

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.

**INTERIM DECISION REMANDING RULEMAKING
PROCEEDING TO THE ADMINISTRATIVE LAW JUDGE**

Mailed Date: October 13, 2016
Adopted Date: October 12, 2016

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I. BY THE COMMISSION

A. Statement

1. By this Decision, the Colorado Public Utilities Commission (Commission) remands this Proceeding to the Administrative Law Judge (ALJ) for additional hearings and public comment consistent with the discussion below.

B. Background and Procedural History

2. In 2014, the Colorado Legislature passed House Bill 14-1031, which created a Towing Task Force (Task Force) consisting of nine members appointed by the Governor. The Task Force was given the statutory directive “[t]o 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.” § 40-10.1-403(5)(a), C.R.S.

3. On December 9, 2015, the chairman of the Task Force reported to the Commission that the Task Force had completed its work on nonconsensual tows and requested that the Task Force’s recommended maximum nonconsensual towing rates be included in the Notice of Proposed Rulemaking (NOPR) for the towing rules.

4. The Task Force developed its recommendations for setting nonconsensual tow rates in Colorado by utilizing a nonconsensual tow study conducted on behalf of the State of Utah. Using the Utah data as a baseline, the Task Force developed a cost model that accounted for 46 variables, and when data was available from the towing representatives on the Task Force, the insurance industry, Colorado State Patrol, or Commission Staff, it was used in lieu of Utah-specific data.

5. Based upon this methodology, the Task Force unanimously recommended the following maximum base rates for Private Property Impound tows:

- (A) Motor vehicles of a gross vehicle weight less than or equal to 10,000 pounds is \$180.00;
- (B) Motor vehicles of a gross vehicle weight between 10,001 pounds and 19,000 pounds is \$210.00;
- (C) Motor vehicles of a gross vehicle weight between 19,001 pounds and 33,000 pounds is \$275.00; and

- (D) Motor vehicles of a gross vehicle weight more than 33,000 pounds is \$325.00.

The Task Force also unanimously recommended the following maximum base rates for law-enforcement ordered tows and recovery operations:

- (A) The towing or recovery of motor vehicles of a gross vehicle weight less than or equal to 10,000 pounds shall not exceed \$205 per hour;
- (B) The towing or recovery of motor vehicles of a gross vehicle weight between 10,001 pounds and 19,000 pounds shall not exceed \$245.00 per hour;
- (C) The towing or recovery of motor vehicles of a gross vehicle weight between 19,001 pounds and 33,000 pounds shall not exceed \$320.00 per hour;
- (D) The towing or recovery of motor vehicles of a gross vehicle weight more than 33,001 pounds shall not exceed \$370.00 per hour; and
- (E) The recovery of a motor vehicle requiring the use of Charges for the use of a Heavy Rotator (65+ tons) shall not exceed \$585 per hour.

6. These proposed rates were included in the February 19, 2016, NOPR issued by the Commission for Rules 6500 through 6514 of the Commission's Towing Carrier Rules of the Rules Regulating Transportation by Motor Vehicle, 4 *Code of Colorado Regulations* 723-6.

7. By Decision No. C16-0129, the Commission referred this Proceeding to an ALJ and scheduled a public comment hearing for April 27, 2016. Prior to the hearing, written comments were filed with the Commission by Colorado Auto Recovery Inc., the Colorado Motor Carriers Association, Connolly's Towing, Inc., D&J Towing & Recovery of Colorado Inc., Owner-Operator Independent Drivers Association, Parking Authority, LLC, Towing Operations, LLC, doing business as Wyatt's Towing, Towing & Recovery Professionals of Colorado, and the Task Force. Additional oral comments were received during the hearing.

8. On August 2, 2016, the ALJ issued Recommended Decision No. R16-0712. Thereafter, Exceptions to the Recommended Decision were filed by the Task Force, Colorado State Patrol, Owner-Operator Independent Drivers Association, Colorado Apartment Association,

Colorado Motor Carrier Association, Towing Operations, LLC, Connolly's Towing, Inc., Towing & Recovery Professionals of Colorado, and Parking Authority, LLC.

C. Recommended Decision

9. The Commission is delegated the duty under § 40-10.1-106(b), C.R.S., to prescribe rules 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.”

10. Consistent with this mandate, the Colorado Legislature, pursuant to § 40-10.1-403, C.R.S., created the Task Force charged explicitly with making recommendations to the Commission on maximum rates for nonconsensual tows.

11. In response to the Commission's NOPR, the Task Force, along with numerous other parties, filed comments concerning the proposed modifications to the Commission's Towing Carrier Rules. After hearing, the ALJ issued a comprehensive Recommended Decision covering those proposed modifications.

12. The ALJ specifically referenced the Task Force's cost model—which was adapted from the Utah model—throughout the Recommended Decision. He noted that while the cost model predominantly supports the Task Force's position, there “are also aspects of the study warranting further analysis and consideration.”¹

13. Indeed, the ALJ opined that “[u]ntil the Task Force study can be further considered to address circumstances found in Colorado ... the adopted rules continue the

¹ Recommended Decision No. R16-0712, ¶ 68.

previous rates comprehensively adopted by the Commission for the light category.”² Moreover, he states, “[w]ithout 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.”³

14. The ALJ therefore determined that the Task Force’s study required additional analysis and consideration, particularly concerning Colorado-specific circumstances, prior to recommending a change for maximum nonconsensual tow rates in the light (under 10,000 pounds) category. The maximum nonconsensual tow rate recommended by the Task Force for the light category would thus not be implemented. Instead, the rate would remain at the rate approved by the Commission in 2012 of \$160.00.

