Order 22241 - Sterry Street Towing: Petition to Amend Tariff

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITIES AND CARRIERS
89 JEFFERSON BOULEVARD
WARWICK, RHODE ISLAND 02888

In re: **Sterry Street Auto Sales, Inc. d/b/a Sterry Street Towing (MC-812)**
257 Rice Street
Pawtucket, Rhode Island 02861

Petition To Amend Heavy Duty Non-Consensual Towing And Recovery Tariff

Docket No. 14 MC 66

Hearing Date: February 11, 2015[1]

REPORT AND ORDER

1. INTRODUCTION

On February 24, 2014, Sterry Street Auto Sales, Inc., d/b/a Sterry Street Towing (MC-812) ("Sterry Street" or "Petitioner"), filed a petition with the Rhode Island Division of Public Utilities and Carriers ("Division") seeking an increase in its approved "Heavy Duty Towing & Recovery"[2] and its so-called "Complicated or Difficult Towing & Recovery"[3] tariff

rates. The petitioner's filing went on to state that "the proposed increases would primarily affect tractor-trailers and extraordinary circumstances in the vein of water recoveries. Tariffs pertaining to all other types of tows would be unaffected."[4] Sterry Street is authorized to transport motor vehicles by tow-away/drive-away methods under Certificate of Public Convenience and Necessity ("CPCN") number MC-812.

As of the date on which Sterry Street initially filed its petition in this matter, it had two approved towing tariffs in effect. The heavy duty tariff at issue in this proceeding covered all vehicles with a gross vehicle weight ("gvw") of 15,001 lbs. and greater, including appropriate charges for "recovery" services (i.e., all work required to be done to get the vehicle to be towed "on the hook").[5] The other tariff in effect covered all light duty tows (gvw of 8,000 lbs. or less) and medium duty tows (gvw of 8,001 lbs. through gvw of 15,000 lbs), including recovery charges of $60.00 per hour in 15 minute increments after the first hour.[6]

Sterry Street's current heavy duty (15,000 lbs. gvw and over) towing and recovery tariff for non-consensual third-party requested tows (i.e, tows requested by the police or a private property owner, not the owner of the vehicle) provides for the following charges:[7]

Billable Activity	**Charge**
Actual Tow (Includes driver)[8]	
15,000-20,000 gvw	$ 90.00
20,001-30,000 gvw	$ 125.00
30,001-40,000 gvw	$ 165.00
40,001-50,000 gvw	$ 185.00

50,001-60,000 gvw	$ 225.00
60,001 and up gvw	$ 300.00

Part 1—Extra Man

Regular business hours	$ 45.00/hr
Evenings, Saturday, Sunday, Holiday	$ 55.00/hr

Part 2 – Restore Truck to Order Prior to Tow on Recovery Work

15,000-20,000 gvw	$ 45.00/hr
20,001-30,000 gvw	$ 62.50/hr
30,001-40,000 gvw	$ 82.50/hr
40,001-50,000 gvw	$ 92.50/hr
50,001-60,000 gvw	$ 112.50/hr
60,001 and up gvw	$ 150.00/hr

Part 3 – Renting Equipment

Rental of trucks, trailers, tools, lighting, chain saws, compressors, cranes, air bags, etc., as necessary to supplement Sterry Street's equipment	Charge equal to 1 of rental fee paid Sterry Street

Part 4 – Expert Personnel

Contracting for outside personnel with specialized experience and knowledge when necessary to complete a towing operation	Charge equal to 1 of the fees paid outside personnel

Part 5 – Accident Coordinator

When required to manage accident scene only for accidents involving vehicles exceeding 26,000 gvw	$ 125.00/hr

Part 6 – Cleanup

Labor to clean up accident scene	$ 45.00/hr
Cost of disposal by outside contractor	Charge equal to 1 disposal fees paid outside contractor

Part 7 – Storage & Related Fees

A. Storage	**First 5 hours free**
Up to 20 ft.	$ 23.00/day
20 to 30 ft.	$ 33.00/day
30 to 40 ft.	$ 43.00/day
50 to 60 ft.	$ 53.00/day
60 and over 2 units	$ 80.00/day

B. After Hours Release of Truck or Load

Release of truck or load after hours, weekends and legal holidays	$ 20.00
If Sterry Street must stand by for a load to be moved, charge for standing time	$ 50.00/hr

C. Storage Of Freight

Inside storage for safekeeping or weather conditions or due to condition of the load	$ 100.00/day/25'

D. Transfer Load

When carrier is required to transfer a load to a new truck or repack the current load	$ 45.00/hr/man

Part 8 – Use of Special Equipment When Required for Recovery Efforts at a Location

Forklift w/driver	$ 90.00/hr
Steering Dolly w/driver	$ 90.00/hr
Backhoe	$ 200.00/hr
35-Ton Hydraulic Tilt-Trailer w/Tractor w/driver used to transport cargo on disabled vehicles with gvw of 26,000 lbs or greater	$ 350.00/hr

Part 9 – Recovery From Body of Water

When the carrier is required to remove a truck from a body of water, charge is by the hour based on

particular weight group with no standing time allowed for tides, current and wind change	
15,000-20,000 gvw	$ 90.00
20,001-30,000 gvw	$ 125.00
30,001-40,000 gvw	$ 165.00
40,001-50,000 gvw	$ 185.00
50,001-60,000 gvw	$ 225.00
60,001 and up gvw	$ 300.00

Sterry Street's tariff amendments, as originally proposed on February 21, 2014,[9] are as follows:

Item 4. Billable Activity

1) Heavy Duty Towing & Recovery	**Rate/Unit**
Towing Charges	$ 400.00/hr
Standard Recovery Charges	$ 550.00/hr
Simple Water Recovery Charges	$ 550.00/hr

2) Complicated or Difficult Towing & Recovery	**Rate/Unit**
Emergency Response Manager or Supervisor	$ 175.00/hr
Certified Diver and Dive Assistant[10]	$ 300.00/hr
Outside Experts or Personnel	Cost plus 30%
Recovery Personnel	$ 85.00/hr
Crane (operation) and (setup fee)	$ 775.00/hr $1,000.00
Heavy Duty Wrecker	$ 425.00/hr
Medium Duty Wrecker or Flatbed	$ 225.00/hr
Roll-off Truck	$ 350.00/hr
Landoll or Lowbed Trailer w/Tractor	$ 450.00/hr
53' Box or Refrigerated Trailer	$ 750.00/day

Fork Lift	$ 225.00/hr
Front End Loader, Excavator, Bulldozer, or Skid Steer w/Attachments	$ 450.00/hr
Incident Support Unit	$ 600.00/hr
Converter Dolly or Converter Tandems	$ 250.00/hr
Air Cushion Lift System	$8,000.00/day
Traffic Control System	$ 300.00/day
40' Power Boom Lift, Diesel Powered	$ 350.00/hr
Scene Lightng	$ 90.00/hr
Work Boat	$ 350.00/hr
Supplies, Materials & Expendables	Cost plus 20%

ITEM 5 – STORAGE & MISCELLANEOUS RATES

1) Storage, Standby, & Loading	**Rate/Unit**
Up to 30'	$ 33.00/day
30' to 60'	$ 63.00/day
60' and over two units	$ 93.00/day
Inside Storage of freight (25' x 10')	$ 100.00/day
After Hours, Weekend & Legal Holiday Release Fee	$ 20.00 flat fee

Although the tariff filing also seeks to modify Sterry Street's current light and medium duty tariffs for Sterry Street through replacing some or all of the recovery provisions included in those tariffs with the "so-called 'Complicated or Difficult Towing & Recovery,' for all gross vehicle weights" …

"defined in Item 2, para. 8 of the tariff as 'retrieval of a Motor Vehicle in demanding circumstances …",[11] this filing neither set out the current tariff provisions for those lower weight classes nor adequately explained how the proposed "Complicated or Difficult Towing & Recovery" rates would impact the tow rates for those classes. Nor were those impacts and relationships with the existing light and medium duty tow tariffs addressed at all by Sterry Street during the February 11, 2015, hearing on this tariff filing or during the subsequent post-hearing data responses. Accordingly, we cannot, at this time, approve the use of the "Complicated or Difficult Towing & Recovery" rates for light and medium duty tows.[12]

Upon receipt and inspection of Sterry Street's petition, the Division issued an Order on March 26, 2014, suspending "the proposed tariff filing to afford the Division an opportunity to investigate the reasonableness of the instant tariff rates and provisions after a public hearing,"[13] and prepare and issue a final report and order. Under R.I.G.L. §39-12-12, a tariff filing, once suspended, remain suspended until such time as the Administrator is able to complete his review of that filing and the proposed rates contained therein.

2. Subsequent Written Modifications of the Tariff Filing

a. July 21, 2014

On July 21, 2014, the Petitioner submitted an amended proposed tariff, including some additional and/or revised proposed amendments to its existing heavy duty towing tariff and to its "Complicated or Difficult Towing & Recovery" rates.[14] This was followed about one month later, on September 2, 2014, by the Division's "First Set Of Data Requests"

directed to the Petitioner, Sterry Street Auto Sales, Inc. d/b/a Sterry Street Towing.[15] Sterry Street responded to those data requests on October 1, 2014 (they were received by the Division on October 3, 2014). [16]

Thus, as of July 21, 2014, Sterry Street's amended proposed tariff sought the Division's approval of the following rates:

Item 4. Towing & Recovery Rates	**1st Proposal**	**Amended**
1) Heavy Duty Towing & Recovery	**Rate/Unit**	**Rate/Unit**[17]
Towing Charges	$ 400.00/hr	$ 400.00/hr
Standard Recovery Charges	$ 550.00/hr	**deleted**
Simple Water Recovery Charges	$ 550.00/hr	**deleted**
2) Complicated or Difficult Towing & Recovery	**Rate/Unit**	
Emergency Response Manager or Supervisor	$ 175.00/hr	$ 175.00/hr
Certified Diver and Dive Assistant[18]	$ 300.00/hr	$ 300.00/hr
Outside Experts or Personnel	Cost plus 30%	Cost plus 30%
Recovery Personnel	$ 85.00/hr	$ 85.00/hr
Crane (operation) and (setup fee)	$ 775.00/hr $1,000.00 fee	$ 775.00/hr $1,000.00 fee
Heavy Duty Wrecker	$ 425.00/hr	$ 425.00/hr
Medium Duty Wrecker or Flatbed	$ 225.00/hr	$ 225.00/hr
Roll-off Truck	$ 350.00/hr	$ 350.00/hr

Landoll or Lowbed Trailer w/Tractor	$ 450.00/hr	$ 450.00/hr
53' Box or Refrigerated Trailer	$ 750.00/day	$ 750.00/day
Fork Lift	$ 225.00/hr	$ 225.00/hr
Front End Loader, Excavator, Bulldozer, or Skid Steer w/Attachments	$ 450.00/hr	$ 450.00/hr
Incident Support Unit	$ 600.00/hr	$ 600.00/hr
Converter Dolly or Converter Tandems	$ 250.00/hr	$ 250.00/hr
Air Cushion Lift System	$8,000.00/day	$8,000.00/day
Traffic Control System	$ 300.00/day	$ 300.00/day
40' Power Boom Lift, Diesel Powered	$ 350.00/hr	$ 350.00/hr
Scene Lightng	$ 90.00/hr	$ 90.00/hr
Work Boat	$ 350.00/hr	$ 350.00/hr
Supplies, Materials & Expendables	Cost plus 20%	Cost plus 20%

ITEM 5 – STORAGE & MISCELLANEOUS RATES	**1st Proposal**	**Amended**
1) Storage, Standby, & Loading	**Rate/Unit**	**Rate/Unit**
Up to 30'	$ 33.00/day	$ 33.00/day
30' to 60'	$ 63.00/day	$ 63.00/day
60' and over two units	$ 93.00/day	$ 93.00/day
Inside Storage of freight (25' x 10')	$ 100.00/day	$ 100.00/day
After Hours, Weekend & Legal Holiday Release Fee	$ 20.00 fee	$ 20.00 fee

Thus, the only "rate" changes between the originally proposed tariff of February 21, 2014, and the amended proposed tariff filed on July 21, 2014, was the deletion of two charges: "Standard Recovery Charges" at $550.00 per hour, and "Simple Water Recovery Charges at $550.00 per hour. These are not, however, the only changes between the proposed and amended proposed tariffs.

Item 1 – Application of Rates

The first new change occurs in Item 1 of the amended proposed tariff, where any reference to the tariff applying to "Heavy Duty Towing and Recovery and storage between points within Rhode Island" has been deleted. Instead, the July 21, 2014, amended proposed tariff states that it applies "to Complicated or Difficult Towing & Recovery … between points within Rhode Island and storage of the recovered Motor Vehicles." It is unclear what, if any, effect this is intended to have on Sterry Street's "Heavy Duty Towing and Recovery" tariff.

Item 2 – Definition of Terms

In addition, the July 21, 2014, version of the tariff changed several key definitions from those set out in Item 2 of the February 21, 2014, submission.

The definition of "**After Hours Release**" was significantly expanded. In the original proposal, the definition was: "'After Hours Release' means release of a Motor Vehicle from the Carrier's facility between the hours 9:00 p.m. and 8:00 a.m." As originally drafted, that definition suggested that Sterry Street had personnel on its premises every day, 365 days each year, from 8:00 a.m. through 9:00 p.m. In the latest version, the definition was changed to read as follows: "'After Hours, Weekend & Legal

Holiday Release' means release of a Motor Vehicle from the Carrier's facility between the hours of 9:00 p.m. and 8:00 a. m., or between Friday evening and Sunday evening, or on New Year's Day, Memorial Day, Fourth of July, Victory Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, or Christmas, or any day on which any such holiday is officially celebrated." Thus, there are now as many as nine days, in addition to Saturdays and Sundays, when Sterry Street suggests it does not have any personnel on scene.

The next definition changed was that of "**Complicated or Difficult Towing & Recovery**." A new subsection "f" was added to the original definition: "Over 26,000 lbs in weight." Given the way this definition is constructed, it is apparent that a vehicle that meets any one of the six criteria for being a "Complicated or Difficult Towing & Recovery" is considered to qualify as complicated or difficult. In other words, under this modified definition, a semi-trailer truck parked quietly on the shoulder of a straight stretch of highway, even if otherwise operable (i.e., it was pulled over for speeding and the driver arrested under an outstanding warrant), is considered a "Complicated or Difficult Towing & Recovery" simply because the combined weight of tractor, trailer and cargo exceeds 26,000 lbs.

The new submission deletes the definition of "**Heavy Duty Towing & Recovery**" entirely. Under the original proposal "Heavy Duty Towing & Recovery" meant towing and/or recovery of a vehicle over 26,000 lbs. Generally speaking, this definition would have been inconsistent with Division guidelines, which would consider any tow of a vehicle over 15,000 lbs. GVW to be a heavy duty tow.[19]

The new definition of "**Motor Vehicle or Vehicle**" contained in the July 21, 2014, filing expands significantly on that set out in the original submission. Under the new definition: "'Motor Vehicle' or 'Vehicle' means any vehicle, machine, truck, tractor-trailer, or semi-trailer propelled or drawn by any mechanical power and used upon the highways in the transportation of property, but does not include any vehicle or car operated on a rail or rails whether on or off the publicly used highways." This new definition is actually more consistent with that set out in R.I.G.L. §§ 39-12-2(m) and 39-12.1-2(12) for involuntary third party tows done under the "Towing and Storage Act".

The July 21, 2014, version of the proposed tariff adds a new definition of "**Private Passenger Vehicle**." Under this new definition: "'Private Passenger Vehicle' means any vehicle under 10,000 lbs registered or leased to an individual, used exclusively for personal, recreational, or commuting purposes, and not used as a motor vehicle for hire." This definition would appear to be some type of amalgam of light duty tows (up to 8,000 lbs. GVW) and medium duty tows (8,001 lbs. to 15,000 lbs. GVW) with a focus on the purpose for which the vehicle is used, attempting to separate out vehicles being used solely for personal, non-commercial, transportation from identical vehicles that are used for commercial purposes.

Next, the July 21, 2014, version of the proposed tariff deletes the definition of a "**Standard Recovery**." As originally proposed, the tariff provided that: "'Standard Recovery' means a Recovery other than a Simple Water Recovery or Complicated or Difficult Towing & Recovery."

The new proposed tariff also changes the definition of "**Towing**" by replacing the word "removal" with the word "transporting" so that the

definition now reads: 'Towing' means the transporting a [sic] Motor Vehicle from one location to another by means of a Wrecker, Roll-off Truck, Landoll or Low bed Trailer, or other mechanical or motorized means.

The new proposed tariff deletes the definition of "**Weekend & Legal Holiday Release**" although it takes the language from the original proposed tariff and folds it into the definition of "After Hours, Weekend & Legal Holiday Release" discussed above.

Item 3 – Miscellaneous Provisions

Petitioner Sterry Street made a number of additional changes between the February 21 and July 21 filings with respect to Item 3 of its proposed tariffs, some subtle, some obvious, but virtually all are substantive.

The first change made is that the July 21, 2014, proposed tariff no longer addresses how "**Heavy Duty Towing and Recovery**" services are to be billed; the original filing provided that such services were to be "billed comprehensively at the hourly rates indicated in item 4, section 1, and carry a one-hour minimum." (Emphasis supplied.) As a result of this deletion, there is no longer clear guidance in the July 21, 2014, tariff proposal as to how the actual towing performed under the tariff is to be billed, and there is no longer any provision for billing anything for recovery work that does not amount to "Complicated or Difficult Towing and Recovery" services.

The July 21, 2014, proposed tariff also changes the manner in which billable hours are calculated. In the February 21, 2014, original proposal, "[h]ours incurred are computed from the time of dispatch until the time the Carrier unhooks from the towed or recovered vehicle…." In

the newer version, "[h]ours are computed *per line item* from the time of dispatch until the time *of return from the recovery site or tow destination*." Thus, while under the original proposal the vehicle owner's exposure to billing ended for all purposes as soon as the hook was removed from his towed vehicle, now that exposure continues for each piece of equipment or billable line item after the tow has been completed until such time as Sterry Street's equipment and/or personnel have returned to Sterry Street's premises.

The July 21, 2014, proposed tariff also changes the way in which vehicle releases to the vehicle owner at the scene are accomplished. In the original proposed tariff, on February 21, 2014, "[i]f a vehicle owner appears at the scene of a tow and has the ability to satisfy the towing charge, the vehicle shall be released to the owner at the scene. In such instances, the vehicle shall not be towed to Carrier's facility." This language was amended to provide that "[i]f the owner of a Motor Vehicle appears at the scene of a tow and has the ability to satisfy the Complicated or Difficult Towing & Recovery charges, the Vehicle shall be released to the owner at the scene. In such instance, the Vehicle shall not be towed to Carrier's facility absent *a valid police-ordered impoundment*." (*Emphasis* supplied.) This is the first time the concept of a "police-ordered impoundment", valid or not, has been introduced into a tow tariff for tows performed under the authority of R.I.G.L. § 39-12.1-1 *et seq.* ("The Towing Storage Act"). There is no guidance as to how one determines whether or not a "police-ordered impoundment" is "valid."[20]

b. October 1, 2014

On October 1, 2014, the Petitioner, Sterry Street, filed its responses to a number of data requests posed by the Advocacy Section of the Division. Attached to those responses was a new proposed tariff with a couple of additional changes from the July 21, 2014, version, all found in Item 3, Appendix 5, of the October 1, 2014, version of the amended tariff.

The first change adds a clause to the end of the first sentence of Item 3, Paragraph 1, at Appendix 5, so that it now reads:

> Complicated or Difficult Towing & Recovery services are billed separately on a line item basis at the hourly rates indicated in Item 4 and carry a four-hour minimum per line item, **except that the four-hour minimum will not apply in cases where the Carrier simply provides towing service and nothing more for a vehicle over 26,000 lbs.** …

(**Emphasis** in original highlighted new language.) This amendment seems to acknowledge that simply "scoop and scoot" tows, even for very heavy vehicles, are not in themselves uniformly "Complicated or Difficult."

The second change amends Item 3, Paragraph 4, at Appendix 5 of the October 1, 2014, filing by adding some new language to the second sentence thereof, so that it now reads:

> If the Owner of a Motor Vehicle appears at the scene of a tow and has the ability to satisfy the Complicated or Difficult Towing & Recovery Charge, the Vehicle shall be released to the owner at the scene. In such instance, the Vehicle shall not be towed to Carrier's facility absent a valid **warrant or** police-ordered **seizure pending court review**.

(**Emphasis** in original highlighted new language.) The addition of the words "warrant or", and the substitution of the words "seizure pending court review" for the word "impoundment" adds some clarity to the circumstances under which Sterry Street might decline to turn a vehicle

over to its owner upon payment of any applicable and reasonable towing and storage fees.

There were no further written amendments to the proposed tariff prior to the public hearing.

3. Procedural Matters

On January 6, 2015, the Division notified the parties that it had scheduled a hearing to consider the proposed amended tariff for Wednesday, February 11, 2015, at 10:00 a.m., in the Division's hearing room at 89 Jefferson Boulevard, Warwick, Rhode Island. Both the Petitioner Sterry Street and the Advocacy Section of the Division appeared at the duly noticed time and place.

Near the conclusion of the hearing on February 11, 2015, the Advocacy Section counsel noted that there had been considerable discussion during the hearing about clarifying the terms of the tariff with respect to the rates being requested on a couple of items (primarily with respect to the set-up fee for a rotator, and the labor costs associated with performing that setup) and suggested that it might be appropriate to submit a fourth amended tariff to clarify those points.[21] The Hearing Officer indicated that he would appreciate that, and hoped it could be filed as a joint exhibit of the parties to indicate that both parties agreed with the wording.[22]

On May 18, 2015, the Hearing Officer, having completed a preliminary review of the record in this matter, promulgated a set of post-hearing data requests to both parties, asking that the material be provided to him by no later than June 18, 2015. On May 22, 2015, the Hearing Officer promulgated a second set of data requests to both parties, asking

that the material responsive to those requests be provided to him by no later than June 25, 2015.

With respect to both sets of data requests, the Hearing Officer also advised the parties that, in the absence of any objections to admission of their data responses as full exhibits, it was his intention to enter them as full exhibits *in absentia* without holding a second hearing. However, if either party objected to admission of any response as a full exhibit, or if either party wished to discuss the data responses in a public hearing, the Hearing Officer indicated that he would schedule a hearing to address that party, or parties, concerns.

The data responses were received from both parties on June 30, 2015 (the original deadline was extended by the Hearing Officer at the request of the parties), without objection to their admissibility as of July 14, 2015, and were therefore marked and admitted as full exhibits *in absentia*.[23]

On November 16, 2015, the Hearing Officer received Petitioner's Motion For Relief And/Or For Reconsideration Of Tariff, filed pursuant to Rule 31(b) of the Division's *Rules of Practice and Procedure* "on the basis that the Division's delay in ruling on Sterry Street's proposed Complicated or Difficult Towing and Recovery Tariff is effectively a denial that cannot be appealed under the" Administrative Procedures Act. The Motion pointed out that Sterry Street filed its petition on February 2, 2014, and the Division held a hearing on the matter on February 11, 2015.[24]

The Hearing Officer spoke with Sterry Street's counsel regarding the Motion on November 17, 2015, and advised him that he expected to complete this Report and Order within another week, and that as a result

that he did not anticipate acting on the Motion. Counsel was satisfied with that explanation, so long as the Report and Order was forthcoming.

4. Discussion Of Legal Issue Presented And Declaratory Ruling.

Early in the initial hearing, Sterry Street raised a significant issue with regards to the extent of the Division's regulatory authority over significant portions of Sterry Street's proposed heavy duty tow tariffs. Specifically, Sterry Street questioned whether or not the Division had any regulatory authority over so-called "recovery charges" (i.e., those charges related to all work required to be done by, or for, the tower before the tower is able to put a motor vehicle "on the hook" and actually tow it away. The issue may be stated thus:

> Whether "recovery charges" associated with performing a non-consensual tow are subject to state regulations along with the actual towing and related storage charges, or whether regulation of "recovery charges" has been preempted by the Federal government by way of the preemption clause of The Interstate Commerce Act, as amended by The Federal Aviation Administration Authorization Act ["FAAAA"], 49 U.S.C. §§14501(c)(1) through 14501(c)(2).

The Parties concurred with the Hearing Officer's observation that this question was being presented to him in the nature of a request for a declaratory ruling.[25] The Parties also provided post-hearing briefs, setting out their respective positions on this issue, which the Hearing Officer read and considered carefully before preparing this Report and Order.

a. Applicable Law—Federal

Federal authority over intrastate transportation by motor carriers of property is as follows:

§14501. Federal authority over intrastate transportation

> …
> (c) MOTOR CARRIRS OF PROPERTY.—
> (1) GENERAL RULE.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier … or any motor private carrier, broker, or freight forwarded with respect to the transportation of property.
> (2) MATTERS NOT COVERED.—Paragraph (1)—
> (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;
> (B) does not apply to the intrastate transportation of household goods; and
> (C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.
> …

49 U.S.C. §14501 (**emphasis** in original; emphasis supplied). This is not, however, the only relevant Federal provision of law with respect to the issue presented here.

