuing that percentage. Historically, maximum permissible drop fees as a percentage of the rate for nonconsensual tow has varied from 30% to 46% and no indication is apparent from Commission decisions that such proportion has ever been used to establish rates. See Decision Nos. C07-0421 and C00-1334.

89. Of greater concern, the Task Force model estimates recovery of towing carrier costs based upon the total costs and profit margin of an average towing carrier. To adopt hourly rates based upon the Utah study that are designed to recover all costs, while ignoring

Colorado revenues from drop fees, results in higher hourly rates and creates the potential for excessive profits.

90. Based upon the foregoing, existing drop fees will not be modified and further weight goes against full adoption of the Task Force hourly rate, particularly in the higher volume category of vehicles having a GVWR less than 10,000 pounds. In any event, as the maximum rate for a PPI tow is not recommended to change in the proposed rules, the drop fee would not change even if the percentage was adopted.

91. Staff also proposes an express minimum drop fee of \$0.00. Comment opposes adoption. Pursuant § 40-10.1-106(b) C.R.S., the Commission regulates minimum and maximum rates for nonconsensual towing and storage of motor vehicles. In many aspects the Commission has regulated the towing industry by establishing parameters within which towing carriers operate. By adopting Staff's proposal, the Commission exercises its jurisdiction without affecting the regulatory approach of establishing industry parameters. The proposal is reasonable and will be adopted.

c. Mileage

92. The Task Force recommends that existing mileage charges remain in effect for PPI tows and to derive hourly rates for tows ordered by law enforcement including associated costs.

93. The study concluded that the fuel and maintenance costs associated with a 45 mile tow were \$34, or \$.76 per mile. In adapting the study to Colorado, only fuel cost and maintenance items were adjusted to distinguish differences based upon mileage. However, other costs commonly included in a mileage rate (e.g. potentially depreciation) remain included as a cost item to be recovered in hourly rates.

94. It is noteworthy that the Utah study included mileage related costs and the Task Force adapted those costs for consideration in Colorado. But, the Task Force did not analyze costs included in current mileage rates. Thus, one cannot ascertain that costs recommended for recovery in hourly rates associated with mileage for the light category are not already recovered in current mileage rates or the surcharge based on the United States Department of Energy “weekly retail on-highway diesel prices” for the Rocky Mountain region using the price per gallon of \$2.60 as the base rate.

95. To ensure fairness and avoid double recovery, the rules generally should strive to match expenses incurred with the method of recovery and not permit billing units or measures to be applied in such a way to charge more than once for the same good or service for the same time. The lack of any ability to definitively match these costs weighs against wholly adopting the hourly rate recommended in the light category at this time.

96. Without a more thorough understanding of revenues and costs recovery, the undersigned recommends continuation of current mileage charges along with the rates adopted based upon the 2012 study of Colorado carriers.

d. Efficient Forum

97. Comment expresses realities also reflected in the efforts of the Task Force. There are numerous scenarios that cannot be fully anticipated as to the complexity of any individual recovery effort integral to a tow. Efficiency in administration and enforcement of statutory obligations must be considered and balanced in developing a process to resolve differences that may arise. Comment suggests that towing carriers be obliged to support amounts invoiced for payment. Logically, the carrier is in the best position to demonstrate the basis upon which billing is incurred; however, disputes typically come before the Commission

by the one receiving the bill filing a formal complaint. In such a proceeding, a complainant bears the burden of proof. Comment addressed this predicament where extensive discovery is necessary to obtain evidence from carriers to support claims.

98. Towing carriers provide an important function to protect the rights of property owners and the convenience and safety of the traveling public. Significant comment addresses recovery billings believed to be excessive by those having to pay the costs. Comment also generally supports a comprehensive hourly rate for a tow truck and driver to streamline and simplify billings, whether being utilized for tow, recovery, or both. Adopting billing parameters and processes will also improve efficiency in resolving disputes for all concerned.

99. Particularly as to tows of vehicles having a GVWR less than 10,000 pounds, substantially less than \$500 is often at issue in disputes resolved by Commission decisions. Comment suggested that litigation costs currently can double the amount of disputed towing costs. The cost to resolve these disputes (e.g. time for both complainants and respondents to prosecute and defend cases, not to mention attorney fees) weighs heavily against marginally increased precision of recovery through more detailed billing determinates. Imposing regulation, the Commission must be mindful of the ready availability of verifiable records and information to support charges (e.g. supporting information and fixed versus hourly billing).