D. Exceptions.

15. While several parties took exception to the ALJ’s determination to maintain the \$160.00 rate, no parties directly addressed the ALJ’s concern that further information regarding the cost model was necessary.

16. Parties complained that proposed Rule 6500, which prohibits maximum rates higher than the rates contained in the Towing Rules, abrogated their current contracts with local governments and law enforcement, which contain rates higher than those proposed in the rules.

17. The parties also argue that the Commission’s authority over towing rates is co-extensive with local municipalities. As a result, it is argued that the Commission’s ratemaking authority does not supersede a city’s authority to contract with towing carriers.

² *Id.* at ¶ 107.

³ *Id.* at ¶96; *Id.* at ¶ 85 (stating that “[t]he 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.”).

18. As set forth in the Recommended Decision, the proposed nonconsensual and law enforcement towing rates are confiscatory since they do not cover the costs of such tows, according to several of the parties. As part of this argument, the parties take the position that the record lacked sufficient factual support to implement the indicated rates.

19. Initially, we do not find merit with the constitutional arguments put forth by the parties. However, we will reserve judgment pending further review of the rates by the ALJ. Consistent with our discussion below, we agree with the ALJ's determination that "further study and analysis" is required, and we will therefore remand this Proceeding to the ALJ for further determinations consistent with this Decision.

E. Findings and Conclusions

20. As indicated above, in analyzing the proposed modifications to the Towing Rules, the ALJ reviewed the Task Force's cost model for maximum nonconsensual tow rates, as contemplated by § 40-10.1-106, C.R.S., and § 40-10.1-403, C.R.S. The ALJ determined that while the Task Force's cost model was predominantly sufficient, additional analysis of the cost model was necessary before incorporating it entirely into the Towing Rules. More specifically, the ALJ determined that additional information specific to Colorado was necessary to fully and properly evaluate the Task Force's cost model.

21. Support for the ALJ's assertion that additional information might be necessary when considering the Task Force's cost model is found under § 40-10.1-106(b), C.R.S., as follows:

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.

22. While the financial “statements” and “information” referenced in § 40-10.1-106(b), C.R.S., are not mandatory, they indicate that certain additional documentation might be available to accompany the Task Force’s cost model. The inclusion of such documentation in the record, if practicable, would be consistent with the plain language of the statute and the ALJ’s determination that the Task Force’s cost model requires additional analysis.

23. The ALJ does reference the Task Force’s use of some Colorado data in its cost model, but the Recommended Decision raises questions about the scope of this data, particularly in light of the comprehensive study performed by Commission Staff in 2012 regarding nonconsensual light tow rates.

24. The ALJ’s consistent determination that further study of this cost model is necessary in his Recommended Decision, necessarily invokes the language in § 40-10.1-106(b), C.R.S., concerning financial statements and information that might not be present in the record here.

25. Based on the foregoing, we agree with the ALJ’s determination that further analysis and study of the Task Force’s cost model needs to be performed regarding maximum rates for nonconsensual tows, particularly in the light category. Such further study and analysis should be performed consistent with the language of § 40-10.1-106(b), C.R.S., regarding financial statements and financial information. We find that this requires that this Proceeding be remanded to the ALJ for further analysis, public comments and findings, with instructions to request financial statements and financial information consistent with § 40-10.1-106(b), C.R.S.

26. Implicit in the ALJ’s determination that the Task Force’s cost model requires further analysis is the question of the Commission’s authority to issue rules regulating maximum

rates for nonconsensual tows. This issue was explicitly raised on Exceptions and is directly relevant to the rulemaking proceeding established in the February 19, 2016, NOPR.

27. Given the paramount importance of the Commission's authority to issue rules regarding rates for nonconsensual tows, the ALJ should also consider at a public hearing any legal arguments that the parties have concerning the Commission's authority to issue rules regulating maximum rates for nonconsensual tows.

28. Thus, this entire Rulemaking Proceeding will be remanded to the ALJ for further determinations on the limited issues delineated in this Decision. While we remand the entire rulemaking to the ALJ, we direct that the further proceedings be limited to comment, discussion and analysis regarding proposed Rules 6500 and 6511.

29. Notably, the ALJ conducted his last hearing concerning the Towing Rules on April 27, 2016. As such, pursuant to § 24-4-103(4)(d), C.R.S., the 180-day deadline after the last public hearing for rules to be adopted is October 24, 2016. We therefore set a hearing for October 21, 2016, at which time the ALJ may take further comment from the parties or establish a later hearing date in order to allow additional time in which to receive financial information from towing carriers and additional comment.

II. ORDER

A. It Is Ordered That:

1. This Proceeding is remanded to the Administrative Law Judge for further determinations on the limited issues delineated in this Decision.

2. A hearing on the proposed Towing Rules will be scheduled as follows:

DATE: October 21, 2016

TIME: 9:00 a.m.

PLACE: Hearing Room
Colorado Public Utilities Commission
1560 Broadway, Suite 250
Denver, Colorado 80202

3. This Decision is effective on its mailed date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
October 12, 2016.**

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GLENN A. VAAD

FRANCES A. KONCILJA

Commissioners

CHAIRMAN JOSHUA B. EPEL ABSENT.