A number of the terms used in 49 U.S.C. §14501 are defined earlier in Title 49, United States Code, Subtitle IV (Interstate Transportation, §§ 10101-16106), Part B (Motor Carriers, Water Carriers, Brokers and Freight Forwarders, §§ 13101-16106), and serve to illuminate what, precisely, Congress had in mind when it promulgated 49 U.S.C. § 14501(c).[26]

> HIGHWAY.—The term "highway" means a road, highway, street, and way in a State.

49 U.S.C. §13102(9).

> MOTOR CARRIER.—The term "motor carrier" means a person providing motor vehicle transportation for compensation.

49 U.S.C. §13102(14). A tower, whether using a flat bed with a hook, or a heavy-duty wrecker, is clearly using a motor vehicle to provide transportation for compensation.

> MOTOR VEHICLE.—The term "motor vehicle" means a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway in transportation, or a combination determined by the Secretary, but does not include a vehicle, locomotive, or car operated only on a rail, or a trolley bus operated by electric power from a fixed overhead wire, and providing local passenger transportation similar to street-railway service.

49 U.S.C. §13102(16) (emphasis supplied). Most of Sterry Street's heavier pieces of equipment used in recovery operations (cranes, rotators, etc.) would appear to fit generally into the definition of "motor vehicles."

> PERSON.—The term "person", in addition to its meaning under section 1 of title 1, includes a trustee, receiver, assignee, or personal representative of a person.

49 U.S.C. §13102(18). This definition incorporates by reference the definition of person contained in 1 U.S.C. §1: "In determining the meaning of any Act of Congress, unless the context indicates otherwise— … the words "person" and "whoever" includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;…" Sterry Street is, then, clearly a "person" within the meaning of 49 U.S.C. §13102(18) and 1 U.S.C. §1.

> STATE.—The term "State" means the 50 States of the United States and the District of Columbia.

49 U.S.C. §13102(21). The State of Rhode Island and Providence Plantations is clearly covered by this definition.

> TRANSPORTATION.—The term "transportation" includes—
>
> (A) a motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and
>
> (B) services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking and interchange of passengers and property.

49 U.S.C. §13102(23) (emphasis supplied). It is important to note that the list of what constitutes "services related to that movement [of property]" set out in 49 U.S.C. §13102(23)(B) is not intended to be all-inclusive, but is merely illustrative of the types of services that are "included" in the phrase "services related to that movement." Clearly services other than those specifically listed may also constitute "services related to that movement."

b. Applicable Law—State

The applicable State laws governing non-consensual tows in intrastate commerce, adopted in response to passage of 49 U.S.C. §14501(c)(2)(C), are found in R.I.G.L. §§ 39-12.1-1 *et seq.*[27], but several statutory provisions found elsewhere in Title 39 of the Rhode Island General Laws are also relevant.

First of all, regulation of intrastate transportation rates has been determined by the State General Assembly to be affected with a public interest.

> (a) The general assembly finds and therefore declares that:

> (1) The businesses of … offering to the public transportation of … property … are affected with a public interest;
>
> (2) Supervision and reasonable regulation by the state of the manner in which such businesses … carry on their operations within the state are necessary to protect and promote the convenience, health, comfort, safety, accommodation, and welfare of the people, and are a proper exercise of the police power of the state;
>
> (3) Preservation of the state's resources, commerce, and industry requires the assurance of adequate public transportation … all supplied to the people with reliability, at economical cost ….
>
> (b) It is hereby declared to be the policy of the state to provide fair regulation of public utilities and carriers in the interest of the public, to promote availability of adequate, efficient and economical … transportation services … to the inhabitants of the state, to provide just and reasonable rates and charges for such services and supplies, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices, and to co-operate with other states and agencies of the federal government in promoting and coordinating efforts to achieve realization of this policy.
>
> (c) To this end, there is hereby vested in … the division of public utilities and carriers the exclusive power and authority to supervise, regulate, and make orders governing the conduct of companies offering to the public in intrastate commerce … transportation services … for the purpose of increasing and maintaining the efficiency of the companies, according desirable safeguards and convenience to their employees and to the public, and protecting them and the public against improper and unreasonable rates, tolls and charges by providing full, fair, and adequate administrative procedures and remedies, and by securing a judicial review to any party aggrieved by such an administrative proceeding or ruling.
>
> …

R.I.G.L. § 39-1-1 (emphasis supplied).

With respect to Title 39, Rhode Island General Laws, generally, R.I.G.L. §39-1-2 defines several important terms that are used in R.I.G.L. §§39-12.1-1 *et seq.*:

> Terms used in this title [Title 39] shall be construed as follows, unless another meaning is expressed or is clearly apparent from the language or context:
>
> (1) "Administrator" means the administrator of the division of public utilities and carriers;
>
> …
>
> (7) "Common carrier", except when used in chapters 12 … of this title, means and includes all carriers for hire or compensation including … express, freight and freight line companies, … and all other companies operating any agency or facility for public use in this conveyance over fixed routes, or between fixed termini within this state or persons or property by or by a combination of land, air, or water;
>
> …
>
> (11) "Division" means the division of public utilities and carriers;
>
> …
>
> (16) "Motor carriers" means any carrier regulated by the administrator pursuant to Chapters … 12 … of this title;
>
> …
>
> (20) "Public utility" means and includes … every company operating or doing business in intrastate commerce and in this state as a … common carrier…;
>
> …

(Emphasis supplied.)

Sterry Street is a "motor carrier of property," and thus falls under Chapter 12 (as well as under Chapter 12.1) of Title 39. The State General Assembly has set out its general policies with respect to governing such motor carriers in R.I.G.L. §39-12-1:

> It is hereby declared to be the policy of the state to regulate transportation of property by motor carriers upon its publicly used highways in such manner as to recognize and preserve the inherent advantages of transportation, and to foster sound economic conditions in transportation and among carriers engaged therein in the public interest; and in connection therewith to:
>
> (1) Promote adequate, economical, and efficient service by motor carriers and reasonable charges therefor without unjust discriminations, undue preferences, or advantages or unfair or destructive competitive practices;

> (2) Improve relations between, and coordinate transportation by and the regulations of motor carriers and other carriers;
>
> ...

(Emphasis supplied.) Chapter 12 also defines a number of terms generally applicable to the legal issue raised with respect to towers generally (i.e., not just for non-consensual tows):

> (a) "Administrator", as used in this chapter, means the public utilities administrator.
>
> ...
>
> (c) "Common carrier", as used in this chapter, means any person who or which undertakes, whether directly or by any other arrangements, to transport property, or any class or classes of property, by motor vehicle between points within this state, for the general public for compensation, over the publicly used highways of this state, whether over regular or irregular routes.
>
> ...
>
> (e) "Drive away-tow away operations", as used in this chapter, means any operation in which any motor vehicle or motor vehicles, new or used, constitute the commodity being transported, when one set or more of wheels of any motor vehicle or motor vehicles are on the highway during the course of transportation, whether or not any motor vehicle furnishes the automotive power.[28]
>
> (f) "Driver", as used in this chapter, means any person operating a motor vehicle used for the transportation of property, which he or she owns or is operating with the express or implied consent of its owner.
>
> ...
>
> (j) "Intrastate commerce", as used in this chapter, means any commerce wholly within this state by motor vehicle between points having a point of origin and a point of destination within this state.
>
> ...
>
> (l) "Motor carrier", as used in this chapter, means a common carrier by motor vehicle,... or an interstate carrier by motor vehicle.
>
> (m) "Motor vehicle", as used in this chapter, means any vehicle, machine, truck, tractor-trailer, or semi-trailer propelled or drawn by any mechanical power and used upon

> the highways in the transportation of property, but does not include any vehicle or car operated on a rail or rails whether on or off the publicly used highways.
>
> …
>
> (p) "Person", as used in this chapter, means any individual, firm, co-partnership, corporation, company, association, or joint stock association, and includes any trustee, receiver, assignee, or personal representative thereof; and, where the context requires shall include "driver", as defined in this section.
>
> …
>
> (r) "Publicly used highways", as used in this chapter, means all public ways, roads, highways, streets, avenues, alleys, boulevards, parks, squares, and bridges and approaches thereto, within this state.
>
> …

R.I.G.L. §39-12-2 (emphasis supplied). Chapter 12 of Title 39 also establishes the general duties and powers of the Division's Administrator with respect to motor carriers of property such as Sterry Street:

> (a) It shall be the duty of the administrator:
>
> (1) To regulate common carriers by motor vehicle as provided in this chapter, and, to that end, the administrator may establish reasonable requirements with respect to continuous and adequate service, uniform system of accounts, records and reports, and preservation of records;
>
> …
>
> (3) To administer, execute, and enforce all provisions of this chapter, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure of administration;
>
> (4) For the purposes of the administration of the provisions of this chapter, to inquire into the management of the business of motor carriers and into the management of the business of persons controlling, controlled by, or under common control with, motor carriers to the extent that the business of the persons is related to the management of the business of one or more motor carriers, and the administrator shall keep himself or herself informed as to the manner and method in which the businesses are conducted, and may obtain from the carriers and persons the information as the administrator deems necessary to carry out the provisions of this chapter.

> (5) To administer, execute and enforce all provisions of chapter 12.1 of this title and to make all necessary orders in connection therewith and to prescribe rules, regulations and procedure of administration.
>
> …
>
> (c) Upon complaint in writing to the administrator by any person, organization, or body politic or upon his or her own initiative without complaint, the administrator may investigate whether any motor carrier has failed to comply with any provisions of this chapter, or with any requirements established pursuant thereto.…
>
> …

R.I.G.L. § 39-12-4 (emphasis supplied).

Finally, the State General Assembly promulgated an entire chapter in Title 39, Chapter 12.1, dealing specifically with non-consensual tows and setting out the General Assembly's policy with respect to such tows. The General Assembly articulated the public interest in regulating non-consensual tows as follows:

> **Declaration of purpose and policy. –** The legislature hereby finds the following legislation to be in the public interest for these reasons:
>
> WHEREAS, A tow truck in the hands of an incompetent operator is a dangerous instrumentality; and
>
> WHEREAS, The public has an inherent right to ready access to the name, location, and telephone number of certificated towers; and
>
> WHEREAS, The operation of a tow truck on the public highway with a vehicle in tow is a dangerous instrumentality exposing others on or about the highway to loss or damage, which must be covered by adequate insurance; and
>
> WHEREAS, The motoring public has a right, when delegating to law enforcement the selection of an operator in the towing-storage business, to expect that the operator selected and responding will be competent; and
>
> WHEREAS, The motoring public has a right when delegating to law enforcement the selection of an operator in the towing-storage business, to expect that the charges for the services to be rendered will be reasonable and compensatory, and that the operator is physically equipped in his or her business to function properly; and

> WHEREAS, The towing and storage of a vehicle without the owner's consent, as is the case in most police instigated tows, requires certain procedures to assure the owner that rights of due process of law are not violated; and
>
> WHEREAS, The owner or person in control of private property of real estate has a right to be free from trespass by vehicle on the private property; and to have any such trespassing vehicle removed at the owner's expense; and
>
> WHEREAS, The police powers delegated by the legislature of the state include the power of the police, even without the owner's consent, to have public ways cleared of conditions which, in the opinion of the officer, creates a hazardous condition to the motoring public; to have removed abandoned, abandoned and of no value, and unattended vehicles; to have removed and/or relocated vehicles in violation of parking ordinances; and to have removed any vehicle under control of any person arrested for any criminal offense; and
>
> WHEREAS, The process of selection of the operator of a towing-storage business for police work is unique in that law enforcement, though having the legal duty to order the work, has no legal duty to pay costs and charges connected therewith, the same being the duty of the vehicle owner.

R.I.G.L. § 39-12.1-1 (emphasis supplied). Significantly, this statute makes it crystal clear that the police are being delegated authority only to select a "towing-storage" operator, and that the police have no legal duty to pay the costs and charges connected with a "towing-storage" operation, those costs remaining the duty of the vehicle owner for whom the "towing-storage" work was actually performed. There is no mention of a separate category of work associated with non-consensual tows designated as "recovery" work (under that or any other similar term), and thus no delegation to the police of any authority to arrange for something other than "towing-storage" work (i.e., "recovery") and obligate the vehicle owner, rather than the police, to pay for that non-"towing-storage" work (i.e., "recovery") performed at the behest of the police.

Chapter 12.1 of Title 39 defines a number of terms as they are to be used only when applying the provisions of that chapter.

> **Definitions. –** As used in this chapter, the following words shall have the meaning as set forth in this section.
>
> …
>
> (3) "Certificated tower" means a carrier possessing a certificate of public convenience and necessity issued by the public utilities administrator for the purpose of transporting vehicles by tow-away method.
>
> (4) "Legal owner" means the person who has obtained ownership of a vehicle by any legal means but has not caused the vehicle to be registered with the division of motor vehicles.
>
> (5) "Police department" means the police department of a city or town or the Rhode Island state department.
>
> …
>
> (9) "Tow truck" means any motor vehicle designed and/or ordinarily used for the purpose of towing or removing vehicles or assisting disabled motor vehicles.
>
> …
>
> (11) "Vehicle" means any motor vehicle as defined in § 39-12-2(m).
>
> …

R.I.G.L. §39-12.1-2 (emphasis supplied).

This definition of "tow truck" in R.I.G.L. § 39-12.1-2(9) clearly extends beyond traditional wreckers (including heavy duty wreckers) to include "***any*** motor vehicle designed and/or ordinarily ***used for the purpose of*** … ***assisting*** disabled motor vehicles." Such motor vehicles would include flat-bed trucks, cranes, roll-off trucks, lowbed trailers with tractor, fork lifts, and boom lifts, among others, all of which can be used, for example, to "assist" a disabled vehicle into a position from which it can be towed. These are all vehicles that Sterry Street's amended tariffs would view as potentially necessary to a "recovery" operation rather than actual towing; yet by definition, ***under Rhode Island law***, they are defined as

"tow trucks" because they are "designed and/or ordinarily used or the purpose of assisting disabled vehicles."

In Rhode Island, the police are not the only ones who can initiate non-consensual tows. R.I.G.L. § 39-12.1-12 provides, in pertinent part:

> **Private trespass towing. –** (a) The owner or person in control of any parcel of property may cause to be removed from the property vehicles which are trespassing upon the property without the consent of the owner or person in control of the property by retaining, in writing, a certificated tower to remove the trespassing vehicle and relocate the vehicle to its private impoundment lot; and this procedure may be undertaken and accomplished without the need to resort to the judicial process; provided, however, that the impoundment lot shall be within ten (10) miles of the point of removal; and provided further that the lot shall be open for business to release the vehicle the same hours it is open to receive the vehicle;[29] and provided further than there shall be posted on the outside of the office of the lot the business hours.
>
> (b) All charges for towing, in accordance with the published tariff and storage shall be borne by the last registered and/or legal owner of the vehicle for which charges he certificated tower shall have a possessory lien …
>
> …

(Emphasis supplied.)

Finally, the General Assembly explicitly assigned the enforcement and administration of the provisions of R.I.G.L. §§39-12.1-1 *et seq.* to the Administrator of the Division: "The public utilities administrator shall supervise, regulate and enforce the provisions of this chapter." R.I.G.L. §39-12.1-15.

c. Preemption And Rules Of Statutory Construction

We can hardly do a better job of setting out the applicable rules of statutory construction than was done by United States Magistrate Judge Robert W. Lovegreen in his decision in *Rhode Island Public Towing*

Association, Inc. v. Rhode Island Division of Public Utilities and Carriers, 1997 WL 225695 at 3-4 (D.R.I.), one of the cases cited in the Petitioner's brief:

> Congress derives its power to preempt state law pursuant to the Supremacy Clause: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; ..., any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Under the doctrine of preemption, it is axiomatic that state laws which "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution," are invalid. *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 822 (1st Cir.1992), *cert. denied*, 506 U.S. 1052, 113 S.Ct. 974, 122 L.Ed.2d 129 (1993) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211, 6 L.Ed. 23 (1824)). "Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) (quoting *FMC Corp. v. Holliday*, 498 U.S. 52, 56–7, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990) (internal quotation marks omitted)). Under either analysis, the fundamental question is congressional intent. *Id.; Greenwood Trust*, 971 F.2d at 823; *French v. Pan Am Express, Inc.*, 869 F.2d 1, 2 (1st Cir.1989).
>
> Where, as here, a federal statute contains an express preemption clause, the focus narrows upon "whether a particular state statute intrudes into the federal pale." *Greenwood Trust*, 971 F.2d at 822. Courts, however, are reminded to assume that "the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress," *id.* at 823 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447, *rev'd on other grounds sub nom. Rice v, Bd. of Trade of City of Chicago*, 331 U.S. 247, 67 S.Ct. 1160, 91 L.Ed. 1468 (1947), and citing *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991)); for the authority to preempt state law is "an extraordinary power .... that we must assume Congress does not exercise lightly." *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991)); *see*

> *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (plurality opinion).
>
> To discern congressional intent, courts apply the time-honored rules of statutory construction by first examining the statute's plain language because its text "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993); *see Morales*, 504 U.S. at 383; *Grenier v. Vermont Log Bldgs. Inc.*, 96 F.3d 559, 562 (1st Cir.1996). However, in those instances where "perlustration[30] of a statute's text fail[s] to disclose the scope of Congress's preemptory intent, [the Court] must then assess the statute's structure and purpose in order to probe Congress's wishes." *Greenwood Trust*, 971 F.2d at 824 (citing *Ingersoll–Rand Co. v. McClendon*, 498 U.S. 133, 138, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990)). Such assessment might include reference to a statute's history and legislative context. *Id.* (citing *Toibb v. Radloff*, 501 U.S. 157, 162, 111 S.Ct. 2197, 115 L.Ed.2d 145 (1991)).

The United States Supreme Court made the latter point a bit more concisely in a recent decision regarding the proper interpretation of 49 U.S.C. §14501(c)(1), *Dan's City Used Cars, Inc. v. Pelkey*, 133 S.Ct. 1769, 1778, 185 L.Ed. 2d 909 (2013). In *Dan's City*, the Court was asked to decide whether 49 U.S.C. §14501(c)(1) preempts a vehicle owner's state-law claims against a towing company regarding the company's post-towing disposal of the vehicle. The Court began its analysis of 49 U.S.C. §14501(c)(1) by setting out the appropriate rule of statutory construction to use in interpreting the scope Federal statutes that preempt state authority.

> Where, as in this case, Congress has superseded state legislation by statute, our task is to "identify the domain expressly pre-empted." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001). To do so, we focus first on the statutory language, "which necessarily contains the best evidence of Congress' pre-

> emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 732, 123 L.Ed. 2d 387 (1993).

Dan's City Used Cars, Inc. v. Pelkey, 133 S.Ct. at 1778.

d. Scope Of Preemption Under 49 U.S.C. §14501(c)(1)

The Federal Aviation Administration Authorization Act of 1994 ("FAAAA") contains, among many other provisions, one specific provision intended to complete the deregulation of the motor carriers of property industry – 49 U.S.C. §14501(c)(1). That section provides, in pertinent part, that "Except as provided in paragraphs (2) and (3), a State … may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier … with respect to the transportation of property." Several things are clear upon its face:

1. It preempts the power of a State to enact laws, regulations or other similar legally binding restrictions.
2. The preemption is limited only to "laws, regulations or other provisions" related to (a) prices, (b) routes, and (c) services pertaining to the operations of certain motor carriers.
3. The motor carriers concerned must be engaged in "the transportation of property."

Congress thoughtfully defined several of the terms used in this provision, including "carrier" [49 U.S.C. §13102(3)], "motor carrier" [49 U.S.C. §13102(14)], "motor vehicle" [49 U.S.C. §13102(16)], "State" [49 U.S.C. §13102(21)], and – most importantly – "transportation" [49 U.S.C. §13102(23)].

It is clear from a reading of 49 U.S.C. §14501(c)(1), in light of the definitions established by Congress in 49 U.S.C. §13102, that the

Petitioner, Sterry Street, who is engaged in the business of transporting motor vehicles for hire via the tow-away/drive-away method, is a motor carrier engaged in the transportation of property. It is also clear that Congress generally intended to preempt Rhode Island's ability to "enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service" with respect to the transportation of property by motor carriers. Under the general rule established by 49 U.S.C. §14501(c)(1), then, Petitioner would be correct in arguing that Rhode Island's power to regulate its provision of transportation services for hire via motor carriers has been preempted by the Federal Government.

The impetus behind Congress' decision to preempt the States' authority with respect to transporting property via motor carriers was a Congressional determination "that state governance of intrastate transportation of property had become 'unreasonably burden[some]' to 'free trade, interstate commerce, and American consumers. *Dan's City* at 133 S.Ct. 1775 (quoting *Columbus v. Ours Garage & Wrecker Service, Inc.,* 536 U.S. 424, 440,, 122 S.Ct. 2226, 153 L.Ed. 2d 430 (2002).) The solution to this problem, in Congress' estimation, was to simply preempt "state governance of intrastate transportation of property."

However, Congress chose not to make the preemption complete, including several exemptions from the general rule. Exempted from the general rule set out in 49 U.S.C. §14501(c)(1) are the following State powers:

1. The safety regulatory authority of a State with respect to motor vehicles. 49 U.S.C. §14501(c)(2)(A).

2. The authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo. 49 U.S.C. §14501(c)(2)(A).

3. The authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorizations. 49 U.S.C. §14501(c)(2)(A).

4. The authority of a state to regulate the intrastate transportation of household goods. 49 U.S.C. §14501(c)(2)(B).

5. The authority of a State to enact or enforce a law, regulation or other provision *relating to the price* of for-hire *motor vehicle transportation by a tow truck* if such transportation is performed *without the prior consent* or authorization *of the owner or operator* of the motor vehicle [being transported/towed]. **I.e., non-consensual tows.** 49 U.S.C. §14501(c)(2)(C).

6. The authority of a State under certain circumstances to enforce a law, regulation, or other provision with respect to the intrastate transportation of property by motor carriers related to –
   a. Uniform cargo liability rules [49 U.S.C. §14501(c)(3)(i)],
   b. Uniform bills of lading [49 U.S.C. §14501(c)(3)(ii)],
   c. Uniform cargo credit rules [49 U.S.C. §14501(c)(3)(iii)],
   d. Antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling [49 U.S.C. §14501(c)(3)(iv)], or
   e. Antitrust immunity for agent-van line operations [49 U.S.C. §14501(c)(3)(v)].

7. The entire State of Hawaii is exempt from 49 U.S.C. §14501(c)(2)(A). 49 U.S.C. §14501(c)(4).

8. The authority of a State to require that, in the case of a motor vehicle to be towed from private property without the consent of the owner or operator of the vehicle, the person towing the vehicle have prior written authorization from the property owner or lessee or that such property owner or lessee be present at the time the vehicle is towed from the property, or both. 49 U.S.C. §14501(c)(5).

Of these, it is the fifth exemption that is at issue in this case.