100. The rules recommended for adoption reconcile that towing a vehicle is the same without regard to who initiates a nonconsensual tow. On the other hand, comment makes very clear the unpredictability of a recovery, including clean up, inherent in some tows. Comment confirmed that a PPI tow does not involve recovery. However, a tow ordered by a law enforcement official is probable to include an unpredictable amount of recovery.

101. The rules will be modified to increase transparency in billing practices by delineating variability of costs and circumstances of recovery from the similarity of the underlying tow. More routine nonconsensual tows should continue to have lesser amounts at stake for disputes and simpler means to resolve differences as they arise. On the other hand, nonconsensual tows in more difficult or extraordinary circumstances will allow increased complexity of disputes and process to address those complexities. This approach, properly struck, will permit carriers the opportunity to recover ordinary and necessary costs incurred for recovery efforts and owners or operators will have an efficient means to understand those costs.

102. The costs of a tow necessarily include both a truck and a driver to perform the tow. Comment makes clear that tow truck drivers are typically compensated by a percentage of the price of the tow price. However, it would not be appropriate for a driver to be at a scene for one hour, but bill one hour for towing and one hour for recovery. Comparably, a recovery item paid for by the hour or day should not be billed for hours within a day in addition to billing for the day.

103. Similar to the potential double recovery addressed above as to mileage charges, it is also important to avoid excess recovery through double counting units or measures in billing practices. Where costs have been analyzed in terms of hours, a reasonable billing increment is necessary to avoid excess windfalls (e.g. billing two 15-minute segments as two hours rather than ½ hour). Transparency is also important for customers to understand the costs they are paying.

104. Aside from other concerns addressed, application of the Utah model to Colorado is problematic and concerning, in part, particularly as to tows taking longer than one hour. The Task Force estimates the total costs per-tow and then appears to use that total cost as the

hourly rate. For the study, all tows are assumed to be completed in one hour. However, some cost components are being allocated based upon a per-tow or per-day basis rather than a per-tow-hour or per-day-hour basis. Where fixed costs are included in the first hour of a tow based upon a per-tow or per-day allocation, an over recovery occurs for subsequent billed hours because the recovery multiplies when the number of tows does not. Thus, incremental billings in excess of the one hour assumed should recover only variable costs.

105. To illustrate, storage yard lease fees are included in the total cost of a tow at \$16.44. The annual cost (\$12,000) is broken down by day ($\$12,000/365=\32.88), then divided by two for the assumption that two cars will be placed in storage equaling \$16.44 each). The model is calculated to recover \$32.88 per day based upon the tow of those two vehicles.

106. If the towing carrier places two cars in storage on a given day and the tows each take one hour, the outcome is as intended. However, if each tow takes two hours rather than one, the recovery is double that intended. Also, comparable to double billing addressed above, applying rates designed for the storage cost of two cars to all tows results in over recovery for tows not destined to a storage facility (e.g. to a repair facility). Potential windfall profits act as a disincentive for towing carriers to minimize the time necessary to perform a tow.

107. Until the Task Force study can be further considered to address circumstances found in Colorado, including concerns raised herein, the adopted rules continue the previous rates comprehensively adopted by the Commission for the light category.

108. It is not reasonable to assume that all tows will be completed within one hour – particularly as to variable circumstances of recovery. Nor is it reasonable to ignore the fact that costs are affected by the length of time it takes to complete a tow. In order to approximate a reasonable rate for incremental billing beyond one hour, elements of the Task Force study were

reviewed. Assuming minimal mileage on average occurs as to recovery as part of a light duty nonconsensual tow (i.e. little mileage at the site of the tow), the only clearly identifiable variable cost is labor at 35% of the tow price. Assuming that 35% of the \$160 rate recommended for adoption, labor is included during the first hour at \$56. Thus, at this time, incremental billing for additional hours for the tow truck will be billable in quarterly increments of an hour at \$56 per hour, plus the 12.5% profit margin incorporated in the model. This is the best estimation of variable costs available in the record to be applied to incremental billings greater than one hour.