The Second Circuit has summarized the history of this fifth exemption as follows:

> Section 14501(c) was originally enacted and codified at 49 U.S.C. § 11501(h), without the present exemption for regulation of nonconsensual tow rates, by the Federal Aviation Administration Authorization Act of 1994 (FAA Authorization Act), Pub.L. No. 103–305, § 601(c), 108 Stat. 1569, 1606. As such, § 11501(h)(1) preempted state and local regulation of any 'price, route, or service of any motor carrier ... with respect to the transportation of property,' and § 11501(h)(2)(A) exempted state and local authority with respect to safety and financial responsibility regulations.
>
> The House Conference Report that accompanied the legislation indicates that the purpose behind § 11501(h)(1) was to free the motor carrier industry from state and local regulation and to put that industry on a playing field level with that of the air carrier industry, which had already been deregulated by the Airline Deregulation Act of 1978. See H.R.Conf.Rep. No. 103–677, at 85, 87 (1994), reprinted in 1994 U.S.C.C.A.N. 1715, 1757, 1759. In so doing, Congress hoped to eliminate the competitive advantage air carriers, such as Federal Express, had enjoyed under decisions interpreting the 1978 statute, relative to motor carriers, like United Parcel Service. See *id.* (citing *Federal Express Corp. v. California Pub. Utils. Comm'n*, 936 F.2d 1075 (9th Cir.1991)).
>
> The House Conference Report further clarifies that the exemptions from preemption under § 11501(h)(2)(A) simply reflect the fact 'that State authority to regulate safety, financial fitness and insurance ... of motor carriers is unchanged since State regulation in those areas is not a price, route or service and thus is unaffected.' *Id.* at 85, reprinted in 1994 U.S.C.C.A.N. at 1757; see also *id.* at 84, reprinted in 1994 U.S.C.C.A.N. at 1756 ('[N]othing in these new subsections contains a new grant of Federal authority to a State ... The intention of the conferees is solely to identify certain areas that are not preempted ...'). The Report nonetheless explicitly qualifies these exemptions, stating, '[t]he conferees do not intend for States to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority.' *Id.*
>
> **Just one year after its enactment, § 11501(h) was recodified at 49 U.S.C. § 14501(c)—with an added**

exemption for state regulation of nonconsensual tow rates —by the Interstate Commerce Commission Termination Act of 1995 (ICC Termination Act), Pub.L. No. 104–88, § 103, 109 Stat. 803, 899. **The House Report** that accompanied the legislation **notes that the added provision struck a balance between the need to protect consumers from exorbitant towing fees and the need for a free market in towing services.**' HR.Rep. No. 104–311, at 120, reprinted in 1995 U.S.C.C.A.N. at 793, 832. Accordingly, **the provision was 'not intended to permit re-regulation of any other aspect of tow truck operations.**' *Id.* at 119, reprinted in 1995 U.S.C.C.A.N. at 831. *Ace Auto Body & Towing v. City of New York*, 171 F.3d 765, 772–73 (2d Cir.), cert. denied, 528 U.S. 868, 120 S.Ct. 166, 145 L.Ed.2d 140 (1999).[FN3]

> FN3. In relevant part, the full House report reads as follows: "[The legislation] ... adds a new provision as subsection (c)(2)(C) which **provides a new exemption from the preemption** of State regulation of intrastate transportation **relating to the price of non-consensual tow truck services**. This is **only intended to permit States** or political subdivisions thereof **to set maximum prices for non-consensual tows, and is not intended to permit re-regulation of any other aspect of tow truck operations**.
>
> "The Committee had been asked to go farther and permit States and political subdivisions thereof to re-regulate all aspects of non-consensual tow truck services. The Committee **provision struck a balance between the need to protect consumers from exorbitant towing fees and the need for a free market in towing services**. Under the current provision, States and political subdivisions thereof would need to take affirmative action to re-regulate the prices of non-consensual tow truck operations." H.R.Rep. No. 104–311, at 119–20, reprinted in 1995 U.S.C.C.A.N. at 793, 831–32.

Modzelewski's Towing and Recovery, Inc., v. Connecticut Department of Motor Vehicles, 58 Conn. L. Rptr 806, 2014 WL 4494312 (Conn. Super.

2014) (holding that Connecticut DMV could not regulate "recovery" rates under Connecticut law)(**emphasis** supplied).

Clearly, then, it took Congress less than a year after passing the FAAAA to determine that consumers were being harmed by exorbitant non-consensual towing fees and to decide that it had to return some control over those fees to the States – at least to the extent of regulating "motor vehicle transportation by a tow truck."

e. What Is "Motor Vehicle Transportation By A Tow Truck"?

At the crux of it all is one simple question: What is motor vehicle transportation by a tow truck? Congress has helped the States by defining two of the three key terms in this question – "motor vehicle" and "transportation" – but has left the States to their own devices in determining what constitutes a "tow truck" (and, for that matter, what constitutes a "tow").

The very first clause of 49 U.S.C. §13102 states "In this part, the following definitions shall apply." (Emphasis supplied.) Since both 49 U.S.C. §13102 and 49 U.S.C. §14501 are in the same "part," that is, Part B of Subtitle IV of Title 49, United States Code, it is clear that the definitions set out in 49 U.S.C. §13102 apply to the terms used in 49 U.S.C. §14501. Thus, when we apply the exemption for nonconsensual tows set out in 49 U.S.C. §14501(c)(2)(C), we must do so informed by the relevant definitions set out in 49 U.S.C. §13102.

A "motor vehicle," for the purposes of applying 49 U.S.C. §14501(c)(2)(C), is defined as:

> MOTOR VEHICLE.—The term "motor vehicle" means a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway in transportation,

> or a combination determined by the Secretary, but does not include a vehicle, locomotive, or car operated only on a rail, or a trolley bus operated by electric power from a fixed overhead wire, and providing local passenger transportation similar to street-railway service.

49 U.S.C. §13102(16) (emphasis supplied). This definition is broad enough to cover any situation in which any tower in the state is called by the police to perform a nonconsensual tow. Rhode Island's own statutory definitions of "motor vehicle" are consistent with this Federal definition. *See* R.I.G.L. §39-12-2(m).[31]

"Transportation," as used throughout Part B of Subtitle IV of Title 49, United States Code, for the purposes of interpreting 49 U.S.C. §14501(c)(2)(C), is defined as:

> TRANSPORTATION.—The term "transportation" includes—
>
> (A) a motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and
>
> (B) services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking and interchange of passengers and property.

49 U.S.C. §13102(23) (emphasis supplied). It is important to note that the list of what constitutes "services related to that movement [of property]" set out in 49 U.S.C. §13102(23)(B) is not intended to be all-inclusive, but is merely illustrative of the types of services that are "included" in the phrase "services related to that movement." Clearly services other than those specifically listed, such as transferring cargo from a disabled trailer to a functional one, maneuvering a vehicle back onto its wheels so that it may resume its journey (or, at least, be moved), arranging for a new

refrigerated trailer, etc., may also constitute "services related to that movement."

Since there is no Federal definition of a "tow truck" in 49 U.S.C. §13102, we must look to State law for the definition (we can infer from the absence of a Federal definition of "tow truck" that Congress did not intend to preempt the State's ability to issue its own definition). Under the Rhode Island General Laws, nonconsensual tows are governed by Chapter 12.1 of Title 39. Under R.I.G.L. § 39-12.1-2(9), "'Tow truck' means any motor vehicle designed and/or ordinarily used for the purpose of towing or removing vehicles or assisting disabled motor vehicles." (Emphasis supplied).

This definition of "tow truck" in R.I.G.L. § 39-12.1-2(9) clearly extends beyond traditional wreckers (including heavy duty wreckers) to include "***any*** motor vehicle ***designed and/or*** ordinarily ***used***" for any one, or more, of three purposes: (1) towing vehicles; (2) removing vehicles; and, (3) assisting disabled motor vehicles. Such motor vehicles would include, among others, traditional wreckers, flat-bed trucks, cranes, roll-off trucks, low bed trailers with tractor, fork lifts, and boom lifts, all of which can be used, for example, to "assist" a disabled vehicle into a position from which it can be "towed" or otherwise "removed" from its present location. Put another way, by definition, ***under Rhode Island law***, these are all examples of motor vehicles that may be defined as "tow trucks" because they are "designed and/or ordinarily used for the purpose of assisting disabled vehicles."

So, what is "motor vehicle transportation by a tow truck"? Given that the statutory definitions of all three critical terms – "motor vehicle" [*see* 49 U.S.C. §13102(16) and R.I.G.L. §39-12.1-2(m)], "transportation"

[*see* 49 U.S.C. §13102(23)] and "tow truck" [*see* R.I.G.L. §39-12.1-2(9)] – are broadly inclusive, rather than limited, definitions, it is clear that a "tow" involves far more than attaching a tow truck's hook to a disabled vehicle and hauling it off. It includes the preparatory work required to get a disabled vehicle back on its wheels, shifting its cargo to another vehicle if necessary to move and safeguard it, and the operation of all of the vehicles required to accomplish that even if some of those vehicles are not traditional wreckers. To put it more plainly, "recovery" work, as it is used in Petitioner's proposed heavy-duty nonconsensual tow tariff (and as it has been used in other tariffs in this state), is merely the preliminary part of the tow, not an action separate and distinct from the tow.

e. Delegating To Law Enforcement Or A Private Property Owner The Authority To Select A Tower Without The Prior Consent Of The Owner/Operator Of The Vehicle Being Towed.

We should consider for a moment the consequences of reaching the contrary conclusion – i.e., that "recovery" is not part of the "tow." The exemption set out in 49 U.S.C. §14501(c)(2)(C) makes it clear that the State can only regulate "the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle." That raises the question of who it is that is contracting with the tower to perform the nonconsensual third-party tow? If "recovery" is not part of "transportation by a tow truck," who is contracting with the tower for the "recovery"? That is, who is going to pay for the "recovery" being performed, and who is going to pay for the "tow"? Obviously, it is up to

the State to determine how those questions are to be answered in these nonconsensual situations.[32]

Rhode Island has specifically addressed the delegation of authority issue in R.I.G.L. §39-12.1-1. That statute provides, in pertinent part:

> **Declaration of purpose and policy. –** The legislature hereby finds the following legislation to be in the public interest for these reasons:
>
> …
>
> WHEREAS, The motoring public has a right, when delegating to law enforcement the selection of an operator in the towing-storage business, to expect that the operator selected and responding will be competent; and
>
> WHEREAS, The motoring public has a right when delegating to law enforcement the selection of an operator in the towing-storage business, to expect that the charges for the services to be rendered will be reasonable and compensatory, and that the operator is physically equipped in his or her business to function properly; and
>
> …
>
> WHEREAS, The owner or person in control of private property of real estate has a right to be free from trespass by vehicle on the private property; and to have any such trespassing vehicle removed at the owner's expense; and
>
> WHEREAS, The police powers delegated by the legislature of the state include the power of the police, even without the owner's consent, to have public ways cleared of conditions which, in the opinion of the officer, creates a hazardous condition to the motoring public; to have removed abandoned, abandoned and of no value, and unattended vehicles; to have removed and/or relocated vehicles in violation of parking ordinances; and to have removed any vehicle under control of any person arrested for any criminal offense; and
>
> WHEREAS, The process of selection of the operator of a towing-storage business for police work is unique in that law enforcement, though having the legal duty to order the work, has no legal duty to pay costs and charges connected therewith, the same being the duty of the vehicle owner.

R.I.G.L. § 39-12.1-1 (emphasis supplied). This delegation of authority refers only to towing, storage, and removal of vehicles. More to the point, at least from the viewpoint of the police, it only insulates the police from having to pay the costs of towing, storage, and removal of vehicles when it orders such work, assigning the duty to pay those costs to the vehicle owner. The statute says nothing about "recovery" of motor vehicles as distinct from "towing," "storage," or "removal" of motor vehicles.

If the Petitioner is right, and "recovery" is separate and distinct from the "tow," then the Legislature has not delegated to law enforcement (or private property owners for that matter) the authority to select any "recovery provider" to perform a "recovery" while passing along the costs of providing that recovery to the motor vehicle owner. For whom, then, would the Petitioner be working when it performs a "recovery" and to whom would the Petitioner direct the resulting recovery invoice? The police have no delegated authority to select a "recovery" provider without the consent of the vehicle owner, and if they do, they have no statutory language that would allow the police to bind the vehicle owner to pay for that arguably unwanted expense. Would the police be held liable for paying for such services? Is the "recovery" being provided on a voluntary basis of some sort? Do the police or the potential "recovery" provider have an obligation to contact the vehicle owner or its insurer for permission prior to beginning such work? (For most heavy duty tows and recoveries, the vehicles involved are commercial vehicles and have the owner's name and phone number painted on the vehicle itself, making it fairly easy in most cases to make a call to a responsible party.)

All of these issues are eliminated if "recovery" is recognized for what it is, an integral part of the overarching category of "transporting a motor

vehicle by a tow truck." Recovery is what you must do in order to get the target motor vehicle ready to be towed away to either its eventual destination or to a towing storage yard. If recovery is part of the towing process, then the police do have clear delegated authority to select an appropriate towing company to perform the recovery (which towing companies are trained and equipped to do, and which they do as part of their basic towing operation every day), and it is clear that the costs of performing that recovery may be assigned to the vehicle owner along with all of the other towing and storage charges related to transporting the motor vehicle owner's property and cargo by tow truck. When "recovery" is recognized as part of the towing transportation process, as both the Federal and State statutes clearly intend, everything is straight-forward; when it is not, there is a clear gap in the law at both the Federal and State level, and the potential for unnecessary litigation in every heavy-duty tow case approaches certainty.

The U.S. Supreme Court addressed a similar issue in the *Dan's City* decision. In that case, Dan's City maintained that Pelkey's claims with regards to Dan's City's disposal of Pelkey's vehicle were "related to" the towing service it rendered because selling Pelkey's car was the means by which Dan's City obtained payment for the tow. The Court rejected that argument outright, stating that:

> …[I]f such state-law claims are preempted, no law would govern resolution of a non-contract-based dispute arising from a towing company's disposal of a vehicle previously towed or afford a remedy for wrongful disposal. Federal law does not speak to these issues.[fn.6] Thus, not only would the preemption urged by Dan's City leave vehicle owners without any recourse for damages, it would eliminate the sole legal authorization for a towing company's disposal of stored vehicles that go unclaimed. No such design can be attributed to a rational Congress. See *Silkwood v. Kerr-McGee Corp.*, 464

> U.S. 238, 251, 104 S.Ct 615, 78 L.Ed. 2d 443 (1984)("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.")
>
> > fn.6 There is an exception to Congress' silence, but it is of no aid to Dan's City. The Act spares from preemption laws "relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed [as it is here] without the prior consent or authorization of the owner of the motor-vehicle." 49 U.S.C. §14501(c)(2)(C).

Dan's City at 133 S.Ct. 1780-1781.

Ours is the analogous situation, though "recovery" would, in Sterry Street's view, occur before the transportation via tow truck begins rather than after it concludes. If Sterry Street were right, and "recovery" is completely separate from the process of transporting a vehicle via tow truck, "without the prior consent or authorization of the owner or operator of the motor vehicle," then there would be a gap in the law which is addressed by neither Federal law nor (arguably) State law. Sterry Street and other towers would be performing "recovery" work without any prior agreement with anyone authorized to contract with them for that work; there would be no law governing resolution of such a non-contract-based dispute arising from a towing company's "recovery" of a vehicle in order to render that vehicle fit for a non-consensual tow.

It has been the Division's experience that in most cases involving recovery efforts prior to conducting a non-consensual heavy duty tow, the largest portion of the costs for which the vehicle owner is eventually responsible must be attributed to the "recovery" portion of the operation, and not to the actual tow. Reference to Sterry Street's proposed tariff makes this point crystal clear. The tow itself is billed at $400.00 per

hour. Virtually all of the heavy equipment that is likely to be required for a recovery operation is billed at higher rates than that (i.e., Air Cushion Lift System at $8,000.00 per day; Crane at $750.00 per hour plus $1,000.00 set-up fee; Landoll or Lowbed Trailer w/Tractor at $450.00 per hour). It is easy to see how a recovery requiring some of this equipment could cost several times more than the actual tow itself. We cannot believe that a rational Congress (or a rational General Assembly) intended to allow oversight for the cheapest portion of a non-consensual towing operation while exempting the far more expensive recovery operations from any oversight at all. This is particularly true given that the impetus for creating a preemption exemption for non-consensual transportation of motor vehicles by tow trucks was "the need to protect consumers from exorbitant towing fees." *See generally Modzelewski's Towing and Recovery, Inc.,* quoted above.

f. DECLARATORY RULING: "Recovery" Work Is An Integral Part Of "Transportation By A Tow Truck" And The Division May Regulate The Price Of Such Recovery Work When It Is Performed As Part Of A Nonconsensual Tow.

For the foregoing reasons, the Division finds that "recovery" work is clearly an integral part of "transportation of a motor vehicle by a tow truck." Accordingly, the Division has the authority, under 49 U.S.C. §14501(c)(2)(C), "to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle" including

regulating the price of so-called "recovery" work associated with performing such a nonconsensual tow.[33]

5. Hearing And Appearances.

The Division conducted a duly noticed public hearing in this docket on February 11, 2015. The hearing was conducted in the Division's hearing room located at 89 Jefferson Boulevard in Warwick. The following counsel entered appearances:

For Sterry Street:	J. Richard Ratcliffe, Esq.
For the Division's Advocacy Section:	Christy Hetherington, Esq.

Sterry Street proffered two witnesses in this docket. The first was Mr. John Martins, the President of Sterry Street Towing, and the second was Mr. Patrick T. Matthews, Esq.

The Advocacy Section of the Division proffered one witness, Mr. Terrence Mercer, Associate Administrator for Motor Carriers, Division of Public Utilities and Carriers.

6. Evidence Presented.

a. Sterry Street's Case in Chief.

Sterry Street's first witness was Mr. John Martins, President of Sterry Street Auto Sales, Inc., d/b/a Sterry Street Towing (i.e., the Applicant). Mr. Martins testified that Sterry Street has been incorporated since about 1983, and currently operates out of three locations, two in Rhode Island (Providence and Pawtucket) and one in Attleboro, Massachusetts.[34]

Mr. Martins explained that he has been involved in the towing business throughout his adult life. He began driving a tow truck when he

was 16 years old, and as time went on obtained the certifications necessary to operate medium and heavy duty tow trucks. He has always enjoyed the challenge, and has more than 30 years of experience doing tows of all types, and probably at least 30 years of experience just with doing heavy duty tows and recoveries.[35]

Based on his experience in the industry, there is a big difference between a recovery and a tow. He explained that when a truck is simply broken down on the side of the road, you just have to pull up to it, hook it up, and drive it off. If the same truck is instead down an embankment, you cannot simply tow it away, you have to engage in a recovery operation first. You really have to know what you are doing to properly hook up a truck in that situation, because if you do not know what you are doing, the cables can come loose, hooks and chains can go flying in the air, and bystanders can get seriously hurt.[36]

Similarly, he said, even if the hooks and cables do not come loose, if you hook the truck being towed in the wrong locations, or in the wrong way, then that truck's trailer can literally be pulled apart by the power of a heavy duty tow truck. When that happens, you end up with the cargo spilled and have to do a major cleanup operation that can drag the whole process out for hours. Recovery operations are much more complex than straight-forward tows.[37]

Next, Mr. Martins testified that Sterry Street specializes in doing heavy duty towing and recovery; that is what the company is known for. As a result, Sterry Street has had to purchase a lot equipment to make it easier, safer, and more efficient for them to conduct heavy duty towing

and recovery work. Among other things, Sterry Street has purchased cranes, rotators, dollies, and airbags for lifting and shifting heavy vehicles, and generators, trailers, forklifts, front-end loaders, and similar equipment to help the company transfer loads when that becomes necessary.[38]

One such piece of heavy equipment Sterry Street has recently purchased is a rotator. Mr. Martins explained that a rotator is very similar to a crane, but where a crane is used only for lifting, a rotator will pull on an object as well as lift it; a rotator is capable of winching a heavy object, pulling it upright. A crane may have a boom that can reach out 150 feet to lift a heavy object, while a rotator's boom will only extend 40 feet or so. The shorter boom of a rotator makes it better suited for pulling than a crane, though it must be much closer to the object being pulled than a crane would be to whatever it is trying to lift. The advantage of a rotator over an old-style tow truck is that the rotator can pull up alongside a disabled vehicle, lift it, upright it, and not impede traffic flow on the adjacent lanes. The rotators also allow Sterry Street to pick up a trailer unit fully loaded, rather than having to unload it first and shift the cargo; this alone can reduce the time on-scene by as much as 6 hours and reduce traffic disruptions. Keeping the traffic lanes clear is extremely important to the police departments arranging most of these tows, and 99% of the time, a rotator will allow Sterry Street to accomplish its mission without obstructing traffic while a traditional tow truck will often require that traffic lanes be blocked while the tow truck pulls a disabled vehicle back onto the road for towing.[39]

Next, Mr. Martin's testimony turned to Sterry Street's Exhibit 3 at Appendix 24. This document illustrates how Sterry Street's Peterbilt

rotators can be used to extricate a tractor-trailer unit that has rolled over a guard rail along the highway. The accident in question occurred near Boston on a very busy highway. By using two rotator units, Sterry Street was able to pull up alongside the tractor-trailer unit, upright it, lift it over the guardrail, and then tow it off without ever impeding traffic. (Sterry Street has two Peterbilt rotators, and typically pairs them up, one at the front of a tractor trailer, one at the rear, to do preparatory work for a tow requiring this type of recovery.)[40]

Mr. Martins testified that Sterry Street bought its newest Peterbilt rotator truck in 2013, and that its second (and somewhat smaller) rotator truck was purchased in 2009. The newer of the two trucks was purchased for about $700,000.00 when all of the options were added in, and the older truck was purchased for about $450,000.00 to $475,000.00 in 2009. Sterry Street felt it was necessary to purchase such trucks because the state police insist that towers have the ability to clear the travel lanes on the highways as quickly as possible and that means using rotator trucks; a tower simply has to have a rotator truck if he wants to "be in the game."[41]

He then illustrated that last point by explaining how rotators are used on the scene and why they make things go much more smoothly and quickly. Many of the trucks that they are called upon to lift are hauling cargo that can weigh 40,000 pounds or more. It takes a lot of power, and a lot of very careful rigging, to lift that much weight and either pick it up, or pull it upright. Trailers are not designed to be picked up by their sides, particularly when fully loaded, so it is necessary to run straps underneath them, perhaps use airbags for lifting, and cradle them properly before

attempting to move them at all. If this process is done wrong, the trailer can come apart and the cargo spilled onto the roadway. Once you break open the trailer and the cargo is spilled, a job that could have been done in a couple of hours may suddenly require several times as much work with the related travel disruptions that causes. If all you have is a conventional tow truck to try to pull them onto their wheels, rather than a proper rotator truck and other lifting equipment, you will break open the trailer.

The cargo in these trucks is typically loaded on using forklifts and pallets. If you can get the trailer upright – or keep it upright with proper lifting – it can be pretty easy to shift the cargo from even a trailer that can no longer safely carry cargo over the roads. If that trailer cannot be lifted upright, or if it is broken open, all of that cargo will have to be shifted by hand as manual labor, turning a 20 minute job into a five hour job. If the cargo is perishable, it will turn salvageable cargo into a complete write-off as well. When the cargo is food, the Health Department will be on scene right away and will condemn the cargo unless it can be shifted to a new container (often refrigerated) quickly enough to keep if from spoiling. Having the right equipment – such as rotators – on hand can make the difference between losing a half a million dollars or more of cargo and tying up traffic for hours, and saving the cargo and getting the traffic back underway in quick order.[42]

Mr. Martins' testimony turned next to a discussion of several towing and recovery operations illustrated in Sterry Street Exhibit 3. The first example involved a tractor trailer that had gone over a guardrail. Mr. Martins indicated that for an old-style tow truck to get the tractor trailer

combination back over the guardrail, the tow operator might have had to take a chop saw, cut the guardrail out of the way, and then tow the tractor trailer back onto the highway conventionally. It could have been done with a traditional tow truck, but it would take twice as long and the whole highway would have ended up blocked for hours.[43]

The next example involved a Cadillac that had gone off the road and ended up in the water in an area with a lot of boulders and trees to have to work around. If a conventional two truck tried to drag it back out of that situation, there is every likelihood that the transmission pan, the oil pan, and possibly the gas tank would be ripped open and the fluids would leak out all over the ground and into the water. This would cause an environmental problem that could run into hundreds of thousands of dollars to remediate. On the other hand, Sterry Street was able to use one of its rotators to simply lift the Cadillac straight up and place it on a flatbed tow truck without any risk to the environment or additional risk to the car.[44]

Mr. Martins then turned his attention to explaining why the latest version of Sterry Street's proposed tariff sought to charge a four-hour minimum for the use of a number of pieces of equipment and related services. He explained that his company did not seek to collect a four-hour minimum for the actual tow, but only for providing recovery services in complicated situations. As Mr. Martins put it, it simply is not cost-effective to send out many of the more expensive pieces of equipment (crane, rotators, air bag) required to do complicated recovery work quickly and efficiently if you are only able to bill in hourly increments. Sterry Street has to ensure that its equipment operators receive the appropriate

training and certifications to safely operate this type of equipment (which increases Sterry Street's costs), and the operators have to be available on call to respond to a scene around the clock (and are guaranteed at least four hours pay for coming in after hours). In order to have any chance of recovering their costs for the use of this type of equipment, and justify their purchasing the equipment in the first place, his company believes it really needs to be able to bill a four-hour minimum, and then bill in hourly increments after that point.[45]

Sterry Street has invested upwards of one million dollars just in the two rotators. If a company is going to invest that type of money in equipment, training and personnel to ensure that it can do dangerous and very technical work without causing further damage to the vehicles (and cargo) it is trying to tow for the police, it has to be able to charge appropriately. The only way for Sterry Street to recover the investments it has made for the purpose of keeping the police happy, is to make sure Sterry Street recovers a reasonable minimum charge every time it has to send a major piece of equipment to the scene of an accident. Charging a four-hour minimum allows them to recover enough.[46]

In response to further direct examination, Mr. Martins testified that his company has been called to accident scenes where there has been environmental issues created by fuel or cargo spills. When they find that type of situation, Sterry Street will normally have to call in another company if the spill is more than a comparatively small amount (15 gallons or less Sterry Street normally tries to address out of its own resources using Speedi Dry and 50-gallon drums). In those situations, Sterry Street seeks to recover the actual cost of sub-contracting for the

specialized services, plus 30%. Mr. Martins explained that Sterry Street had not had to actually call in any outside experts or personnel for the last five years in connection with any tows, but that the company felt that adding a 30% premium on top of the actual cost of sub-contracting for specialized services was simply to cover the cost of doing business.[47]

Mr. Martins also explained that there are times when his company has to use consumables as part of performing a particular tow (for example, Speedi Dry or absorbent pads for handling a small fluid spill). In those situations, Sterry Street wants to charge the vehicle owner the cost of those consumables plus a 20% premium on top of the actual cost of the consumables. Sterry Street has to maintain a certain stock of these items at all times on the trucks in case they have to be used on a particular job, and that means replacing the items as they are used up. In his opinion, it is reasonable to mark up the cost of replacing consumables by 20%.[48]

Next, the testimony turned to a discussion of why the proposed tariff called for an hourly fee of $775.00 for crane operations, plus a $1,000.00 "set-up" fee.[49] "Set-up" apparently entails getting the truck set up by putting the out-riggers down for stabilization, positioning timbers to make sure everything can be leveled, verifying that the ground where the crane is located is solid enough to support crane operations, getting the crane level, and everything else required to operate the crane safely. It takes roughly an hour to an hour and a half to do this, depending on how many people are available to help the crane operator. The "set-up" fee includes the cost of the labor involved in setting up the crane; the labor is not charged separately from the "set-up". The total minimum cost of using the

crane would be the $1,000.00 set-up fee, plus a four-hour minimum charge for deploying the crane billed at $775.00 per hour.[50]

With respect to Sterry Street's two rotators (the new $750,000.00 machine as well as the older $450,000.00 model), Mr. Martins testified that his company had to use one or both about ten (10) times per year, usually for police-ordered tows. The calls for service could come from either Rhode Island or Massachusetts police departments, because Sterry Street operates in both states.[51]

Mr. Martins then explained that Sterry Street was really seeking to collect the same charges in Rhode Island as it does in Massachusetts for recovery-type work. He testified that Massachusetts, unlike Rhode Island, does not require towing companies to have tariffs on file with respect to recovery charges.[52]

As examples of the types of equipment Sterry Street owns that allow it to perform more comprehensive recovery and towing work, but which are not required that frequently, Mr. Martins cited the company's 53' refrigerated trailer (used perhaps once each year to store perishables when the vehicle owner's own trailer is not operable), a 40-foot boom lift (used for rigging or for reaching objects that cannot be reached safely any other way), an air-cushion lift system (basically, air bags that can be placed under a tractor or trailer to safely lift them upright).[53]

With respect to the air-cushion lift system, Mr. Martins explained that the entire system owned by Sterry Street costs about $125,000.00, including the generators and related parts, and that the replacement cost for individual bags runs at around $4,500.00 each. The bags themselves

are vulnerable to being punctured at accident scenes, and have to be replaced after they sustain damages. It take a lot of work to get these systems safely deployed underneath a vehicle, and they require quite a bit of expertise to use safely and effectively, but when deployed properly they can cut the recovery time by half or more, making them very worthwhile. For all of these reasons, particularly the system's own susceptibility to damage, Sterry Street believes it is appropriate to charge a daily minimum rate of $8,000.00.[54]

The next line item Mr. Martins turned to in the proposed tariff concerned the Emergency Response Manager or Supervisor, billed at $175.00 per hour. He explained that his person liaises with police and fire department personnel at the scene, and oversees all aspects of the operation including whether or not all rigging has been done properly and safely. Having someone on scene to fulfill these functions is mandated by OSHA, with the supervisor to be on scene from start to finish, ensuring that all personnel are properly equipped, and that all safety protocols are properly followed. If Sterry Street does not comply with the OSHA requirements, they can be shut down (and, of course, serious accidents could also occur).[55]

With respect to using outside experts or personnel, Mr. Martins testified that his company has not had to bring anyone in from the outside for the last five years because his company's personnel possessed all of the requisite skills to accomplish all requesting towing services during that period. However, in the event that it should ever be necessary to bring personnel in from the outside, the company proposed to bill for those services at cost plus 30%. The justification he offered for billing for

outside services in this fashion was that it was "[j]ust the cost of doing business."[56]

Next, Mr. Martins turned his attention to some of his company's recurring expenses. According to his testimony, his company had not increased its tariffed rates in about fifteen years, even though expenses had been steadily rising.[57] He testified that Sterry Street pays approximately $242,000.00 each year for insurance coverage; this bill would be much higher if it were not for the fact that his company had not had many accidents or losses.[58] His electric utility bills from National Grid had been running at around $4,000.00 per month from May through December of 2014, then jumped to $8,617.03 in January of 2015 as a result of a 37% electric rate increase. He ventured the opinion that over $8,000.00 a month for electricity at a body shop and tow company is hard to understand.[59] His company also pays out a lot each year in taxes; for example, between the three properties Sterry Street is currently operating, it pays out about $150,000.00 each year just in real property taxes, and another $30,000.00 or so each year in equipment and registration taxes for Sterry Street's vehicles.[60]

In fact, Mr. Martins testified, Sterry Street would not be able to cover its costs in doing a non-consensual towing and recovery of a tractor-trailer in Rhode Island if it is forced to continue operating under its existing tariff. The cost of doing business has just gone up too much. He cannot even get his employees to answer the phone for an after-hours tow if they know they are only going to get paid for a half hour of work, or even a couple of hours of work. It just is not worth their while to come in for

that. If he wants somebody to come in after hours to do a job, he has to offer them four hours' worth of wages to get them to do it. Anything less than that, and they just pretend they did not hear the phone ring. And on top of having to pay them for four hours just get them to come back in, he has to pay them overtime rates, too, all of which drives up his associated personnel expenses (like Workman's Comp insurance, Social Security, taxes) because those expenses are based on the gross numbers. Sterry Street's current tariff simply does not allow him to do all of this.[61]

Mr. Martins concluded his direct testimony by stating that his company is known for doing the heavy-duty towing and recovery work, and it has invested in a lot of equipment to allow it to maintain that reputation. In order to continue doing that type of work, though, his company needs to be appropriately compensated, and he believes the tariff they have proposed will allow that to happen.[62]

In response to cross-examination by the Advocacy Section, Mr. Martins testified that the reason his company recently opted to buy a new 2013 rotator rather than investing in a second used 2007 rotator, was that the newer model could do much more than the older model and, in those situations where two rotators needed to be used, significantly enhances his company's capabilities. The newer one is better stabilized, giving it more capability to be used as a crane than the old one, and greater (safe) lifting capacity to the side than the old one. On most recoveries where a rotator is called for, Sterry Street sends both machines because it allows them to clear the scene much faster and much safer than using one rotator alone; it is the industry standard for larger companies such as his to try to use two rotators for faster recovery and towing. His company

uses both pieces of equipment for tows in Massachusetts as well as in Rhode Island.[63]

In response to questions concerning the Horizon Beverage Company incident in January 2014, Mr. Martins explained that he was using it to explain how two rotators lifting together could get a vehicle out of a body of water near shore without risk of causing further damage to fuel tanks and oil pans. If you try to simply tow a vehicle out of a body of water, you cannot be sure of what it might be lodged on. For example, he believes that the Horizon Beverage Company truck was partially immersed in an area where there were a number of boulders in and under the water. Simply dragging that truck up the bank could have very easily led to a rupture of a fuel tank or an oil pan with significant adverse environmental impacts. By using two rotators to lift the vehicle up out of the water and place it on shore, Sterry Street was able to completely avoid any risk of causing, or worsening, environmental damages due to ruptures of the trucks fuel tank or oil pan.[64]

Before buying the 2013 rotator, Sterry Street could still have done the Horizon Beverage Company job, but it would have taken much longer, and there would have been a greater risk of causing environmental damages that would have cost more to clean up than the cost of doing the tow and recovery with two rotators. The 2013 rotator actually replaced an older model that Sterry Street sold off. They purchased the newer machine because they knew they needed to do that to stay competitive and keep having the police or commercial accounts call them to do the work.[65]

With respect to paying for a site manager or supervisor, Mr. Martins explained that part of that person's job is to liaise with the fire department, police and ambulance personnel when they are on scene and coordinate the tower's activities with what those other services need. If there is a gasoline tanker turned on its side, nothing happens until the fire department is satisfied, and traffic safety is taken care of by the police department. Mr. Martins' personnel cannot take any actions without clearing things with the other personnel on site, and those other personnel have to understand what the tower is going to do next, and what impact that will have on traffic flow or general safety. You cannot really have the operator of one of Sterry Street's pieces of heavy equipment do that coordination role, too, because that is a distraction for the operator. You do not want a distracted equipment operator. You do want someone in overall charge concentrating on coordinating the tower's activities with those of the local authorities.[66]

Next, Mr. Martins explained that when a request comes in to his company from the police for assistance in doing a heavy duty tow, they usually get a basic description of the situation from the police and can start detailing personnel and equipment that are likely to be needed. However, before dispatching a lot of specialized equipment to the scene, either himself or one of his general managers will typically go directly out to the accident and assess the situation, then make a call back to the shop as to what types of specialized equipment will be needed for that particular job, whether rotators, crane, or airlift bag. Only a handful of his people are qualified to make that assessment, and they are the ones that get dispatched first to the scene. Once there, they remain on scene to

act as the coordinator/supervisor and ensure that everything is done properly. Knowing how to assess and coordinate something like this requires a lot of extra training and experience, and clearly calls for commensurate compensation. Major accident scenes will normally require two senior personnel, one to concentrate on supervising towing and recovery operations, and a second to act as the scene manager coordinating with the other entities present.[67]

In response to further cross-examination, Mr. Martins testified that in the current tariff proposal, there is a one-hour minimum charge for performing a basic tow, what he referred to as a "pick-and-go" tow with no recovery work required. All the recovery operations, however, called for a four-hour minimum charge. He explained that four-hour minimum charges were pretty standard for the use of heavy equipment such as rotators or cranes, regardless of the type of work involved or its complexity. These are expensive pieces of equipment, and no one wants to risk them unless they are being adequately compensated. Mr. Martins explained that he cannot cover his costs for operating these pieces of equipment if he only charges for an hour or two; he needs to charge four hours in order to cover the costs of owning, operating and insuring the equipment, just like any other business operating similar pieces of equipment. Even if the Division were determined to have no regulatory authority over the recovery component of performing a heavy duty tow, he would still look to charge four-hour minimums for this equipment because if he charged more than that, his commercial accounts would think he was price-gouging them and look elsewhere for towing and recovery services.[68]

When asked who typically pays for the complicated heavy-duty towing and recovery jobs, Mr. Martins testified that most of the time insurance companies pay for the work, particularly for the big jobs that require a lot of time and equipment. Other heavy duty towing and recovery jobs that can be done for just a few thousand dollars, however, are paid directly by the company that owns the vehicles involved, particularly the bigger companies. They figure that putting in a claim for $4,000.00 or so could increase their insurance premiums by far more than the amount of a claim; for them, it is more cost effective to simply pay Sterry Street directly. Mr. Martins estimated that maybe 75% of his heavy duty tows and recoveries are local jobs, not too complicated, where the vehicle owner pays directly, and about 25% are the big and complicated jobs that are paid for by insurance companies.[69]

Mr. Martins then went on to testify that Sterry Street owns around 20 tow trucks, of which eight are for performing heavy-duty tows. Of the remaining 12 tow trucks, only one is a medium-duty tow truck and the remaining 11 are flat-bed type tow trucks. It costs him roughly the same to operate the medium duty tow-truck as it does the heavy duty trucks (labor costs are identical), but the medium duty truck is less useful because in many cases, the actual weight of the vehicle being towed exceeds the capacity of the medium duty truck because the vehicle being towed is fully loaded. It is generally better to send out the heavy duty trucks because they are always going to be able to complete the tow.[70]

In response to further cross-examination by the Advocacy Section, Mr. Martins testified that Sterry Street operates a body shop, transport company and towing operation out of its Rice Street location in Attleboro,

and storage facilities for vehicles out of its Providence and Pawtucket locations. Sterry Street also engages in vehicle sales operations. They utilize a good portion of their yards for the towing and transport businesses. He was not seeking to have all of the increases in his companies' expenses be covered solely by the towing operation, but all of their costs for all of their operations have gone up in the past few years. Even the body shop also directly supports the towing operations, because that is where they do repairs on their own trucks. Revenues for his company's operations have increased over the same time period, but not quickly enough. Their gross revenue is up, but the profit margin on all of their operations are extremely thin.[71]

Mr. Martins went on to testify that part of the reason his profit margins have been so slim, and which he had forgotten to mention earlier, was that the cost of benefits for his employees, including health insurance and 401(k) plans, have soared. His drivers used to work for $8.00 to $9.00 an hour, and now he has to pay $25.00 to $28.00 an hour for his heavy duty drivers. All those drivers do is drive the trucks, for the most part; they may help in cleaning the truck after a job, but the serious maintenance and repair work is performed by full-time mechanics.[72]

Mr. Martins then verified that Sterry Street owns its Attleboro, Providence and Pawtucket facilities through an affiliated realty company. He explained that in Rhode Island, his company is on the Providence and Pawtucket police tow lists, but that a number of the other municipalities in northern Rhode Island will call them on occasion just because the

police in those communities know that Sterry Street has the equipment to handle big jobs.[73]

The Advocacy Section's cross-examination then turned to the question of set-up fees for the crane, asking Mr. Martins to justify the crane set-up fee when there is already a minimum four-hour charge for dispatching the crane to the scene of an accident, and when the personnel performing the set-up of the crane are already being paid an hourly wage to be at the job site. Mr. Martins testified that he did not consider that to be "double-dipping" even though the same people doing the set-up were also getting an hourly rate for being present at the job site.[74]

In response to re-direct examination, Mr. Martins then testified that with respect to the crane set-up rate, Sterry Street was not proposing to charge additional rates for labor in addition to the $1,000.00 set-up charge for the crane.[75]

In response to a question from the Hearing Officer, Mr. Martins testified that charges for equipment usage start accruing from the minute the equipment is dispatched from the Sterry Street yard until the equipment returns to Sterry Street after the job is completed. So, the four-hour minimum rate would apply to any job of four hours or less, portal to portal, and any job that requires the equipment to be out of the yard over four hours would be charged for actual time out.[76]

That concluded Mr. Martins' direct testimony.

Sterry Street's second witness was Patrick T. Matthews, Esq., a Massachusetts attorney. Mr. Matthews testified that in addition to a law degree he has a Master of Business Administration degree. He has

practiced law in Massachusetts for 20 years, with his practice geared towards the towing and recovery industry. He represents towing companies in Massachusetts and throughout the country. In addition to his law practice, he has taught as an adjunct professor at UMass Law, and has testified before the Massachusetts legislature regarding the towing and recovery industry.[77]

Attorney Matthews testified that he was familiar with 49 U.S.C §14501(c)(2)(c) and the issue of Federal preemption of state authority. He explained that several laws come into play on this general topic, including the Federal Aviation Administration Authorization Act ("FAAAA") and the Interstate Commerce Commission Termination Act. He testified that back in the 1990's, Congress deregulated the motor carrier industry generally, and specifically exempted tow companies from being regulated by States (and their subordinate governmental units) with respect to price, route or services. The only exception to this prohibition in the statute was the so-called "safety exception" which allowed police to regulate towing services for the purposes of police-ordered non-consensual tows.[78]

Next, when asked whether he has, in his professional experience, ever had to deal with the term "recovery" as opposed to "tow," Attorney Matthews testified that "states vary from time to time on how they define it, but there's a difference between a tow and a recovery."[79] Many states, Massachusetts and Louisiana, for example, defines a "tow" as the actual transportation of a vehicle from one point to another, and "recovery" as everything you have to do to get to the point of hooking the vehicle to be towed to the actual tow truck. He further testified that,

based on his education, training and experience, his understanding of the Federal law is that recovery is a "service" and as a service, the regulation of recovery would be preempted by the Federal law. Therefore, in his opinion, the Rhode Island Division of Public Utilities and Carriers would not have the authority to regulate the rates charged by any tower for performing recovery services. He then pointed out Massachusetts' statutes and regulations, which take this view, to support his interpretation of the law.[80]

Next, Attorney Matthews testified that he was familiar with tow companies throughout the country, and that four-hour minimum charges are commonplace when doing recovery operations, particularly in the New England area. He believes the four-hour minimum is a reasonable way to charge given the investment that a tower has to make in this specialized equipment. A rotator wrecker, for example, might cost $850,000.00, but not be used all that often. If you only get called on to use something like that 10 to 15 times each year, you need to be able to charge an appropriate rate to recover that investment. It is possible that a tower might be able to handle some of those calls with less sophisticated equipment, but the job might also require six hours to do rather than four or less, and the actual cost to the person being towed could then end up being greater. Towers are kind of like firemen – they have to maintain a lot of expensive equipment and be ready to respond immediately 24 hours each day, never knowing what they are going to face when they get to the scene. They are also required by police to respond to calls within a fairly short period of time, which means they have to be concerned about having enough equipment to respond to multiple calls at practically the same

time. They cannot send their equipment to more distant calls – which would allow them to spread the costs over those additional calls – without running a risk of losing the local jobs to one of their competitors. If towers like Sterry Street did not make the investment in some of these specialized pieces of equipment, the municipalities would have to do so.[81]

Attorney Matthews then went on to explain that towers need to purchase this sophisticated – and expensive – equipment for a number of reasons. Often, various local authorities require certain types of equipment of a tower in order for that tower to be on a particular tow list. Following 9/11, the Federal Department of Transportation and the National Highway Administration came out with a "quick clearance" policy driven by a fear that any kind of major congestion on the Interstate 95 corridor could have a devastating impact on the ability to do evacuations of areas at threat; the Federal agencies wanted to make sure that critical highways could be cleared within 90 minutes tops. As a result, while a tower might be able to do a job using three or four wreckers rather than using one or two rotators, using the wreckers might well require closing the highway for eight hours rather than the three hours that would be required for a rotator. The Federal government and local authorities want major highways cleared in the shortest time possible, and place pressure on the towers to make that happen. That pressure has led to companies like Sterry Street feeling they have to invest in more capable equipment. [82]

In addition, Attorney Matthews testified that the economic impact of having a major highway close can be significant, particularly to the local economy where goods and workers are sitting in traffic jams rather than

getting to where they are needed, not to mention medical and emergency personnel who are unable to get to where they need to be. Aggravating the economic impact of a major accident, the risk of secondary accidents goes up perhaps 30% for every five minutes traffic is tied up – and those secondary accidents themselves can have a huge impact on the local economy.[83]

In response to further direct testimony, Attorney Matthews testified that he had reviewed Sterry Street's amended tariff, and believes it is in line with those of many other towing companies in the area, particularly those in Massachusetts where there is no tariff requirement. The Massachusetts rates are what he would term market-driven, and Sterry Street's proposed rates are very much in line with them. In his view, Sterry Street's proposed four-hour minimum charge for the use of its equipment is appropriate, given that much of that equipment is expensive, and that there is no way to be sure how many times it will be needed in a particular year. In this case, he believes Sterry Street's proposed rates will allow it to recover its costs on this equipment in an average year; sometimes, a piece may be needed more often than expected, and sometimes less, but you have to base your business decisions on what you expect will be required on average, and he thinks that is what Sterry Street has done.[84]

Next, Attorney Matthews testimony turned to the impact of OSHA[85] regulations on towing operations. He explained that OSHA has had a significant impact on towing operations. For example, whenever a piece of machinery with a boom (i.e., cranes or rotators, among others) is

being used you have to worry about having those booms hit overhead electrical services or other hazardous objects; OSHA requires that whenever a boom is above ten feet off the deck, a safety observer is required in addition to the boom operator. If a tower hit a power line with his boom, or injured someone with it, he would be in violation of OSHA regulations and looking at a fine. The safety observer for boom operations cannot also be the scene or incident manager, because the safety observer cannot be distracted from fulfilling his safety duties, and a scene or incident manager is responsible for everything that is happening, not just the safe utilization of a single piece of equipment. There are similar requirements for safety observers or signalers for many of the other pieces of equipment being used at a given accident scene, and the tower still needs somebody who can keep a handle on everything that is going on above and beyond the individuals working on the safe operation of various pieces of equipment.[86]

In response to cross-examination by the Advocacy Section, Attorney Matthews confirmed that he was Sterry Street's Massachusetts attorney. He testified that he was familiar with tow rates in Rhode Island, and has been admitted *pro hac vice* in the Federal District Court in Rhode Island on towing cases. His is a small firm in Massachusetts, specializing in towing and recovery matters, with most of his big clients in Massachusetts, although he does have clients in California, Texas and Louisiana (in the latter states, he is normally brought in to consult with the tower's in-state attorney). He also does four to five seminars a year nationwide. His firm concentrates mostly on three different areas of law: (1) whether or not something is subject to regulation; (2) whether or not a

tower is charging fair and reasonable rates; and, (3) whether or not a tower has been properly excluded from a particular police tow list. His clients are all towers; he has never represented a regulatory agency.[87]

With respect to how he determined that Sterry Street's proposed rates were reasonable, Attorney Matthews testified that it was because the cost of doing a recovery is the same whether it is in Massachusetts or in Rhode Island. Since the rates in Massachusetts are market-driven, and those are essentially the same rates being sought by Sterry Street in Rhode Island, they are clearly reasonable. That was why the Federal government deregulated the motor carrier industry and preempted state regulation of these issues – the market is the most effective means of setting the reasonable rates. If a tower in a state that does not attempt to regulate towing or recovery rates gouges a customer by charging excessive rates, the consumer has the option of going to court and challenging those rates. If the police find that a company is gouging the public, in his experience the police are going to stop using that towing company. The police, fire and ambulance personnel that respond to an accident are being paid out of tax dollars, but the tower, the one with the most expensive equipment at the scene, has paid for everything he uses out of his own pocket and never knows when he submits his bill whether or not he is going to be paid. He simply has the most skin in the game.[88]

In response to further questions by the Advocacy Section, Attorney Matthews stated that because Rhode Island is small, most of the Rhode Island towers he knows are also doing work in Massachusetts and Connecticut. When he was speaking earlier about how many different pieces of equipment were required for towers, he was specifically referring

to the statues and regulations in Massachusetts requiring rotators and other pieces of equipment. He did not know whether or not there were any similar requirements imposed by Rhode Island or its municipalities. In a lot of municipalities, towers are required by law to have specific pieces of equipment, not necessarily by the job. A tower may be able to do a job using two wreckers, but local ordinances may require that the tower use a rotator instead of, or in addition to, one of those wreckers.[89] Sometimes towers are required by the authorities to have certain equipment on site, even when it isn't needed to do the job. He admitted that he did not know whether any specific municipality in Rhode Island actually had those types of requirements, though he suspected that the Rhode Island State Police, at least, probably did.[90]

In response to re-direct examination, Attorney Matthews testified that the Massachusetts State Police promulgated some of their rules regarding performing recovery operations because of the Federal "quick clearance" rules he discussed earlier.[91]

b. Advocacy Section's Case In Chief

The Advocacy Section called Mr. Terrence Mercer, the Division's Associate Administrator for Motor Carriers, to testify. He explained that he had been with the Division for about 15 years, the last 13 in his current position. His responsibilities include overseeing the regulation of all for-hire motor carriers of both persons and property, specifically including towers. He went on to indicate that he had been involved in the review of Sterry Street's proposed tariff amendments from the beginning,

including helping prepare discovery requests and reviewing Sterry Street's responses to those requests.[92]

Mr. Mercer testified that under Rhode Island law, towers are defined as common carriers; as such, they are also considered to be public utilities subject to the regulatory oversight of his agency, the Rhode Island Division of Public Utilities and Carriers. When it comes to ratemaking for regulated utilities such as a towing company, the goal is for the Division to determine whether or not the tariff proposed by the regulated utility is reasonable. By "reasonable," Mr. Mercer testified, he meant a tariff that would allow the regulated utility to realize a reasonable rate of return on its investment, while guaranteeing that efficient and economical services continue to be provided by that regulated utility to the rate-paying public. It calls for the Division to balance the need of the public utility to earn a reasonable rate of return with the need of the rate-paying public serviced by that utility to have an efficient and affordable service provided to the public.[93]

Mr. Mercer went on to testify that reviewing rates is not something that is done daily. In the case of Sterry Street, it has been 15 years or so since it last came before the Division seeking to change its heavy-duty tariff. In many cases, the Division looks at a proposed amended tariff, compares it to the existing tariff or the more recently approved tariffs of similar public utilities for a similar class of services, and see if the proposed new rates have been approved for other companies since that would tend to indicate that the proposed rates had already been found to be reasonable.[94]