109. In future proceedings, the Commission may more comprehensively consider whether to continue the modeling approach or the analyses herein based upon a study of available verifiable statements of financial results in Colorado.

e. Combination

110. “[I]n combination” was clarified at hearing to mean when one tow truck is capable of simultaneously towing a motor vehicle as well as a trailer connected to the towed motor vehicle. Under the adopted rule, such a tow is one tow and no additional fees may be charged for towing the trailer. This concept is consistent with the discussion above regarding double recovery. Where one tow truck is used to simultaneously tow a truck and connected trailer, it would not be appropriate to charge for two tows at the same time. However, comment also suggests that reasonable circumstances may require the separate tow of a motor vehicle and trailer (e.g. weight restrictions of available equipment). Some comment suggests that a given carrier decline a rotation call if they would not have equipment with the capacity to perform the tow as one tow; however, there is no basis shown to demonstrate reasonable availability of larger equipment at all times or the impact of further delay in clearing the affected roadway. Law enforcement officials are primarily concerned with clearing the roadway and mitigating

risks of secondary collisions. While they may maintain different rotation lists (e.g. by equipment capacity), the rule will not interfere with the official's determination to most expeditiously restore the roadway. Thus, if circumstances reasonably require separation and both are each actually towed by a tow truck (i.e. not in combination), then charging for two tows would be appropriate.

111. Comment during hearing was generated in the context of a law enforcement tow. However, it was recognized that similar questions arise with PPI tows. While the Commission does not address regulations of the Department of Revenue, the adopted rule clarifies applicability of Commission requirements as one tow when towing a motor vehicle with another motor vehicle as cargo (i.e. without regard to whether the cargo is on an open or box trailer).

112. Other comment addressed complications from circumstances for cleanup and disposal of a travel trailer as cargo involved in a tow. The commentor states that if a trailer is damaged in an accident, then it is appropriate that charges be imposed for services and storage provided. The proposed rule is also criticized for towing carriers potentially not being able to recover all recovery costs incurred in connection with a given tow.

113. The adopted rule strikes an appropriate balance to address the latter concern. Should a trailer be damaged, but still towed in combination, it is still appropriately billed as one tow. If sufficient damage requires a second tow, then it may be billed as such. As to concern regarding storage charges, Rule 6511(e) provides for an alternative billing based upon vehicle length, including a trailer. Thus, the towing carrier performing one tow in combination may choose to bill storage charges based upon the length of vehicle. The rule will be clarified, as addressed above, to permit charging for towing a trailer involved in an accident where necessarily towed separate from the power unit.

9. Rule 6514

114. Current Rules 6514(a)(IV) and 6514(c)(IV) are duplicative of the language of rule 6514(b) and result in inconsistent fine schedules. Staff proposes deleting the duplicative language in 6514(a)(IV) and 6514(c)(IV).

115. The proposed modifications are reasonable and will be adopted.

10. Booting

116. In addition to proposed rule language changes, the Commission specifically invited comment on issues expressed in Decision No. C16-0129.

117. Comment claims that companies utilizing boots now are not affiliated with any towing carrier. “Current regulations protect the public by requiring towing carriers to maintain minimum levels of insurance and to prevent felons from ownership in the industry. Common sense dictates such minimum protections for the public in the case of booting companies as well.” Towing Operators at para 6.

118. The commented practices of booting go far beyond the scope of any use in connection with performing a nonconsensual tow. As to such use, the undersigned considers the issue comparable to the discussion of “drive-away” tows above because no use of a tow truck is involved. Comprehensively regulating booting services goes beyond current statutory authorization. The undersigned also agrees with comment that to condition performance of nonconsensual towing upon a company not providing booting services would do little to avoid abuses occurring and likely only encourage gamesmanship to create independent entities for this purpose. The rules will not be further modified at this time.

B. Conclusion

119. Attachment A to this Recommended Decision represents the rule amendments adopted by this decision with modifications to the prior rules being indicated in redline and strikeout format (including modifications in accordance with this Recommended Decision).

120. Attachment B to this Recommended Decision represents the rule amendments adopted by this decision in final form.

121. The adopted rules are available as Attachment A and B through the Commission's E-Filings system in this proceeding (16R-0095TO) at:

https://www.dora.state.co.us/pls/efi/EFL.Show_Docket?p_session_id=&p_docket_id=16R-0095TO.

122. It is found and concluded that the proposed rules as modified by this Recommended Decision are reasonable and should be adopted.

123. Pursuant to the provisions of § 40-6-109, C.R.S., it is recommended that the Commission adopt the attached rules.

III. ORDER**A. The Commission Orders That:**

1. The Rules Regulating Transportation by Motor Vehicle, 4 Code of Colorado Regulations 723-6, contained in redline and strikeout format attached to this Recommended Decision as Attachment A, and in final format attached as Attachment B, are adopted.

2. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

3. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

4. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

G. HARRIS ADAMS

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director