Mr. Mercer went on to testify that there were some aspects of heavy-duty towing tariffs that he had never personally considered to be reasonable, but they had been allowed in the past for other companies, so he had felt compelled to approve them again. Examples of such items he finds particularly troubling would be the mark-up of outside personnel or outside equipment that towers have brought in to supplement their own resources. He understands that, from the tower's perspective, the tower is being asked to provide up-front money (i.e., the tower has to agree to pay these costs himself up-front) to bring in outside personnel or equipment, with no guarantee that he will later be reimbursed by the owner or the insurer of the vehicle being towed. The mark-up is a way a tower can try to protect himself (that is, the mark-up on several tows that do get paid will cover the cost of bringing in outside personnel or equipment on those other occasions where he is not fully reimbursed). Mr. Mercer testified that he has seen mark-ups ranging from 20% to 50%, depending on the line item and the particular tower, but he has never seen any tower present a financial analysis to support any of these mark-ups.[95]

This is a practice that is susceptible to abuse, particularly where you have to rely on the motor carrier whose tariff contains a mark-up to appropriately apply that tariff. The carrier has a direct financial incentive to look for reasons to bring in outside resources to do a job so he can add in that mark-up. Mr. Mercer was careful to explain that this is not a problem specific to Sterry Street, or even to the towing industry as a whole, but it really is a practice that is simply ripe for abuse so he believes the Division needs to take a close look at the whole practice. He explained that this was a concern for non-consensual tows because there was never

a neutral party on-scene calling the shots; by their very nature, in a non-consensual tow, the vehicle owner is not in a position typically to verify that every piece of equipment on scene is being used and properly billed for. The Division does license motor carriers based on fitness, so presumably their certificate is at stake if they are found to be billing inappropriately and determined to be unfit.[96]

Mr. Mercer went on to state that when he first assumed his current position, there was a complaint hearing concerning a tow bill somewhere in the $15,000.00 to $18,000.00 range. More recently, he has been seeing a lot of cases where the heavy-duty tow bill is running in the $40,000.00 to $60,000.00 range. That is a lot of money for a single incident and it presents a lot of incentive to pad a bill for a tower inclined to do so. He was not saying that he has seen any tower, much less Sterry Street, try to do so, but from a regulatory standpoint, trying to balance both ends of the equation (i.e., fair rate of return versus reasonable tow bill), it is a concern. It is his office that handles complaints about whether a non-consensual tow has been appropriately billed (with heavy-duty tows, about 99% of the complaints deal with police-ordered tows rather than private property trespass tows).[97]

Mr. Mercer next turned his attention to explaining how billing complaints against a tower are handled by his office. When a complaint comes in regarding the bill for a nonconsensual tow (consensual tows are not regulated), the first thing his investigators do is pull out the tariff and see if the bill of lading (i.e., tow slip) charges match what the tariff says. The bill of lading is supposed to have itemized charges, listing the equipment used in the tow, how long it was in use, what the labor charges

are, and any mark-up for outside equipment or personnel. The complaints are typically filed by the vehicle owner/operator, or the vehicle insurer, or both. There are not really that many complaints filed regarding heavy-duty tows, but Mr. Mercer opined that was in part because heavy-duty tows also appear to relatively few and far between.[98]

That latter point, he testified, was part of the issue he had too. How can a company justify purchasing a $700,000.00 piece of equipment that is rarely going to absolutely essential to the job at hand? Is this type of purchase what rate analysts would consider a prudent business decision? Mr. Mercer noted that Attorney Matthews touched on the same issue in his testimony. You have to balance the cost of a piece of equipment against how often you are going to be required to use it. If you only expect to use a $700,000.00 piece of equipment three times a year to perform a tow, it can still be a prudent business decision if you are going to be able to use it often enough for other aspects of your business, but if you are purchasing it just to do three heavy duty tows each year, the principles of ratemaking might call for a rate of $25,000.00 per hour – and no rate-setting body is going to find that to be a prudent business decision or allow that kind of rate.[99]

In response to further direct examination, Mr. Mercer testified that he was not persuaded by Sterry Street's justification of the 50% upcharge for handling hazardous materials. In his view, the justification for the charge was risk related rather than actual cost or expertise related. He testified that he was not convinced that a ratepayer should have to pay a

50% upcharge to have someone do a job they were already being paid to do.[100]

Mr. Mercer went on to testify that there has never been a full rate analysis of towing charges. That makes it particularly hard for regulators to determine whether the charges being proposed by a tower are really just and reasonable. In this case, the proposal is to charge for equipment portal to portal on an hourly basis (four-hour minimum). The charge, the cost of using the equipment and staffing it, should be the same whether the work starts at 10:00 a.m. or at 2:00 a.m., but the proposed tariff seems to suggest that it isn't. If the equipment charge is $400.00 per hour, but the company has to charge a four-hour minimum (or $1,600.00) to justify using the equipment, it makes it hard to conclude that the $400.00 an hour charge is really appropriate. Maybe a $700.00 per hour charge, with no minimum charge, is adequate to ensure a reasonable return on investment, but the tower believes it is just going to be an easier sell to tell the regulators the charge is $400.00 an hour when the real charge is going to be a minimum of $1,600.00. There is a real disconnect between how the regulator has to view tariff issues and the way the towers seem to see it. Mr. Mercer testified that it was very hard to find the right balance between the tower's legitimate interest in making a fair return on his investment, and the consumer's interest in only paying a fair charge for work actually performed.[101]

Mr. Mercer's testimony then turned to the charges being proposed for the use of Sterry Street's crane. Mr. Mercer explained that he was concerned about the proposed rate for providing crane services, specifically the fact that Sterry Street was proposing an hourly rate more

than 50% higher than the rate being charged by two other towers offering crane services, plus the fact that Sterry Street was proposing an additional "set-up" fee of $1,000.00 on top of the four-hour minimum for using the crane. He noted that the tariff already provided an hourly wage of $85.00 for laborers already on the scene, and he could find no justification for imposing an additional set-up fee on top of the hourly wages already being billed for the personnel operating the crane. Given that Sterry Street was already proposing an hourly rate more than 50% higher than Sterry Street's competitors, Mr. Mercer could not understand how Sterry Street could justify an additional fee of $1,000.00 on top of that.[102]

Mr. Mercer then offered an example of what happens when a tower has to rent a crane from another company in order to complete a heavy-duty tow, drawing on documents provided in Sterry Street's filing. In that case, Dave's Towing was contacted by the Smithfield Police Department to perform a heavy-duty tow involving a tri-axel dump truck that had overturned and blocked a roadway completely. Dave's Towing does not have a crane (which would seem to indicate that Rhode Island municipalities do not impose the same requirements on towers that Attorney Matthews testified Massachusetts statutes and regulations do), so it contacted another heavy-duty tower, Town Line Towing, that does have a crane (Town Line's tariff for nonconsensual tows provides for a $500.00 per hour fee for using cranes, with no set-up fee) and contracted for Town Line to assist in the tow using Town Line's crane. Since so far as Town Line was concerned, it was engaged in consensual work (it was working for Dave's Towing, not for the Smithfield Police Department) and was not bound to use its nonconsensual towing tariff (which would have

resulted in a crane charge of no more than $3,000.00 for less than six hours on scene with the crane); accordingly, Town Line Towing charged Dave's Towing a total of $6,475.00 for the use of its crane. Dave's Towing then added its 30% upcharge fee of $1,942.50 to Town Line Towing's bill (for a total charge for the use of the crane of $8,417.50). Had the Smithfield Police Department called Town Line Towing rather than Dave's Towing, the vehicle owner would have been billed at most $3,000.00 ($500.00 per hour for no more than six hours) for the use of that crane, a savings of $5,417.50. This shows the slippery slope regulators are on when tariffs are approved without true cost justifications and without requiring that all companies performing similar types of tows have the same types of equipment, while allowing those same underequipped companies to impose markups on subcontracted equipment and personnel of 30% and more.[103]

Next, Mr. Mercer was asked whether he had recently done a review of heavy-duty tow rates in Rhode Island. He responded that he had, and that he had put together a spreadsheet breaking out some of the more common charges for seven heavy-duty towers in Rhode Island that could be compared with Sterry Street's proposed tariff rates for the same line items. Some of these towers have had their tariffs in place for ten years of so, and some were updated within the past couple of years. He prepared the spreadsheet to help him understand how Sterry Street's proposed charges compared to those of other heavy-duty towers in the state. Any tower can come in for an increase in their tariff at any time, just as Sterry Street is doing, but they all present the same problem of evaluating whether or not their rates are reasonable; the problem for both the towers

and the Division is that a full-blown rate analysis is both very expensive and very time consuming.[104]

Mr. Mercer then testified that while a lot of information has been provided on the record concerning increased costs and expenses over the past 15 years, there was no information provided about whether or not revenue has been going up as well. You need information about both sides of the equation – costs and revenue – in order to evaluate the reasonableness of proposed rates. A regulator does not just look at the expenses and revenue of the regulated activity, either. He is expected to take into consideration what else a regulated company is doing with its assets at shared locations. How do you apportion the costs and revenues between multiple aspects of a single business in order to arrive at a fair and reasonable rate to charge for just the regulated activity? The only way to do it is to go through the books for all of the affiliated business activities and try to apportion the costs associated just with the regulated activities, while identifying all of the revenue streams associated with just the regulated activity. That is an intrusive and onerous process that most towers do not want to be subjected to, and that the Division would probably rather avoid as well. In most occasions, it ends up being a negotiation between the tower and the regulator as to which charges are reasonable and which are not with the two trying to strike some type of overall balance. In the end, where the tower and the regulator cannot agree as to reasonableness, it comes down to the Hearing Officer and the Administrator having to make the final call; in this case, Mr. Mercer has concluded he will have to defer to them.[105]

Mr. Mercer then concluded his direct testimony by indicating that while he personally would have preferred a full ratemaking case, he agreed that was not a practical approach for smaller public utilities like towers. He did have some concerns and recommendations regarding the proposed tariff rates. He was concerned that the four-hour minimum did not accurately reflect the true cost of owning and operating some of this equipment, but instead allowed a tower to over-recover. For example, a $700.00 per hour rate might be appropriate, charged without any minimum, so that if a job actually took just a couple of hours the total charge would be $1,400.00 – but he acknowledged that asking for $700.00 per hour might be a much harder sell than asking for $400.00 per hour with a four-hour minimum. When you do the math, though, the smaller hourly charge with a guaranteed minimum could result in a larger bill to the customer on short jobs that does not adequately reflect the tower's costs in performing that job. Based on his review of the data responses, he believes that the four-hour minimum is actually more of an incentive for agreeing to do a job than truly being a cost-driven expense item.[106]

Mr. Mercer testified that he has always had a problem with the various "cost-plus" markups of 25% to 50%, but has allowed them to continue unchallenged because the Division had started that practice long before he assumed his current position. If the explanation for such a markup, as it was with respect to hazmat, is that "my guys don't want to handle hazmat, so I am going to mark it up 50% over my actual cost," then in Mr. Mercer's opinion that is not sufficient justification for imposing an additional fee – above the actual cost – on the narrow band of ratepayers known nonconsensual tows.[107]

Mr. Mercer then testified that he could not say that a basic towing fee of $400.00 per hour for a "pick-and-go" is either too high or too low. Some of the other tariff increases in last couple of years have come in at $300.00 to $350.00 per hour, which is lower than Sterry Street's proposal, but he has no basis for saying that Sterry Street's proposal is unreasonable.[108]

Mr. Mercer testified that he did have more concerns generally about the itemized charges for the recovery portions of the tow because there is simply more potential for abuse (he is not saying this is a problem specifically with reference to Sterry Street, but rather a matter of looking out for the ratepayer generally). We are looking at a very narrow group of ratepayers, and when you are speaking of nonconsensual heavy-duty tows other than "pick-and-go," you are talking about just a handful of tows each year for vehicles that are in a real predicament.[109]

Mr. Mercer concluded his direct testimony by indicating that he was not participating in the hearing to contest every single point in Sterry Street's proposed tariff, but rather to try to assist the Hearing Officer and Administrator in understanding the issues presented by the proposed tariff so that they can make a better decision. Ultimately, it is the Administrator's decision to make.[110]

In response to cross-examination by Sterry Street, Mr. Mercer agreed that, conceptually, there is a distinction between recovery and towing, just like there is between storage and towing. One is not the other, but in Rhode Island, both are regulated. Towers are considered to be regulated public utilities here, so we are talking about utility rates,

which means the people being towed are considered to be ratepayers. He is not sure that all of the ratepayers in question are engaged in commercial endeavors leading to their having to be towed, but most of those who end up as heavy-duty tows are probably engaged in some type of commerce at the time they are towed. So far as he can recall, he has never received a complaint regarding a heavy-duty tow that was not commercial in nature; certainly, he could not remember ever getting a complaint regarding a heavy-duty tow where the vehicle being towed was a passenger-plated vehicle. He would agree that the proposed Sterry Street tariff was geared towards commercial vehicles that end up in difficult recovery situations.[111]

Mr. Mercer also agreed that many of the vehicles that were the subject of a heavy-duty tow travel interstate, and subject to Federal regulations for insurance when traveling interstate, and that the minimum amount of coverage required might well be $750,000.00. He would also agree that the insurance companies offering coverage to these vehicles probably do some kind of risk assessment analysis before determining the appropriate insurance premiums to charge. Mr. Mercer agreed as well that when one of these insured vehicles rolls over, the tower who shows up at the scene should receive a reasonable rate of compensation for the services it provides to that insured carrier; that is the purpose of the hearing.[112]

With respect to whether purchasing a particular piece of equipment is an imprudent business decision, Mr. Mercer testified that it is necessary to look at how that piece of equipment is going to be used throughout the company's entire business enterprise. If a company purchased a

$700,000.00 piece of equipment intending to use it only for nonconsensual heavy-duty tows, and expected to use it just seven times in 10 years for such tows and for no other purpose, that would likely be viewed as an imprudent business decision. However, if the company planned to use that equipment for other purposes than simply the rare nonconsensual heavy-duty tow, such as for doing work around the tow yard, perhaps leasing the equipment out to other towers, or other types of businesses, then perhaps it could be viewed as a prudent business decision. You have to look at the totality of the circumstances, and allocate its costs to all phases of the business in which it is being used. The same would be said about other costs, such as electricity, workmen's comp, natural gas, and everything else – those costs have to be spread or socialized among all aspects of the business that benefits from them. So, for example, auto body, auto sales, repair work, transportation, consensual towing, nonconsensual towing, real estate management, all of those individual revenue generating activities have to be allocated their share of the electric bill, water bill, gas bill, insurance costs, taxes, rent, salaries, workman's comp, equipment depreciation, whatever. Prior to the invention of the rotator, there were still freight trucks having accidents on the highway, and towers were finding a way to deal with that situation using traditional wreckers or other pieces of equipment, but they were getting the job done. So if a company bought a newly developed device that it was going to have to bill at $25,000.00 or $100,000.00 a use in order to recover the costs of purchase, and if it was being used to perform the same task (albeit more efficiently) that had been performed in the past using other types of equipment for far less money, Mr. Mercer testified he

would consider that to be an imprudent business decision and would not be in favor of approving those rates.[113]

Next, Mr. Mercer was asked to comment on Attorney Matthews' testimony earlier that Sterry Street's proposed rates were basically market driven, being based as they were on the market rates in Massachusetts and elsewhere. Mr. Mercer testified that he believed it might be more accurate to say that Sterry Street's Massachusetts rates were "market tolerant" rather than "market driven" because no one has ever done a rate analysis in Massachusetts, either. No one there has addressed whether the rates being charged are reasonable given the number of times a particular equipment is used, its purchase price, the maintenance costs, or any of the other costs that go into a ratemaking proceeding.[114]

Mr. Mercer agreed that trucking companies that do a lot of business in an area probably have preferred towers that give most of their consensual business to, and he agreed that they probably tried to work out an agreement with those towers in advance as to what they would be charged in certain common circumstances. However, in situations like that involving Dave's Towing and Town Line Towing discussed earlier, the tower (Town Line in that case) that is able to do a consensual tow (or part of a tow) is free to charge whatever the market will bear – roughly twice as much in that case as Town Line would have been able to charge for the same service under their nonconsensual tariff if they had been the company receiving the police request. So, for example, in a purely consensual situation, Sterry Street is free to charge whatever they can get the motor carrier to agree to – because they are free to negotiate with each other and the motor carrier can walk away and choose another tower if

Sterry Street wants to charge more than the motor carrier is willing to pay; Sterry Street is not bound by any tariff and is free to try to get the maximum return on its investment. That is not the situation we are dealing with here, though; in this case, we are concerned with nonconsensual tows where the vehicle owner is not able to refuse whichever tower the police call and cannot negotiate with other towers to get the best rate. That is why there is a tariff for these nonconsensual tows that limit the rates to a reasonable return on investment.[115]

In response to further cross-examination, Mr. Mercer agreed that it would be preferable if every police department had police tow lists with only those towers fully equipped and qualified to handle the most difficult towing assignments. It might also make it easier for the Division to try to determine what a reasonable rate is. It is almost always better for the vehicle owner who needs a tow to have that tow performed by a tower with the right equipment, training and personnel, and no need to contract out services.[116]

Next there was a dialogue on the record between Mr. Mercer and counsel for Sterry Street regarding the way in which Sterry Street intended its proposed tariff for a rotator to be applied. Mr. Mercer pointed out that the way the proposed tariff reads, Sterry Street begins charging $775.00 per hour for the rotator from the moment it leaves the tow yard until the time it returns, plus a $1,000.00 set-up fee. Thus, if the rotator is out for five hours, as Mr. Mercer reads the proposed tariff, the charge for the rotator would be $4,875.00 (five hours at $775.00 per hour, plus a $1,000.00 set-up fee). Attorney Ratcliffe, however, explained that the set-up fee was separate and apart from the hourly rate, and the hourly rate

would not apply during the set-up period. Thus, if it took an hour to complete the set-up process, and the rotator was away from the tow yard for a total of five hours, the charge for the rotator would be $4,100.00 (four hours at $775.00 per hour, plus the $1,000.00 set-up fee). Mr. Mercer pointed out that the Division has to apply the tariff as written, and as written the tariff would apply the set-up fee on top of the hourly rate, and that tariff would have to be clarified if there was to be both a set-up fee and hourly charges, but not at the same time. Mr. Mercer and Mr. Ratcliffe then agreed that there might be some similar ambiguity in the way labor charges are applied during the rotator set-up, with Mr. Mercer concerned that the laborers were in effect being paid twice, once at their hourly rate for being on scene and once as part of the set-up fee, and Mr. Ratcliffe indicating that the cost of labor in doing the set-up came out of the set-up fee, and the laborers hourly rate would only be applied if they were required to be on scene thereafter for other purposes. Mr. Ratcliffe suggested that those issues might be cleared up in a post-hearing memorandum.[117]

In response to additional cross-examination, on the subject of Sterry Street's markup charges, Mr. Mercer acknowledged that he had noticed in Sterry Street's responses to the Division data requests that Sterry Street indicated that it had not had to hire outside consultants over the past five years. Given that fact, and the fact that Sterry Street is fairly completely equipped for towing and recovery work, Mr. Mercer agreed that it was unlikely that Sterry Street would engage excessive outside contracting in the future simply to impose the markup fees.[118]

With respect to hazardous materials handling, Mr. Mercer also agreed that was a rather heavily regulated process. He then noted that given the extensive amount of regulation regarding the handling and disposal of hazardous materials, he would expect that DEM would be notified whenever an accident involved such materials, and that DEM would then ensure that properly trained and licensed people would be brought in to handle that aspect of the incident. Mr. Mercer did not, however, agree that if Sterry Street was qualified to handle some level of hazardous material, and was asked by DEM to do so, it should be allowed to add an extra 50% markup on top of its normal towing and recovery rates for that type of cargo. He did not think it was reasonable to impose such a high surcharge on the vehicle owner in a nonconsensual tow situation absent some justification that the additional cost is fair and reasonable.[119]

Finally, Mr. Mercer was asked how many towers in Rhode Island own and operate rotators. Based on his records, he believed two heavy-duty towers (Town Line Towing and Scorpio Towing) in addition to Sterry Street have rotators, although he classed them in his review of tariffs as cranes (as at least one of the other operators does). Both charge $500.00 per hour for their equipment with no set-up fees. Mr. Mercer went on to state that he could not tell whether Sterry Street correctly categorized their rotator as more capable and safer than those of the other two companies. He acknowledged that another company might have also bought a rotator or crane and failed to update their tariffs to reflect that, but if they then went out and performed a nonconsensual tow with it and tried to charge $2,000.00 for crane work, he would have to disallow the charge (unless

contracted out to another company like Dave's Towing did). Mr. Mercer testified that he could not say whether or not a rotator was preferable to a non-rotating crane; to answer that question you would have to take everything into consideration, including the nature of the job being performed and how much more a rotator cost than a non-rotating crane. However, in the right circumstances, where the difference in cost is not too great, and the savings in performing the job are significant, it might make sense to prefer the rotator to the standard crane. It all comes down to the overall benefit of having a particular piece of equipment weighed against the cost of purchasing and operating that equipment.[120]

c. Sterry Street's Rebuttal Case

Sterry Street recalled Mr. Martins to the stand for additional testimony. He testified that he was familiar with the other heavy-duty towers in the state and only one other than Sterry Street, Town Line Towing, has a rotator. His justification for charging more than Town Line was set out in the responses to the Division's data requests. The other tower basically has a conventional wrecker with a crane that does not rotate. His rotator rotates a full 360 degrees and costs about twice what the other towers' machines cost if they were new.[121]

In response to questions by the Hearing Officer, Mr. Martins explained that the trucks that are just cranes can really just lift something up in the air, they cannot move around while doing the lift. The cranes (and rotators) have outriggers to the sides in the front and rear of the vehicle, so the tower's vehicle cannot move while doing a lift. However, a rotator can park parallel to a target vehicle pick it up, and then swing the load around to either side so that it can be cleared off the roadway, and

even dropped on flatbed truck parked adjacent to the rotator. A crane can only lift the target vehicle straight up, perhaps move it closer to the tower's vehicle, but if you want to put it on a flatbed for hauling, the flatbed truck has to maneuver under the target vehicle – which cannot easily be done if there is a guardrail in the way.[122]

d. Sterry Street's Data Responses

The Advocacy Section of the Division [123] propounded a set of data requests for Sterry Street in September 2014. The direct testimony of Sterry Street's witnesses reflected the contents of Sterry Street's responses to most of the Advocacy Section's specific requests. However, a few of the responses do further amplify the testimony.

Item 3, No. 1, of the proposed tariff indicates that "Complicated or Difficult Towing & Recovery services are billed separately on a line item basis at the hourly rates indicated in Item 4 and carry a four-hour minimum per line item, except that the four-hour minimum will not apply in cases where the Carrier simply provides towing services and nothing more for a vehicle over 26,000 lbs.," The Advocacy Section asked for the justification for a four-hour minimum. Sterry Street's response, in relevant part, was that the four-hour minimum is necessary to adequately compensate Sterry Street employees who are required to be available for complicated and difficult recoveries that frequently occur afterhours.[124] Although the data response speaks to afterhours tows, the tariff line items themselves says nothing about limiting the four-hour minimum for labor charges to those tows requiring an employee to come into work outside of the employee's normal work hours.[125] As written, then, an employee

who was sent on four two-hour complicated tows in a single normal eight-hour work day (i.e., no overtime) will be paid as if he did 16 hours of work.

Item 3, No. 3, of the proposed tariff indicates that "Towing and Recovery of Hazardous Materials cargo may be billed at 50 percent above the Towing and Recovery rate otherwise allowed."[126] The Advocacy Section asked whether or not Sterry Street is authorized by the State/Federal government to handle such "hazardous cargo," and Sterry Street responded that it was not a licensed hazardous waste transporter, but is legally required to assist in transporting hazardous waste under "emergency situations" provided certain requirements were met (generally, emergency situations which "present a threat to public health and safety"). The cited regulations also require that "all collected hazardous waste or used oil must be managed in accordance with" the Department of Environmental Management's rules and regulations without specifying what that entails.[127] There was no discussion as to whether or not Sterry Street's actual costs were increased in doing these types of tows.

Item 4, No. 21, of the proposed tariff indicates that "Supplies, Materials & Expendables" may be billed at "cost plus 20%." The Advocacy Section asked Sterry Street to "explain the rationale for charging ratepayers an additional 20 percent above the company's cost" for such items, and provide examples. In Sterry Street's response, it explained that its tariff item was referring to such single use items "as flares, absorbents and solvents. Charging ratepayers cost plus 20% allows Sterry Street to cover its administrative costs of selecting, ordering, stocking and keeping an inventory of such supplies, materials and other expendables." No

support was provided to support the assertion that a 20% markup is actually reasonable.

The Hearing Officer promulgated a number of post-hearing data requests seeking further amplification of several issues. Sterry Street's responses to those requests were received on June 30, 2015, and in the absence of any objection to their admissibility, were entered as a full exhibit on July 14, 2015.

The Hearing Officer's data request 2.1.1 sought clarification as to what "value added" was provided by Sterry Street to justify its proposal to charge "cost plus 30%" for hiring "outside experts or personnel" and for charging "cost plus 20%" for "supplies, materials, and expendables," Sterry Street responded:

> The carrier brings knowledge and trust, and incurs risk. He is the local professional that a state or town emergency agency relies upon, i.e., the approved and vetted company trusted to provide the towing, recovery, and incident management services to the local area. The carrier knows what professionals and specialists exist in the local area, how to reach them, and who has the proper equipment and expertise needed to resolve the incident quickly, safely and responsibly. The carrier must also assure that they understand the needs of the recovery and have the ability to perform as the circumstances require. The carrier then is responsible to manage and coordinate the subcontractors and local officials on scene, such as police, fire, rescue and other emergency management officials. If someone were to bring a lawsuit following a loss or injury of some type, the carrier would be the one responsible for damages and typically the first defendant to be named in a lawsuit. An additional risk is that of non-payment. The carrier is responsible to pay the subcontractor for its services and then wait for reimbursement from the customer or his insurer. If neither pay, the carrier suffers the loss. It should be further noted that a 30% markup is consistent with the existing tariffs for other carriers.

It went on to note that Sterry Street had not retained any outside personnel or experts in the past five years; the provision seeking "cost plus 30%" for hiring such personnel was merely a holdover from its existing tariff. With respect to the "cost plus 20%" sought for "supplies, materials and expendables," Sterry Street explained that:

> Sterry Street identifies and selects appropriate and safe supplies, materials, and expendables, purchases and safely maintains an adequate inventory, assures that they are immediately accessible and available when needed, and delivers them to the place where they are to be used.

Examples of such single use items included flares, absorbents and solvents.[128] The response does not distinguish other "single use" consumables, such as diesel fuel or gasoline, from "flares, absorbents and solvents." Arguably, then, under this provision of its proposed tariff, Sterry Street could seek to bill actual "cost plus 20%" for the diesel fuel consumed during the tow, while also billing for any "emergency fuel surcharge" authorized for towers under R.I.G.L. § 39-12-13(b). (The Division notes that the "emergency fuel surcharge" is intended to compensate towers for increases in fuel cost between rate cases. To this extent, collecting an "emergency fuel surcharge" in addition to the actual "cost plus 20%" for the fuel consumed would result in an over-recovery of fuel costs. This is not acceptable rate-making practice.) The tariff should at a minimum specify each item for which Sterry Street would seek to recover "cost plus 20%." Items which are not explicitly included in the tariff may not be billed for.

The Hearing Officer's data request 1.1.2 asked for clarification with respect to the intended impact of the proposed tariff on recovery charges for light and medium duty tows, and asked for a copy of Sterry Street's

light and medium duty towing tariffs. Sterry Street's response was that "the Towing Tariff issued on March 9, 2000, does not define the terms 'light and medium duty tows.' However, Sterry Street's July 21, 2014 proposal would apply to the circumstances wherein the motor vehicle to be recovered is 'Over 26,000 lbs in weight.'" The response then set out charges for towing several classes of vehicles, starting with 8,001-15,000 lbs gvw. Sterry Street went on to state that its proposed tariff did not seek "to amend simple towing charges for light and medium duty vehicles that do not qualify as 'Complicated or Difficult.' The 'Complicated or Difficult' tariff would only apply to a light or medium weight vehicle if it (a) were not a passenger vehicle, and (b) were submerged in water, located in non-drivable terrain, rolled over, etc." The response concluded by appending its 2000 tariff for "Commercial Motor Vehicle Towing, Recovery, And Storage Rates" rather than the light and medium duty tariffs requested, and stating that it was not currently operating under any special light and medium duty tariffs.[129]

Left to his own devices with respect to the terms of Sterry Street's light and medium duty towing tariff, the Hearing Officer has determined that Sterry Street did file such tariffs in 2005 and that they were approved by *In Re Consent Agreement Regarding Rates For Non-Consensual Towing And Storage*, Division Report and Order number 18328 dated and effective August 19, 2005 (as amended, most recently by Division Order number 19915, dated and effective February 19, 2010). The light and medium duty tariff defines light duty tows as those involving 8,000 lbs. gvw and less, and medium duty tows as those involving 8,001 to 15,000 lbs. gvw; there is no distinction between whether the vehicle being towed is used for

commercial or passenger purposes. That tariff (as amended) provides that light duty vehicles shall be billed at a flat rate of $82.00 for non-consensual police-ordered tows, and $93.00 for non-consensual private property tows, both inclusive of all incidental charges but for a mileage charge for all miles over the first five "on-hook"; in addition, whenever the tower was required to be on-scene for over one hour, the tower could begin assessing a "recovery charge" of $60.00 each hour in 15-minute increments for the second hour on scene. Medium duty tows are billed at an hourly rate of $85.00 per hour in 15-minute increments, inclusive of all incidental charges; there is no separate recovery charge allowed by the tariff, with all such costs covered by the hourly tow charge.

One may infer from the rate structures devised in the light and medium duty tariffs that at least some portion of the cost of preparing a vehicle to be towed was included in the basic fee for performing a tow. Before the Division can agree to apply any portion of the recovery provisions set out in the tariff before us today to light and medium duty tows, we must understand what impact those provisions would have on the basic tow rates assessed for non-consensual light and medium duty tows. Accordingly we will not approve applying any portion of the instant tariff to any vehicle with a gvw of 15,000 lbs. or less. Sterry Street will need to file amended light and medium duty tow tariffs if it wishes to revise the recovery provisions of those tariffs.

Hearing Officer data request 1.1.7 asked for a justification for billing for Air Cushion Lift Systems at $8,000.00 per day, rather than billing for them hourly. Sterry Street's response was that it wanted to bill for this system on a daily rather than hourly basis "because it is generally required for at least four to six hours at the scene. In addition, the lift

system, which consists of 6 nine foot air cushions, two starter bags, two mat jacks, twenty five foot air hoses, a compressor, a manifold and a cribbing system must be thoroughly washed and repacked after each use. The process generally takes an additional six hours. This item is used approximately 3 times per year."[130] The Division finds that billing a job on a daily basis that requires only "four to six hours" to perform, even allowing for some additional time after the job is completed to maintain the equipment, is not appropriate. As we understand the reply, Sterry Street is saying that $8,000.00 is sufficient for a six-hour job.[131]. Billed on an hourly basis, for six hours on scene, that would amount to an hourly rate of $1,333.33 per hour. The Division finds that the reasonable charge for this item is $1,333.33 per hour.

Hearing Officer data request 1.1.8 asked for a justification for billing for the use of a Traffic Control System on a daily basis, rather than on an hourly basis. Sterry Street's response was that the Traffic Control System is "a safety device which consists of electrical beacons designed to mimic common, easily recognized traffic lights and signals. It is used to manage traffic flow around the scene of an accident when the vehicle to be recovered or the recovery vehicle itself is blocking or posing a danger to ordinary traffic patterns. By billing at a per diem rate, discussions about when the system is needed are eliminated and safety is enhanced. Billing this system on an hourly basis would result in pressure to compromise safety for financial savings."[132] While the Division does not believe that billing on an hourly basis "would result in pressure to compromise safety for financial savings" since we are talking about non-consensual tows

where there is no one present in a position to quibble about financial savings (which is why the Division regulates this type of transaction), the Division does not find this daily charge to be unreasonable.

Hearing Officer data request 1.1.9 asked Sterry Street to address some ambiguities regarding its proposed storage rates. As written, the rates to be charged a vehicle owner for storing a 30' vehicle or a 60' vehicle were unclear. Sterry Street's response made it clear that a vehicle that was 30' long would be billed at $63.00 per day for storage, and one that was 60' feet long would be billed at $93.00 per day for storage.[133] In order to remove the ambiguity from the proposed tariff, the Division finds that the proposed storage fees be amended to read as follows:

Under 30'	$ 33.00/day
Under 60' down to 30'	$ 63.00/day
60' and over two units	$ 93.00/day
Inside Storage of freight (25' x 10')	$100.00/day
~~**After Hours, Weekend & Legal Holiday Release Fee**~~	~~**$ 20.00 flat fee**~~

(**Emphasis** identifies amended language.)

Sterry Street's response to Hearing Officer data request 1.1.9 also indicated that Sterry Street's storage location "is manned 24 hours a day. … [A]t least a skeletal staff is always present and can release a vehicle if needed afterhours, on weekends or holidays as well." Under these circumstances, there is no justification for imposing an "After Hours, Weekend & Legal Holiday Release Fee." This charge, which varies slightly from its predecessor in Sterry Street's 2000 tariff for "Commercial Motor

Vehicle Towing, Recovery, And Storage Rates"[134], is not supported by any rationale. The purpose for such an after-hours release fee is, however, discussed in the Settlement Agreement that constitutes Sterry Street's current light and medium duty tow tariff:[135]

> **After Hours Release Charge:** Towers are required to release vehicles to the owner or lien holder upon demand and upon presentation of the towing charges regardless of the type of vehicle towed. However, patrons who choose to retrieve their vehicle outside of the tower's normal business hours may be charged an additional after-hours release fee of twenty ($20.00) dollars. This after-hours release charge applies ***only*** if the particular tower's normal business hours are, ***at a minimum*** from 8:00 a.m. to 5:00 p.m. Monday through Friday and 8:00 a.m. through 12 P.m. on Saturday. This charge is intended to compensate the tower for the expense of requiring an employee of the tower to return to the storage facility after normal business hours to release a vehicle. Accordingly, towers who have employees on site for extended hours as part of the towers routine operations at that site may not impose this charge.

It is that last sentence that is most important for our current purposes. Sterry Street has someone on site to release vehicles 24 hours each day. There is always someone there who can release a vehicle upon request. No one has to come in from home to do so. There is, accordingly, no justification for this additional charge, and the Division must disapprove it.

Hearing Officer data request 1.1.14 asked for an explanation of the Sterry Street's reasoning in defining "towing" to limit it to covering "transporting a [motor vehicle] from one location to another by a Wrecker, Roll-off Truck, Landoll or Low bed Trailer, or other mechanical or motorized means." Sterry Street explained that under the definition in its current tariff, "a crane recovery could be characterized as the 'removal' by

'mechanical or motorized means' of a vehicle. The circumstance of a recovery of a vehicle from a river or ravine and placing it back on the roadway comes to mind, for example. However, this is not 'towing' and a crane recovery should not be wrapped into the standard towing fee. Therefore, Sterry Street has attempted to craft a definition of towing that would exclude this circumstance. Sterry Street did not use the definition found in §39-12.1-2(9) because that is a definition of the term 'tow truck.'"[136]

Under Rhode Island law, a crane "designed and/or ordinarily used for the purpose of towing or removing or assisting disabled motor vehicles" is, by definition, a tow truck. When such a crane is called upon to lift a vehicle from a river or ravine and place it back on the roadway, it is in fact acting as a tow truck. Having said that, however, we agree that lifting a vehicle from a river or ravine is a bit more complex and difficult than a simple "scoop and scoot" and should be billed differently. We believe that the definition is appropriate.

Hearing Officer data request 1.1.20 requested that Sterry Street "provide a copy of all heavy duty tow slips for the past two years, along with any supporting documentation to show in detail what each customer was billed for towing and associated recovery, whether the bill was paid, by whom (vehicle owner, insurer, etc.) the bill was paid, and what portion of a bill was attributed to outside equipment or personnel that Sterry Street had to subcontract for in order to complete the tow/recovery. Clearly indicate whether any bill was not paid in full with an explanation." Sterry Street objected to this request because it found the request excessively burdensome and "the information that would be

obtained is not necessary to determine whether the rates proposed are reasonable under the extraordinary circumstances to which this tariff would apply."[137]

Sterry Street, as the petitioner, has the burden of proof in a rate case and must convince the Division that the rates it proposes are reasonable and sufficient to allow it some reasonable rate of return without being excessive. Generally, that requires the petitioner to submit financial information regarding not only its own revenues and expenditures with respect to the regulated portion of its business, but that of the non-regulated portions of its business with whom it shares resources.[138] Expenses must be apportioned among the regulated and non-regulated portions of the overall operations of the petitioners, and revenues properly accounted for and assigned as well. Only after that has been done can a regulator conclude that the rates proposed in the tariff for the regulated activity are truly just and reasonable, protecting the public interest in having good services at a reasonable rate as well as the regulated entity's interest in receiving a fair rate of return on its investment. Evidence in the form of testimony as to what the rates are throughout the industry, particularly the industry in other jurisdictions, is of some use to the regulator, but it is not as useful as the actual financial data.

Compiling the appropriate financial data is, in fact, time-consuming, expensive, and more than a bit onerous. That is why in the Division in the past has agreed to negotiate rates for portions of the towing industry on a global basis – it saves the many smaller businesses that comprise the majority of the towing industry in this state the very substantial expense

of individual rate cases while allowing the Division some confidence that the overall rates being offered consumers in non-consensual tows are reasonable throughout the state. This is not, however, a case where the industry as a whole is seeking a standard rate increase (or modification), but one where a single company is seeking to set its own individualized rates. The Division is still cognizant that a full rate case would present a significant financial hurdle to even Sterry Street, one of the largest towing operators in the state, and so has agreed to proceed without insisting on a fully-blown financial study. However, review of the past heavy duty tow slips, particularly those that were not for non-consensual tows, would provide valuable evidence for evaluating whether or not the rates proposed in this matter are reasonable and commensurate with those being negotiated by vehicle owners in consensual tows. Knowing how often vehicle owners (or their insurers) fail to pay for their towing and related charges in non-consensual tows would also allow us to evaluate whether the "cost-plus" provisions are reasonable.

Vehicle owners whose vehicles are being towed without their consent (and, often, without their knowledge), should not be expected to pay higher rates than would a vehicle owner whose vehicle is being towed consensually in the absence of some evidence that the costs or risks to the tower are higher. With respect to non-consensual tows, the regulator is placed in the position of having to ensure that the vehicle owners are paying rates that are commensurate with similar tows that are accomplished consensually – we are standing in place of the vehicle owners. Without sufficient information as to the costs of consensual tows, which can only be gleaned from Sterry Street's tow slips, we are not in a

position to find that Sterry Street has fully proved its case as to the overall reasonableness of its rates.

e. Advocacy Section's Data Responses

The Hearing Officer promulgated post-hearing data requests to the Advocacy Section seeking further amplification of a couple of issues. The Advocacy Section's responses to those requests were received on June 30, 2015, and in the absence of any objection to their admissibility, were entered as a full exhibit on July 14, 2015.

In response to Hearing Officer data request 1.2.1 regarding the manner in which Sterry Street's existing light and medium duty tariffs were developed with respect to "recovery" rates, the Advocacy Section responded that Sterry Street's light and medium duty tow tariff did include a provision regarding recovery rates, that those tariffs had been negotiated rates that were the subject of a settlement agreement to which Sterry Street was a party, and that Sterry Street has been free under the terms of that settlement agreement to propose new recovery rates for its light and medium duty tows since August of 2010. The Advocacy Section also testified that it was its understanding that Sterry Street intended for its proposed tariff at issue in this proceeding to address the recovery portion of the light and medium duty tariffs as well (at least with respect to "Complicated or Difficult Towing and Recovery"). [139]

In response to Hearing Officer data request 2.2.1 regarding the basis for the Division having approved "Cost plus" tariff line items in the past for Sterry Street and other towers, the Advocacy Section responded, in pertinent part: [140]

> As the Hearing Officer is aware, it is the Administrator that ultimately decides on the reasonableness of the terms

contained within an approved tariff. Nevertheless, the Advocacy Section will offer the following:

> The practice of approving a mark-up for outside services and equipment for heavy duty tariffs appears to date back at least to the late 1990's, and may pre-date Administrator Ahern, and have been routinely approved as a line item in heavy duty tariff filings since. In recent years, when the Motor Carriers Section has questioned tow companies about that provision, the answer generally has been that there is a "cost of money" associated with engaging outside personnel and/or equipment. That cost, according to the towers, is a result of their contracting with outside vendors and being "on the hook" for the cost of those services. Moreover, several towers have explained, the tow companies have indicated that those charges by outside vendors are frequently payable before payment of the overall towing bill by the vehicle owner, lienholder or insurance company.
>
> … The Advocacy Section does not support this type of billing provision.
>
> The Motor Carriers Section's Associate Administrator has long been concerned about those tariff provisions. It appears it is ripe for abuse and can act as a disincentive to carriers to buy what has become required equipment. This position is not specifically directed to/at Sterry Street.

7. Discussion and Findings

It is the duty of every common carrier of property (including towers) to establish just, reasonable, and reasonably compensatory rates, charges and classification, and reasonable regulations and practices relating to those rates, charges and classification:

> **Establishment of rates and charges of common carriers – Rate discrimination – Rebates. –** It shall be the duty of every common carrier of property by motor vehicle to establish, observe, and enforce just, reasonable, and reasonably compensatory rates, charges, and classification,

> and reasonable regulations and practices relating thereto, ... No common carrier of property by motor vehicle shall charge or demand or collect or receive a greater or less compensation for transportation or any service in connection therewith between points enumerated in the tariff than the rates and charges specified in the filed tariffs in effect at the time; and no carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any other person, any portion of the rates or charges so specified, or extend to any person any privileges or facilities for transportation in intrastate commerce, except such as are specified in its tariffs.

R.I.G.L. § 39-12-12. The Administrator of the Division is required to review all proposed rates when properly asked to do so, and may allow or disallow any existing or proposed rates of common carriers of property in intrastate commerce, and may alter or prescribe the rates of those carriers after a hearing:

> **Alteration of common carrier rates by the administrator. –** (a) The administrator ... upon his ... own motion, after a hearing, may allow or disallow any filed or existing rates and may alter or prescribe the rates of common carriers in connection with the transportation of any or all classes of property to any or between any and all points within the state and any service connected therewith in accordance with the legal standards provided in this chapter. Whenever, upon complaint or in any investigation on his or her own initiative, the administrator, after a hearing, shall be of the opinion that any rate or charge collected, charged, or demanded by any common carrier by motor vehicle, or any classification, rule, regulation, or practice whatsoever of the carrier affecting the rate, charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, he or she shall determine and prescribe the lawful rate or charge, or the maximum and minimum rate or charge thereafter to be observed or the lawful classification, rule, regulation, or practice thereafter to be effective.

R.I.G.L. § 39-12-13(a). In deciding whether or not to approve or modify an existing or proposed rate, the Administrator must consider a number of

factors, including (but not limited to) the public interest in transportation at the lowest cost commensurate with allowing the carrier a just and reasonable return on his investment:

> **Factors governing determination of just and reasonable rates – Burden of proof. –** In the exercise of power to prescribe just and reasonable rates and charges for the transportation of property by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, and to disallow rates filed by any carriers, the administrator shall give due consideration, among other factors, to the inherent advantages of transportation by the carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; ***to the need, in the public interest, of adequate and efficient transportation service of the carriers at the lowest cost consistent with the furnishing of the service; and to the need of revenues sufficient to enable the carriers under honest, economical, and efficient management to provide such service***. In any proceeding to determine the justness and reasonableness of any rates or charges of any common carrier, ***there shall not be taken into consideration or allowed, as evidence or elements of value of the property of the carrier, either good will, earning power, or the certificate under which the carrier is operating***. At any hearing involving a change in rates, charges, or classification, or in a rule, regulation, or practice, ***the burden of proof shall be upon the carrier to show that the ... changed rate, charge, classification, regulation, or practice is just and reasonable***.

R.I.G.L. § 39-12-14 (***emphasis*** supplied). As R.I.G.L. § 39-12-14 makes explicitly clear, the burden of proof is on the carrier to show that the carrier's proposed rates, charges, classifications, regulation and/or practices are just and reasonable.

As an initial finding, the Division notes that Sterry Street did not submit a pre-filed direct case (i.e., pre-filed direct testimony with supporting documents) in this docket, which is a violation of the Division's

Rules of Practice and Procedure, [141] and its initial filing (and two subsequent filings which amended that initial filing) was deficient in many of the supporting evidentiary requirements that apply in all rate change petition filings. Indeed, some of the most critical supporting documents – its tow slips for heavy duty tows, records it is required to keep for Division inspection – were not presented even when the Hearing Officer specifically requested them.[142] A more complete rate filing would have simplified the review process and, perhaps, better supported Sterry Street's overall proposal.[143]

Towing Charges – Item 1, Item 3(1) and Item 4

Despite the significant deficiencies in Sterry Street's overall case, it is clear in the record that Sterry Street has not had a rate increase for its heavy duty tows since 2000, while the Consumer Price Index (and common experience) makes it clear that costs generally have increased significantly over the past 15 years. For example, the Consumer Price Index in March 2000, when Sterry Street's current tariff was approved, was 171.2, while in December 2013, shortly before Sterry Street filed its original amended tariff, the Consumer Price Index had grown to 233.049, an increase of about 36% in 13 years.[144] While this allows us to find that Sterry Street should be allowed some increase in its 2000 tariffed rates (which were hourly rates), the absence of thorough revenue and expense data, along with data to allow us to allocate those revenues and expenses accurately among Sterry Street's various enterprises, makes it impossible to do a meaningful assessment of Sterry Street's 2014 request,

particularly its proposal to bill most line items using 4-hour minimums. (This proposal is a significant departure from its current practice of charging for actual time portal-to-portal, without 4-hour minimums.[145])

Sterry Street's current heavy duty (15,000 lbs. gvw and over) towing and recovery tariff for non-consensual third-party requested tows (i.e, tows requested by the police or a private property owner, not the owner of the vehicle) provides for the following charges:[146]

Billable Activity	**Charge**
Actual Tow (Includes driver)[147]	
15,000-20,000 gvw	$ 90.00
20,001-30,000 gvw	$ 125.00
30,001-40,000 gvw	$ 165.00
40,001-50,000 gvw	$ 185.00
50,001-60,000 gvw	$ 225.00
60,001 and up gvw	$ 300.00

The proposed tariff states that it applies to "Complicated or Difficult Towing & Recovery,"[148] and defines such tows as:[149]

> … the retrieval of any Motor Vehicle, except a Private Passenger Vehicle, in demanding circumstances, such as wen the Motor Vehicle is:
>
> a. Submerged or located in a body of water over 2 feet deep;
> b. Located on a non-drivable surface or topography;
> c. Rolled over or in a position from which it could not extract itself even if operational;
> d. Carrying an unsecured load, oversized load, Hazardous Materials cargo, or has spread substantial debris;
> e. In need of unloading or reloading of a box trailer, box trucks, or flatbed trailers; or
> f. Over 26,000 lbs in weight.

The actual rate for the tow itself, under the proposed tariff, is $400.00 per hour[150] with a 4-hour minimum unless the only reason the tow is considered to be a "Complicated or Difficult Towing & Recovery" is that the vehicle being towed is 26,000 lbs. gvw or higher.[151]

While the proposed tariff states by its own terms that it is limited to "Complicated or Difficult Towing & Recovery," the practical effect of Item 2(8)(f) of the proposed tariff is to amend the basic tow rate for every heavy duty tow of a vehicle of 26,000 lbs. gvw and higher. As a result, the heavy duty tow rates now in effect would actually be as follows if the proposed tariff is approved:

Billable Activity	**Charge**
Actual Tow (Includes driver)	
15,000-20,000 gvw	$ 90.00
20,001-26,000 gvw	$ 125.00
26,001-and up gvw	$ 400.00

The proposed rates represent the following percentage increase over the current rates:

Billable Activity Actual Tow (Includes Driver)	**Current Charge**	**Proposed Charge**	**Percent Increase**
15,000-20,000 lbs. gvw	$ 90.00	$ 90.00	0.00%
20,001-26,000 lbs. gvw	$ 125.00	$ 125.00	0.00%
26,001-30,000 lbs. gvw	$ 125.00	$ 400.00	220.00%
30,001-40,000 lbs. gvw	$ 165.00	$ 400.00	142.42%
40,001-50,000 lbs. gvw	$ 185.00	$ 400.00	116.22%

50,001-60,000 lbs. gvw	$ 225.00	$ 400.00	77.78%
60,001 and over gvw	$ 300.00	$ 400.00	33.33%

Except for the heaviest weight class in the current tariffs, and for the rate classes below 26,001 lbs. gvw, the proposed rates represent a rate increase on the basic hourly towing rate ranging from twice the Consumer Price Index increase since Sterry Street's current tariff was approved in 2000 (about 36%) to more than 6 times that increase. In the absence of any cost and revenue data on which to base such dramatic increases, we cannot approve the proposed rates. By the same token, given the rise in the Consumer Price Index since 2000, we must also find that the decision not to seek a rate increase at the lower end of the weight class scale – which would result in Sterry Street operating at a loss on those tows, which could affect its economic viability – is also unsupportable.

Based on the record available, the Division finds that the following rates are appropriate:

Billable Activity Actual Tow (Includes Driver)	**Current Charge**	**Approved Charge**	**Percent Increase**
15,000-20,000 lbs. gvw	$ 90.00	$ 126.00	40.00%
20,001-26,000 lbs. gvw	$ 125.00	$ 175.00	40.00%
26,001-30,000 lbs. gvw	$ 125.00	$ 175.00	40.00%
30,001-40,000 lbs. gvw	$ 165.00	$ 231.00	40.00%
40,001-50,000 lbs. gvw	$ 185.00	$ 259.00	40.00%
50,001-60,000 lbs. gvw	$ 225.00	$ 315.00	40.00%
60,001 and over gvw	$ 300.00	$ 420.00	40.00%

The percentage increase we have authorized – 40% – is somewhat higher than the increase in the Consumer Price Index – 36% – for the period from 2000 through 2003. This takes into account that this is now late 2015, and allows for some increase in the Consumer Price Index since Sterry Street prepared Sterry Street Exhibit 3 at Appendices 12-14.

The proposed tariff also provides that whenever a tow is a "Complicated or Difficult Towing & Recovery" on any basis other than simply being over 26,000 lbs. gvw, there will be a 4-hour minimum charge for the tow (as well as for other components of the tow).[152] That means that under Sterry Street's October 2, 2014, amended petition, all such complicated or difficult tows would have a minimum charge as follows (with the rate increase calculated based on actually accomplishing the tow in one hour or less):

Billable Activity Actual Tow (Includes Driver) – 4 hr. min.	**Current Charge**	**Proposed Charge**	**Percent Increase**
15,000-20,000 lbs. gvw	$ 90.00	$ 360.00	300.00%
20,001-26,000 lbs. gvw	$ 125.00	$ 500.00	300.00%
26,001-30,000 lbs. gvw	$ 125.00	$1,600.00	1,180.00%
30,001-40,000 lbs. gvw	$ 165.00	$1,600.00	869.70%
40,001-50,000 lbs. gvw	$ 185.00	$1,600.00	764.86%
50,001-60,000 lbs. gvw	$ 225.00	$1,600.00	611.11%
60,001 and over gvw	$ 300.00	$1,600.00	433.33%

Imposition of a 4-hour minimum charge for tows results in a staggeringly large rate increase for any complicated or difficult tow that is

actually accomplished in significantly less than 4 hours. Sterry Street did not provide any financial analysis to justify charging a 4-hour minimum for heavy duty tows as opposed to simply charging for the amount of time their heavy duty tow truck actually needed to accomplish the tow as computed in accordance with Item 3(2) of the proposed tariff.[153] We do know, however, that Sterry Street operated under its current tariff for some 13 years before seeking a rate increase, and the current tariff does not provide for 4-hour minimum towing charges under any circumstances; everything is billed for time actually required. It is difficult to reach any other conclusion than that billing for actual time provided adequate compensation for Sterry Street from 2000, when the current tariff was approved, until at least late 2013, when Sterry Street finally decided it was time to seek higher rates. In the absence of (any) compelling evidence to the contrary, we have no choice other than to find that Sterry Street's proposal to bill for complicated and difficult tows at a 4-hour minimum must be denied.

By the same token, Sterry Street also seeks to charge customers for any ancillary equipment required to prepare a vehicle for towing at a 4-hour minimum as well. While it attempted to provide some information as to the cost of purchasing some of its larger pieces of equipment (cranes and/or rotators), it provided no financial analysis as to why it would be necessary to bill a 4-hour minimum for the use of such equipment. Again, use of such minimums is a significant departure from its current tariff. And, again, Sterry Street was apparently able to realize an adequate return on such pieces of equipment from 2000 until late in 2013, when it first initiated its tariff amendment process. In the absence of (any)

compelling evidence to the contrary, we have no choice other than to find that Sterry Street's proposal to bill for its ancillary equipment used in complicated and difficult tows at a 4-hour minimum must be denied.

That portion of Item 3(1) that in Sterry Street's October 1, 2014, amended tariff filing that provides that the line items contained in Item 4 of that amended tariff filing will carry a four hour minimum is disapproved. Item 3(1) in Sterry Street's October 1, 2014, amended tariff filing shall be amended to read:

> Complicated or Difficult Towing & Recovery services are billed separately on a line item basis at the hourly rates indicated in Item 4. The rate for a Certified Diver and Dive Assistant, however, is comprehensive, i.e., billed at one rate for the two individuals as a collective. All other professionals, personnel, vehicles, and equipment listed in Item 4 are billed separately, i.e., billed as a separate line item for each vehicle, equipment, professional, etc.

Finally, for the same reasons as discussed above, the second sentence of Item 3(2) of Sterry Street's October 1, 2014, amended tariff filing shall be deleted as it pertains to the 4-hour minimum charges which have been disapproved.

After Hours, Weeknds & Legal Holiday Release – Item 2(2), Item 5

Sterry Street's October 1, 2014, amended tariff filing, at Item 5, provides for a $35.00 charge for "After Hours, Weekend & Legal Holiday Release." However, Sterry Street's storage location "is manned 24 hours a day. … [A]t least a skeletal staff is always present and can release a vehicle if needed afterhours, on weekends or holidays as well." Under these circumstances, there is no justification for imposing an "After Hours, Weekend & Legal Holiday Release Fee." This charge, which varies slightly from its predecessor in Sterry Street's 2000 tariff for "Commercial Motor

Vehicle Towing, Recovery, And Storage Rates"[154], is not supported by any rationale. The purpose for such an after-hours release fee is, however, discussed in the Settlement Agreement that constitutes Sterry Street's current light and medium duty tow tariff:[155]

> **After Hours Release Charge:** Towers are required to release vehicles to the owner or lien holder upon demand and upon presentation of the towing charges regardless of the type of vehicle towed. However, patrons who choose to retrieve their vehicle outside of the tower's normal business hours may be charged an additional after-hours release fee of twenty ($20.00) dollars. This after-hours release charge applies ***only*** if the particular tower's normal business hours are, ***at a minimum*** from 8:00 a.m. to 5:00 p.m. Monday through Friday and 8:00 a.m. through 12 P.m. on Saturday. This charge is intended to compensate the tower for the expense of requiring an employee of the tower to return to the storage facility after normal business hours to release a vehicle. Accordingly, towers who have employees on site for extended hours as part of the towers routine operations at that site may not impose this charge.

It is that last sentence that is most important for our current purposes. Sterry Street has someone on site to release vehicles 24 hours each day. There is always someone there who can release a vehicle upon request. No one has to come in from home to do so. There is, accordingly, no justification for this additional charge, and the Division must disapprove both the charge in Item 5 of Sterry Street's October 1, 2014, amended tariff filing, and the definition contained in Item 2(1) of that filing (where the charge is not allowed, there is no need to include a definition of the charge).

Towing and Recovery of Hazardous Materials, Item 2(11) and Item 3(3)

Item 3(3) of Sterry Street's October 1, 2014, amended tariff filing provides that "Towing and Recovery of Hazardous Materials cargo may be billed at 50 percent above the Towing and Recovery rate otherwise allowed."[156] Sterry Street provided its justification in response to the Advocacy Section's[157] first set of data requests as follows:

> Sterry Street first considered the possibility that it may be called upon to transport hazardous materials cargo in reviewing the *Schedule of Prescribed Rates and Requirements* approved by General Order in the State of Louisiana effective March 26, 2010. See Appendix 47 [of Sterry Street Exhibit 3]. That tariff provides that "Recovery of hazardous materials cargo, as defined by D.E.M. or State Police Hazmat Unit may be billed at 50% above the rate allowed on towing & recovery charges." **Sterry Street** adopted this provision from the Louisiana tariff and **did not conduct a detailed cost analysis**. However, handling hazardous materials would not be just another day on the job for Sterry Street's employees. Some employees may not be willing to handle such materials. Those who are should be compensated for the extra risk they run and extra care required under those circumstances. On the chance that an employee is harmed in a recovery of that nature, Sterry Street must be certain to charge a rate commensurate with its increased risk. **The State of Louisiana found a 50% markup to be adequate. Having no other guideline, Sterry Street's proposal mirror's that state's determination**.

(**Emphasis** supplied.) Clearly, then, Sterry Street is using the "me too" rationale to justify significantly enhanced charges whenever hazardous materials may be involved in the case rather than actually having performed the sort of cost/benefit analysis that is appropriate to a rate case.

This is a very flawed approach for many reasons. We do not know whether the State of Louisiana ever performed any type of cost analysis

before adopting this policy. We do not know whether other states have done a cost analysis of this issue and adopted other, lower, premiums for performing tows involving hazardous materials. We do not know whether towers in Louisiana are required to undergo additional training and certification before they can perform tows involving hazardous materials, or invest in and use specific safety gear and other specialized equipment (to justify the additional cost). We do not even know whether the workers who are performing these tasks (and whose theoretically increase personal risk is the justification for the premium) are going to receive this additional money (as opposed to Sterry Street's owners) to compensate them for their (theoretically) increased risk. In other words, we do not have any factual basis for approving this tariff proposal.

We do know, however, that in spite of having done tows on the existing tariff for at least 15 years, in spite of presumably having performed tows of vehicles involving hazardous materials on multiple occasions over the past 15 years, and in spite of the fact that the State of Louisiana adopted this premium more than 5 years ago, Sterry Street has not heretofore seen the need to seek a 50% mark-up for performing tows involving hazardous materials. We also know that Sterry Street's current tariff has long allowed Sterry Street to contract with outside personnel to provide expertise not available within Sterry Street's own ranks, and to rent specialized equipment when necessary. It can do the same under its proposed tariff without the need for a "hazardous materials" mark-up, thus obviating the need for its own personnel to deal with the hazardous materials.

For all of the foregoing reasons, Item 3(3) of Sterry Street's October 1, 2014, amended tariff filing, providing that "Towing and Recovery of

Hazardous Materials cargo may be billed at 50 percent above the Towing and Recovery rate otherwise allowed," is disapproved.

Definition of "Private Passenger Vehicle, Item 2(18)

Item 2, Paragraph 18, of the October 1, 2014, amended tariff filing provides as follows:

> "Private Passenger Vehicle" means any vehicle under 10,000 lbs registered or leased to an individual, used exclusively for personal, recreational, or commuting purposes, and not used as a motor vehicle for hire.

This definition would appear to be some type of amalgam of light duty tows (up to 8,000 lbs. GVW) and medium duty tows (8,001 lbs. to 15,000 lbs. GVW) with a focus on the purpose for which the vehicle is used, attempting to separate out vehicles being used solely for personal, non-commercial, transportation from identical vehicles that are used for commercial purposes.

There is no need to define "Private Passenger Vehicle" in a tariff which we have determined applies only to heavy-duty tows (tows in excess of 15,000 lbs. gvw). Quite apart from the fact that the proposed tariff, as approved, will not apply to any vehicle included in this definition, there is no need to distinguish between private passenger or commercial vehicles in this or any other tariff. Tow rates are governed by the weight of the vehicle being towed, not the purposes to which that vehicle was put before needed to be towed, nor by identity of the person who owns the vehicle. Accordingly, the definition of "Private Passenger Vehicle" set out in Item 2, Paragraph 18, of the proposed tariff is disapproved.

Release of Vehicle Upon Payment of Towing & Recovery, Item 3(4)

Item 3, Paragraph 4, of the October 1, 2014, amended tariff filing provides as follows:

> If the Owner of a Motor Vehicle appears at the scene of a tow and has the ability to satisfy the Complicated or Difficult Towing & Recovery Charge, the Vehicle shall be released to the owner at the scene. In such instance, the Vehicle shall not be towed to Carrier's facility absent a valid warrant or police-ordered seizure pending court review.

The addition of the words "warrant or", and the substitution of the words "seizure pending court review" gives some clarity to the circumstances under which Sterry Street might decline to turn a vehicle over to its owner upon payment of any applicable and reasonable towing and storage fees. Unfortunately, we believe that Sterry Street is still unclear as to what the law actually provides. A brief restatement of the pertinent provisions of The Towing Storage Act may be in order.

The Towing Storage Act (R.I.G.L. §§ 39-12.1-1 *et seq.*) delegates to the police the power of a vehicle owner (or person in control of a vehicle) to choose a towing company for that vehicle owner under limited circumstances:

> § 39-12.1-1 Declaration of purpose and policy. – The legislature hereby finds the following legislation to be in the public interest for these reasons:
>
> …
>
> WHEREAS, The motoring public has a right, **when delegating to law enforcement the selection of an operator in the towing-storage business**, to expect that the operator selected and responding will be competent; and
>
> WHEREAS, The motoring public has a right **when delegating to law enforcement the selection of an operator in the towing-storage business**, to expect that the charges for the services to be rendered will be reasonable and compensatory, and that the operator is physically equipped in his or her business to function properly; and
>
> WHEREAS, **The towing and storage of a vehicle without the owner's consent, as is the case in most police instigated tows, requires certain procedures to assure the owner that rights of due process of law are not violated**; and

...

> WHEREAS, **The police powers delegated** by the legislature of the state **include the power of the police**, even without the owner's consent, **to have public ways cleared of conditions which**, in the opinion of the officer, **creates a hazardous condition to the motoring public**; **to have removed abandoned, abandoned and of no value, and unattended vehicles**; **to have removed and/or relocated vehicles in violation of parking ordinances**; and **to have removed any vehicle under control of any person arrested for any criminal offense**; and
>
> WHEREAS, The process of selection of the operator of a towing-storage business for police work is unique in that **law enforcement, though having the legal duty to order the work, has no legal duty to pay costs and charges connected therewith, the same being the duty of the vehicle owner**.

(**Emphasis** supplied.) Thus, this is a limited delegation to the police of the power of the vehicle owner to choose an operator in the towing-storage business to perform tows under a limited number of circumstances, and to then store the towed vehicles for a period of time. While the last registered owner and/or legal owner of a vehicle so towed is liable for all reasonable costs of recovery, towing and storage, the vehicle owner by no means forfeits all say in who is to tow his vehicle or to where it is to be towed so long as exercising that degree of choice does not cause or prolong traffic congestion or create or prolong a hazardous condition on the highway:

> § 39-12.1-3 Removal of abandoned, abandoned and of no value, and unattended vehicles. – (a) Any member of any police department or the owner or person in control of private property may order the removal of any abandoned or unattended vehicle or, any member of any police department, upon completion of a vehicle survey report, as defined in this chapter, may order the removal of any abandoned vehicle of no value by a certificated tower and may instruct the certificated tower to remove said vehicle to its own place of storage.

(b) The **last registered owner and/or the legal owner**, or the person who left a vehicle in a position so that the vehicle becomes abandoned, abandoned and of no value, or unattended **shall be liable for all reasonable costs of recovery, towing, and storage** in accordance with the certificated towers' tariff.

(c) Any member of a police department observing a vehicle on or near a public way which appears to be abandoned, abandoned and of no value, or unattended shall tag the vehicle by affixing securely to the vehicle a colored form, or by using an easily observable sticker. The tag or sticker shall show:

(1) The date and time of tagging, and the name and telephone number of the police department;

(2) That the vehicle will be removed pursuant to this chapter unless the vehicle is removed after forty-eight (48) hours; provided, however, **the police officer may order the immediate removal of the vehicle** without prior tagging as provided in this section **if it is parked illegally, causes traffic congestion or hazard or when the operator is not allowed to continue to operate the vehicle after having been detained for operating in violation of the law**.

(d) **No person in possession of a vehicle** which, in the opinion of the police officer in charge of the scene, needs to be removed to another location, **shall be denied the right to have any certificated tower of his or her choice attend to the removal**; **provided**, however, **that** allowing the choice of certified tower **does not cause a continuation of traffic congestion or of a hazardous condition on the highway** which the police officer is able to eliminate by other means. **When the hazardous condition has been eliminated, the person's choice shall be employed to remove the vehicle to the place selected by the person in possession**.

As R.I.G.L. § 39-12.1-3(d) makes quite clear, the owner of a vehicle (or the person in possession of that vehicle) retains his or her primary right to choose who will tow their vehicle away; only if the vehicle in its current location is causing traffic congestion or creates a hazardous condition on the highway can the police over-ride the owner’s choice of tower, and then only to the limited extent of having the vehicle moved to a place where it

no longer causes traffic congestion or creates a hazardous condition on the roadway. Once the vehicle has been moved far enough so that it no longer presents a problem (perhaps to an adjacent parking lot, for example), the police's delegated authority under The Towing Storage Act ceases to exist.

The Towing Storage Act then goes on to set out the extent to which a tower may retain possession of a vehicle towed under The Towing Storage Act and the circumstances under which a vehicle owner (or other authorized person) may reclaim the vehicle:

> § 39-12.1-4 Notice and processing of abandoned and unclaimed motor vehicles by certificated tower. –
>
> **...**
>
> (b) A certificated tower removing an abandoned or unattended vehicle shall notify within fourteen (14) days thereof, by registered mail, return receipt requested, the last known registered owner of the vehicle and all lienholders of record at the address shown in the records of the appropriate registry in the state in which the vehicle is registered that the vehicle has been taken into custody. The notice shall be substantially in the form provided in § 39-12.1-13 and shall describe:
>
> ...
>
> (4) That recovery, towing, and storage charges are accruing as a legal liability of the registered and/or legal owner.
>
> (5) That the certificated tower claims a possessory lien for all recovery, towing, and storage charges.
>
> (6) **That the registered and/or legal owner may retake possession at any time during business hours by appearing, proving ownership, and paying all charges due the certificated tower pursuant to its published tariff.**
>
> (7) That should the registered and/or legal owner consider that the original taking was improper or not legally justified, he or she has a right to file an administrative complaint

> pursuant to chapter 12 of this title to contest the original taking.
>
> ...

(**Emphasis** supplied.) In other words, if a vehicle is properly towed under the provisions of The Towing Storage Act, the tower is required to release that vehicle to the "registered and/or legal owner" as soon as ownership is proved and all charges due the tower under its approved tariff have been paid. R.I.G.L. § 39-12.1-5 provides a very limited exception to the notice requirements of R.I.G.L. § 39-12.1-4 in the case of certain vehicles, but that exception would not appear to extend to denying a vehicle owner the right to recover possession of his or her vehicle and remove it to a location of the owner's choice.

This is all relevant because the second sentence of Item 3(4) of Sterry Street's amended tariff, as set out in Sterry Street Exhibit 3, claims that Sterry Street has some authority to refuse to release to a vehicle owner a vehicle towed under The Towing Storage Act. This is simply not correct. If the police direct a tow under The Towing Storage Act, they are doing so using the statutorily delegated authority of the vehicle owner under very limited circumstances. The owner of a vehicle towed under The Towing Storage Act, as directed by the police using its delegated authority, has an absolute right to possession of the owner's vehicle upon paying the appropriate charges under the tariff. The Towing Storage Act does not provide any authority to the police to require a tower to hold on to a vehicle once the appropriate charges have been paid.[158]

If the police for some reason directs a tower to refuse to release a vehicle to the vehicle owner, it is not doing so using its delegated authority under The Towing Storage Act; it must be using some other statutory

grant of authority or, perhaps, some inherent police power. That would mean that The Towing Storage Act – which requires the vehicle owner to pay for tows directed under that Act – does not apply. Unless the police – or Sterry Street – can point to some other statute that would require a vehicle owner to pay for a tow (and storage) of a vehicle directed by the police under its police powers, the vehicle owner cannot be considered liable for those towing and storage charges because those charges clearly were not accrued for the owner's benefit under any authority delegated to the police by the owner.

For the foregoing reasons, the second sentence of Item 3(4) of Sterry Street's amended tariff, as set out in Sterry Street Exhibit 3, is disapproved and must be deleted from the tariff.

Outside Experts or Personnel, Cost Plus 30%, Item 4, Line 4

Item 4, Line 4, of Sterry Street's October 1, 2014[159], amended tariff filing provides that outside experts or personnel will be billed at "cost plus 30%." This charge is very similar to that in the current tariff, which provides that whenever Sterry Street "must enlist the services of an outside EXPERT personnel" a charge "equaling 130% of the provider's charge shall be assessed."[160] In its direct case, Sterry Street justified this mark-up by explaining that it was "[j]ust the cost of doing business."[161] Given this less than satisfactory explanation, the Hearing Officer propounded a post-hearing data request seeking further clarification as to what "value added" was provided by Sterry Street to justify its proposal to charge "cost plus 30%" for hiring "outside experts or personnel." Sterry Street responded:[162]

> The carrier brings knowledge and trust, and incurs risk. He is the local professional that a state or town emergency agency relies upon, i.e., the approved and vetted company trusted to provide the towing, recovery, and incident management services to the local area. The carrier knows what professionals and specialists exist in the local area, how to reach them, and who has the proper equipment and expertise needed to resolve the incident quickly, safely and responsibly. The carrier must also assure that they understand the needs of the recovery and have the ability to perform as the circumstances require. The carrier then is responsible to manage and coordinate the subcontractors and local officials on scene, such as police, fire, rescue and other emergency management officials. If someone were to bring a lawsuit following a loss or injury of some type, the carrier would be the one responsible for damages and typically the first defendant to be named in a lawsuit. An additional risk is that of non-payment. The carrier is responsible to pay the subcontractor for its services and then wait for reimbursement from the customer or his insurer. If neither pay, the carrier suffers the loss. It should be further noted that a 30% markup is consistent with the existing tariffs for other carriers.

The data response at least cited a couple of risks to Sterry Street of bringing in outside experts (something it says it rarely does) to assist in a particular towing operation, risks that might justify some premium on top of the amount it must pay the expert. Sterry Street mentioned the risk of exposure in a law suit should the outside expert cause some type of injury or damage while on scene, and it cited the risk it assumes when it must pay the outside expert up front and may – or may not – be reimbursed by the vehicle owner or its insurer for that work at some later date. Here again it would have been useful if Sterry Street had provided the tow slips and related information the Hearing Officer asked for, since that information would have allowed the Division to assess the actual degree of risk being faced.

Most of the towing incidents covered by this tariff involve either insured vehicles, or large carriers that self-insure.[163] In most such cases, the insurer probably pays all reasonable charges promptly, which would suggest that Sterry Street may not be at much risk, at least with respect to being able to reimburse the outside expert from the proceeds of the tow. In the absence of any real supporting data, however, we can only conclude that the need for any mark-up, much less one of 30%, is completely unsubstantiated. Sterry Street simply failed to meet its burden of proof.

Accordingly, the Division must find that Sterry Street's request for a premium of 30% above its actual cost for bringing in outside experts is unsupported by the evidence and must be denied. Further, the Division finds that the Associate Administrator for Motor Carriers should review the existing tariffs for all other towers with a view toward requiring them to provide adequate financial justification for any "cost-plus" line items in their tariffs; if they are unable to justify such line items, the "cost-plus" language should be removed from their tariffs as well.

Crane, $775/hr Plus $1000 Setup Fee, Item 4, Line 6

Item 4, Line 6, of Sterry Street's October 1, 2014[164], amended tariff filing provides that use of a crane will be billed at $775.00 per hour, plus a setup fee of $1,000.00; it appears from the testimony that rotators are considered as cranes for billing purpose (Sterry Street has two rotators, but there is no line-item specific to them).[165] According to Sterry Street's direct case, "set-up" apparently entails getting the crane set up by putting the out-riggers down for stabilization, positioning timbers to

make sure everything can be leveled, verifying that the ground where the crane is located is solid enough to support crane operations, getting the crane level, and everything else required to operate the crane safely. It takes roughly an hour to an hour and a half to do this, depending on how many people are available to help the crane operator. The "set-up" fee includes the cost of the labor involved in setting up the crane; the labor is not charged separately from the "set-up". The total minimum cost of using the crane would be the $1,000.00 set-up fee, plus a four-hour minimum charge for deploying the crane billed at $775.00 per hour.[166]

Mr. Martins then justified Sterry Street's proposed crane charges by stating that his company was really seeking to collect the same charges in Rhode Island as it does in Massachusetts for recovery-type work. He testified that Massachusetts, unlike Rhode Island, does not require towing companies to have tariffs on file with respect to recovery charges.[167] .

It is clear that there is really no cost/revenue analysis to support these charges. There was no suggestion that Massachusetts ever attempted to do any cost/revenue analysis to support this proposed charge for a crane (indeed, quite the opposite). Given that the crane is being billed on an hourly basis while on site or in transit to and from the towing location, and given that the crane operator and one or more Sterry Street employees are on site as well at all times, it is hard to find any justification for a $1,000.00 setup fee. There is no evidence that the labor involved in setting up the crane costs $1,000.00. The crane cannot be used while it is being setup (yet Sterry Street is still billing for it to sit there while it is setup. In the absence of any evidence to justify the cost associated with a "setup" fee for cranes or rotators, that portion of Sterry

Street's October 1, 2014[168], amended tariff filing in Item 4, Line 6, that provides for a $1,000.00 crane setup fee, in addition to $775.00 per hour for operating and transporting the crane, is disapproved (the basic hourly fee of $775.00 per hour is approved).

Air Cushion Lift System, $8,000/Day, Item 4, Line 16

Item 4, Line 16, of Sterry Street's October 1, 2014[169], amended tariff filing provides that use of an air cushion lift system will be billed at $8,000.00 per day. Sterry Street supported that proposal in its direct case by stating that the entire system owned by Sterry Street costs about $125,000.00, including the generators and related parts, and that the replacement cost for individual bags runs at around $4,500.00 each. The bags themselves are vulnerable to being punctured at accident scenes, and have to be replaced after they sustain damages. It take a lot of work to get these systems safely deployed underneath a vehicle, and they require quite a bit of expertise to use safely and effectively, but when deployed properly they can cut the recovery time by half or more, making them very worthwhile. For all of these reasons, particularly the system's own susceptibility to damage, Sterry Street believed it is appropriate to charge a daily minimum rate of $8,000.00.[170]

In response to further inquiry by the Hearing Officer, Sterry Street explained that it wanted to bill for this system on a daily rather than hourly basis "because it is generally required for at least four to six hours at the scene. In addition, the lift system, which consists of 6 nine foot air cushions, two starter bags, two mat jacks, twenty five foot air hoses, a compressor, a manifold and a cribbing system must be thoroughly washed

and repacked after each use. The process generally takes an additional six hours. This item is used approximately 3 times per year."[171] The Division finds that billing a job on a daily basis that requires only "four to six hours" to perform, even allowing for some additional time after the job is completed to maintain the equipment, is not appropriate. As we understand the reply, Sterry Street is saying that $8,000.00 is sufficient for a six-hour job, including cleaning up and re-setting the equipment at the end of the job. Billed on an hourly basis, for six hours on scene (on average), that would amount to an hourly rate of $1,333.33 per hour. The Division finds that the reasonable charge for an Air Cushion Lift System, Item 4, Line 16, of Sterry Street's October 1, 2014[172], amended tariff filing, is $1,333.33 per hour.

Supplies, Materials & Expendables, Item 4, Line 21

Item 4, Lines 21, of Sterry Street's October 1, 2014[173], amended tariff filing provides that "Supplies, Materials & Expendables" will be billed at "cost plus 20%." With respect to the "cost plus 20%" sought for "supplies, materials and expendables," Sterry Street explained that:

> Sterry Street identifies and selects appropriate and safe supplies, materials, and expendables, purchases and safely maintains an adequate inventory, assures that they are immediately accessible and available when needed, and delivers them to the place where they are to be used.

Examples of such single use items included flares, absorbents and solvents.[174] Sterry Street is in the business of providing towing services, not in the business of reselling such items as flares, absorbents and solvents. Assuming that keeping such items in stock on its trucks is

not actually included in the operating costs of the truck itself – and they typically are included (or, at least, not routinely addressed as a line item in towing tariffs) – Sterry Street still failed to provide any evidence that a 20% mark-up on such items would cover the reasonable administrative costs of re-ordering and re-stocking such supplies. We note that there was no such provision in the current tariff, and that Sterry Street apparently included such items in its overall towing charges for the past 15 years without a problem.

In the absence of any evidence to support adding a new charge for "supplies, materials and expendables" now, the Division must disapprove that request as already being covered in the basic hourly rates for Sterry Street's equipment. Further, the Division finds that the Associate Administrator for Motor Carriers should review the existing tariffs for all other towers with a view toward requiring them to provide adequate financial justification for any "cost-plus" line items in their tariffs for "supplies, materials and expendables"; if they are unable to justify such line items, the "cost-plus" language should be removed from their tariffs as well.

Storage & Miscellaneous Rates, Item 5, Lines 1-3

Item 5, Lines 1-3, of Sterry Street's October 1, 2014[175], amended tariff filing establishes the appropriate storage rates to be charged for various sized vehicles. As drafted, the amended tariff is ambiguous as to the rate to be charged for storing vehicles that are either exactly 30' long or 60' long. Sterry Street eventually explained that a vehicle that was 30' long would be billed at $63.00 per day for storage, and one that was 60' feet long would be billed at $93.00 per day for storage.[176] In order to

remove the ambiguity from the proposed tariff, the Division finds that the proposed storage fees set out in Item 5, Lines 1-3, of Sterry Street's October 1, 2014, amended tariff shall be amended to read as follows:

Under 30'	$ 33.00/day
Under 60' down to 30'	$ 63.00/day
60' and over two units	$ 93.00/day

(**Emphasis** identifies amended language.)

8. Conclusion

The Division has specifically rejected a number of tariff practices that it had approved in past tariffs, specifically the after-hours charge and "cost plus" billing. However, it is important to remember that this is the first time those items have been addressed in an actual rate case (which requires some evidence to justify the requested rates). Evidence that other companies, often in other jurisdictions, have comparable charges in their tariffs (which, as in Massachusetts, may not even be subject to review) is not sufficient to meet the burden of proof in a rate case. In this case there was literally no cost/revenue analysis provided to support either "cost plus" rates or minimum hourly rates, and those rates have, accordingly, been rejected. The Associate Administrator for Motor Carriers may wish to consider reviewing the tariffs of other towing companies with a view toward determining whether or not those companies will be allowed to keep such rates in their current tariffs.

Accordingly, it is:

(22241) ORDERED:

1. That the Division finds that "recovery" work is clearly an integral part of "transportation of a motor vehicle by a tow truck" and, therefore, the Division has the authority, under 49 U.S.C. §14501(c)(2)(C), "to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle" including regulating the price of so-called "recovery" work associated with performing such a nonconsensual tow.
2. That the October 1, 2014, amended petition filed by Sterry Street Auto Sales, Inc., d/b/a Sterry Street Towing (MC-812), 257 Rice Street, Pawtucket, Rhode Island 02861, seeking an increase in its approved heavy duty towing tariff and adoption of a tariff covering "Complicated or Difficult Towing & Recovery" is hereby approved in part and disapproved in part.
3. That Sterry Street's request to apply the "Complicated or Difficult Towing & Recovery" rates proposed in Sterry Street's October 1, 2014, amended tariff filing to light and medium duty tows (i.e., tows under 15,000 lbs. gvw) is disapproved; Sterry Street may apply to the Division to amend its light and medium duty towing tariff to adopt the "Complicated or Difficult Towing & Recovery" rates for light and medium duty tows in a separate filing.
4. That Item 2(18) in Sterry Street's October 1, 2014, amended tariff filing, establishing a definition of "Private Passenger Vehicle," is disapproved and must be deleted from the proposed tariff.

5. That Item 4 in Sterry Street's October 1, 2014, amended tariff filing shall be amended, with respect to "Towing Charges" to provide for the following rates:

Billable Activity Actual Tow (Includes Driver)	**Approved Charge**
15,000-20,000 lbs. gvw	$ 126.00
20,001-26,000 lbs. gvw	$ 175.00
26,001-30,000 lbs. gvw	$ 175.00
30,001-40,000 lbs. gvw	$ 231.00
40,001-50,000 lbs. gvw	$ 259.00
50,001-60,000 lbs. gvw	$ 315.00
60,001 and over gvw	$ 420.00

6. That Item 3(1) in Sterry Street's October 1, 2014, amended tariff filing shall be amended to read:

> Complicated or Difficult Towing & Recovery services are billed separately on a line item basis at the hourly rates indicated in Item 4. The rate for a Certified Diver and Dive Assistant, however, is comprehensive, i.e., billed at one rate for the two individuals as a collective. All other professionals, personnel, vehicles, and equipment listed in Item 4 are billed separately, i.e., billed as a separate line item for each vehicle, equipment, professional, etc.

7. That the second sentence of Item 3(2) of Sterry Street's October 1, 2014, amended tariff filing shall be deleted as it pertains to the 4-hour minimum charges which have been disapproved.
8. That the $45.00 charge for "After Hours, Weekends & Legal Holiday Release" contained in Item 5 of Sterry Street's October 1, 2014,

amended tariff filing, and the definition of that term contained in Item 2(1) of that filing, are disapproved.

9. That Item 3(3) of Sterry Street's October 1, 2014, amended tariff filing, providing that "Towing and Recovery of Hazardous Materials cargo may be billed at 50 percent above the Towing and Recovery rate otherwise allowed," is disapproved.
10. That the second sentence of Item 3(4) of Sterry Street's amended tariff (i.e., "In such instance, the Vehicle shall not be towed to Carrier's facility absent a valid warrant or police-ordered seizure pending court review"), as set out in Sterry Street Exhibit 3, is disapproved and must be deleted from the tariff.
11. That Sterry Street's request for a premium of 30% above its actual cost for bringing in outside experts is unsupported by the evidence and must be denied; Sterry Street may only charge actual cost for retaining outside experts.
12. That the reasonable charge for an Air Cushion Lift System, Item 4, Line 16, of Sterry Street's October 1, 2014, amended tariff filing, is $1,333.33 per hour.
13. That Item 4, Lines 21, of Sterry Street's October 1, 2014, amended tariff filing, providing that "Supplies, Materials & Expendables" will be billed at "cost plus 20%," is disapproved.
14. That the Associate Administrator for Motor Carriers should review the existing tariffs for all other towers with a view toward requiring them to provide adequate financial justification for any "cost-plus" line items in their tariffs; if they are unable to justify such line items, the "cost-plus" language should be removed from their tariffs as well.

15. That the proposed storage fees set out in Item 5, Lines 1-3, of Sterry Street's October 1, 2014, amended tariff shall be amended to read as follows:

Under 30'	$ 33.00/day
Under 60' down to 30'	$ 63.00/day
60' and over two units	$ 93.00/day

16. That Sterry Street Auto Sales, Inc., d/b/a Sterry Street Towing (MC-812), 257 Rice Street, Pawtucket, Rhode Island 02861, shall amend its October 1, 2014, amended petition consistent with the foregoing numbered order paragraphs governing "Heavy Duty Tows" and "Complicated or Difficult Towing & Recovery;" it may begin charging the new rates upon receiving verification from the Division's Associate Administrator for Motor Carriers that the amended October 1, 2014, petition is consistent with the terms of this Report and Order as directed above.

DATED AND EFFECTIVE AT WARWICK, RHODE ISLAND, DECEMBER 10, 2015.

_____

William K. Lueker, Esq.
Deputy Chief of Legal Services
Hearing Officer

APPROVED: _____
Thomas F. Ahern
Administrator

NOTICE OF AVAILABILITY OF JUDICIAL REVIEW
(PROVIDED PURSUANT TO R.I.G.L. §42-35-12)

Please be advised that if you are aggrieved by this final decision (report and order) of the Rhode Island Division of Public Utilities and Carriers ("Division") you may seek judicial review of the Division's final decision by filing an appeal with the Rhode Island Superior Court. You have thirty (30) days from the mailing date (or hand delivery date) of the Division's final decision to file your appeal. The procedures for filing the appeal are set forth in Rhode Island General Laws, Section 42-35-15.

Proceedings for review may be instituted by filing a complaint in the Superior Court of Providence or Kent Counties. Copies of the complaint must be served upon the Division and all other parties of record in your case. You must serve copies of the complaint within ten (10) days after your complaint is filed with the Superior Court.

Please be advised that the filing of a complaint (appeal) with the Superior Court does not itself stay enforcement of the Division's final decision. You may however, seek a stay from the Division and/or from the Court.

The judicial review shall be conducted by the Superior Court without a jury and shall be confined to the record. The Court, upon request, shall hear oral argument and receive written briefs.

[1] The record did not close until July 14, 2015, when the Hearing Officer admitted the parties' responses to the Hearing Officer's post-hearing data requests as exhibits *in absentia.*

[2] The proposed tariff as filed on February 24, 2014, defined "Heavy Duty Towing & Recovery" as "towing and/or recovery of a vehicle over 26,000 lbs." *See* Item 2, para. 12, Appendix 3, of the original filing submitted on the petitioner's behalf by its counsel on February 24, 2014, in Sterry Street Exhibit 1.

[3] Unlike the tariff for "Heavy Duty Towing & Recover," the "Complicated or Difficult Towing & Recovery" applied for all gross vehicle rates and was defined as:

> "…retrieval of a Motor Vehicle in demanding circumstances, such as when the motor vehicle is, as determined by a responding law enforcement officer:
>
> a. Submerged or located in a body of water over 2 feet deep;
> b. Located on a non-drivable surface of topography;
> c. Rolled over or in a position from which it could not extract itself even if operational;
> d. Carrying an unsecured load, oversized load, Hazardous Materials cargo, or has spread substantial debris; or
> e. In need of unloading or reloading of a box trailer, box trucks, or flatbed trailers."

See Item 2, para. 8, Appendix 3, of the original filing submitted on the petitioner's behalf by its counsel on February 24, 2014, in Sterry Street Exhibit 1.

[4] *See* Sterry Street Exhibit 1, cover letter at 2.

[5] *See* Sterry Street Exhibit 1, Appendices 7-11.

[6] *See In Re Consent Agreement Regarding Rates For Non-Consensual Towing And Storage*, Division Report and Order number 18328 dated and effective August 19, 2005, in Docket number 05 MC 78, *as amended* by Division Order number 19915 dated and effective February 19, 2010, Docket number 05 MC 78. (There were also two earlier amendments. All of the amendments approved cost-of-living increases in accordance with the provisions of the original Consent Agreement. The hourly recovery charge for light and medium duty tows has remained the same since the original Report and Order approving the Consent Agreement.) Prior to 2005, "recovery" costs were considered by the towers (and the Division) to be included within the basic hourly towing fee for light and medium duty tows. *See generally In Re Statewide Tow Rate*, Division Report and Order number 15988 dated and effective September 16, 1999, in Division Docket number 99 MC 37. The separate $60.00 "recovery" fee for light duty tows was first introduced for light duty tows in 2000. *See In Re Division's Motion To Accept A Recovery Rate of $60.00 For Tows That Extend Beyond What Is Normally Considered A Tow*, Division Report and Order number 16400 dated and effective September 27, 2000, in Division Docket number 00 MC 83.

[7] *See* Sterry Street Towing, Inc., Towing Tariff effective April 3, 2000, at Sterry Street Exhibit 1, Appendices 7 – 11. This tariff also contains a towing rate for medium duty tows (8,001-15,000 gvw). Sterry Street Exhibit 1, Appendix 9. However, this tariff was superseded for medium duty tows only in 2005. *See In Re Consent Agreement Regarding Rates For Non-Consensual Towing And Storage*, Division Report and Order number 18328 dated and effective August 19, 2005, in Division docket number 05 MC 78. Sterry Street Towing (MC-812) was an original signatory (*see* Appendix 2 to that Report and Order) to

the Consent Agreement (*see* Appendix 1 to that Report and Order) approved by Report and Order number 18328.

[8] These charges are all a flat charge per tow rather than an hourly charge. Any charges in the tariff other than a flat charge are explicitly described as such in the 2000 tariff.

[9] Sterry Street Exhibit 1 at Appendices 1-6.

[10] The Certified Diver and Dive Assistant are billed as a unit (i.e., $300.00 total for both). *See* Sterry Street Exhibit 1, Item 3.2 at Appendix 5.

[11] Sterry Street Exhibit 1 at 1; Sterry Street Exhibit 2 at 1.

[12] The Petitioner may, of course, file new tariffs for its light and medium duty tows, including rates for "Complicated or Difficult Towing & Recovery" rates if it so desires. Alternatively, the Associate Administrator for Motor Carriers may, on his own motion, under R.I.G.L. § 39-12-13, initiate a review of Sterry Street's existing light and medium duty tow tariffs in order to evaluate whether or not those tariffs are still adequate.

[13] *In Re Sterry Street Auto Sales, Inc. (MC-812)*, Division Order number 21395 dated and effective March 26, 2014, in Division Docket 14 MC 66.

[14] Sterry Street Exhibit 2.

[15] Advocacy Section Exhibit 1.

[16] Sterry Street Exhibit 3.

[17] Item 4 is no longer divided into two section, and does not distinguish between "Heavy Duty Towing & Recovery" and "Complicated or Difficult Towing & Recovery." Instead, all Item 4 charges are considered to be "Complicated or Difficult Towing & Recovery Rates."

[18] The Certified Diver and Dive Assistant are billed as a unit (i.e., $300.00 total for both). *See* Sterry Street Exhibit 2, Item 3.1 at 5.

[19] *See generally* the Division's *Rules And Regulations Governing Transportation Provided By Motor Carriers Of Property* at Appendix D.

[20] There is no provision under R.I.G.L. § 39-12.1-1 *et seq.* that authorizes police-ordered impoundments; that authority, if it exists at all, must be found elsewhere than in Title 39 of the Rhode Island General Laws. *See generally In Re Petition For Declaratory Judgment From The Rhode Island Public Towing Association*, Division Report and Order number 20200 dated and effective December 6, 2010, in Division Docket number D-10-26, *aff'd R.I. Public Towing Association, Inc. v. Thomas F. Ahern, Administrator, R.I. Division of Public Utilities and Carriers*, C.A. No. PC 10-1016 (*consolidated w/* C.A. No. PC 10-7491, C.A. No. PC 11-1622)(decision filed March 20, 2012, Mr. Assoc. Justice Stone).

[21] Tr. at 174.

[22] The updated/corrected proposed tariff has not been filed as of the date of this Report and Order. Presumably the parties were unable to agree on amended language.

[23] Sterry Street's post-hearing data responses were marked as Sterry Street Exhibit 6 *in absentia*, and the Advocacy Section's post-hearing data responses were marked as Advocacy Section Exhibit 4 *in absentia.*

[24] Sterry Street and the Advocacy Section of the Division were apparently in negotiations over some of the terms of the amended tariff between February of 2014 and February of 2015, as evidenced by the fact that version actually at issue here, the one dated October 1, 2014, is the third version in the record. The record in this case was not

closed until July 14, 2015, when the Hearing Officer admitted the parties' responses to several post-hearing data requests.

[25] Tr. 2/11/15, at 8-11. Declaratory rulings by agencies are governed by R.I.G.L. §42-35-8.

[26] The very first clause of 49 U.S.C. §13102 states "In this part, the following definitions shall apply." Since both 49 U.S.C. §13102 and 49 U.S.C. §14501 are in the same "part," that is, Part B of Subtitle IV of Title 49, it is clear that the definitions set out in 49 U.S.C. §13102 apply to the terms used in 49 U.S.C. §14501.

[27] Commonly known as "The Towing And Storage Act."

[28] This definition requires that "one set or more of wheels of ***any*** motor vehicle or motor vehicles are on the highway during the course of transportation" in order for the transportation to qualify as a "drive away-tow away operation." The definition does not specify that those wheels must belong to the towed vehicle. Thus, a flat bed with a winch that loads a vehicle for transport is engaged in a "drive away-tow away operation" so long as the flat bed is a motor vehicle and has its wheels on the highway.

[29] As an aside, it is worth mentioning that many light and medium duty tow tariffs include a $20.00 fee for an "after hours release." That is, if a vehicle owner wants to collect a vehicle outside of the tower's published business hours, the tower will add a charge of $20.00 for opening the lot to release the vehicle. Arguably however, under this statute, if the vehicle was a non-consensual private property tow, and if the tower performs non-consensual private property tows upon the request of private property owners 24/7, then for purposes of releasing such vehicles, the tower's actual hours of operation for its tow lot must also be 24/7 – and it would be a violation of this statute for the tower to collect an "after hours release fee" for any private property non-consensual tow under those circumstances.

[30] "Perlustration" is defined as "the action of perlustrating; a going round and viewing or surveying thoroughly. The action of going through and examining a document; *esp.* the inspection of correspondence while passing through the post." THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY Vol. II 710 (Oxford University Press 1971). Basically, the author of the quoted decision in the *Greenwood Trust* case was saying that if, after reading an entire statute closely in context it is still unclear to what extent Congress intended to preempt State authority, a court must then attempt to assess the statute's structure and purpose to see if that sheds more light on Congress' intent with respect to preemption. That assessment might include reviewing the specific statute's legislative context and history.

[31] "'Motor vehicle', as used in this chapter, means any vehicle, machine, truck, tractor-trailer, or semi-trailer propelled or drawn by any mechanical power and used upon the highways in the transportation of property, but does not include any vehicle or car operated on a rail or rails whether on or off the publicly used highways." R.I.G.L. §39-12-2(m). Interestingly, Sterry Street's own expert witness, Patrick T. Matthews, Esq., a Massachusetts attorney specializing in motor carrier and towing issues, acknowledged that the various states define "towing" and "recovery" differently. When asked whether he had, in his professional experience, ever had to deal with the term "recovery" as opposed to "tow," Attorney Matthews testified that "states vary from time to time on how they define it, but there's a difference between a tow and a recovery." Tr. at 102, lines 5-10. He then discussed the definitions adopted in Massachusetts and Louisiana, but (rather curiously, given that he was testifying as an expert in Rhode Island) never discussed the definitions adopted in this state, how they differed from those in other states, or how the Rhode Island definitions might interact with the Federal law. Tr. at 102-104.

[32] The Federal law does not address who it is that has the authority to select a tower to perform a nonconsensual tow. Towers clearly cannot "self-select" in these matters; someone must ask them to perform a transportation service before they can do so. If the owner/operator of the vehicle is not in a position to make that request (i.e., consent to a particular tow operator performing the tow), who can make that request? Since the Federal law does not address that issue at all – i.e., Congress made no effort to preempt State authority to make the decision – then clearly only the State is in a position to request a tower to perform any given tow without the consent of the party actually being towed.

[33] This is not the same conclusion reached by the judge in *Modzelewski's Towing and Recovery, Inc.* Judge Schuman makes it quite clear, however, that he based his decision in that case on two rationales: (1) Connecticut law and regulation distinguishes between "towing" (which includes a routine preparation component) and "recovery" (which involves more elaborate procedures such as winching and which is "necessary to return a motor vehicle to a position where the nonconsensual towing or transporting may be initiated;" and, (2) although consumers assuredly need protection in nonconsensual towing situations because they are not able to negotiate the fees, in most cases the consumer has insurance that provides reimbursement.

As we have found, Rhode Island law and regulation do not distinguish between "recovery" and "towing" as Connecticut law apparently does, thus negating the first of Judge Schuman's rationales with respect to Rhode Island tows. As for Judge Schuman's second rationale, we find that the presence or absence of insurance coverage is irrelevant here; either the consumer bears recovery and towing costs directly or – through higher insurance rates – indirectly. In either case, as Congress recognized, the consumer still needs to be protected against exorbitant towing fees (including the recovery component) in the limited case of nonconsensual tows.

[34] Tr. at 17-18.

[35] Tr. at 18-19.

[36] Tr. at 19.

[37] Tr. at 20.

[38] Tr. at 20.

[39] Tr. at 20-23.

[40] Tr. at 23-26; Sterry Street Exhibit 3 at Appendix 24 (also Sterry Street Exhibit 1 at 23).

[41] Tr. at 25; Sterry Street Exhibit 3 at Appendices 25-41. Interestingly, the 2013 Peterbilt Model 388 rotator truck is described by Peterbilt in the invoice paperwork as a "wrecker" type truck used for towing and recovery (i.e., a tow truck). See Sterry Street Exhibit 3 at Appendices 29, 30. Thus, rotator trucks are actually a type of "wrecker" that clearly fit within the definition of a tow truck found in R.I.G.L. § 39-12.1-2(9) because they are "used for the purpose of towing or removing vehicles or assisting disabled motor vehicles."

[42] Tr. at 26-29.

[43] Tr. at 29; Sterry Street Exhibit 3 at Appendix 24.

[44] Tr. at 29-30; Sterry Street Exhibit 3 at 21.

[45] Tr. at 30-35; Sterry Street Exhibit 3 at Appendix 5.

[46] Tr. at 36-38; Sterry Street Exhibit 3 at Appendix 5.

[47] Tr. at 38-39, 50-; Sterry Street Exhibit 3 at Appendix 6.

[48] Tr. at 39-40. It is notable that the witness was unable to offer any justification for seeking cost plus 20% when his counsel first asked him to articulate the basis for seeking this recovery rate for consumables. Tr. at 39, lines 19-22. Indeed, it took three subsequent leading questions by counsel on this very important point to elicit any substantive response from the witness. Tr. at 39, line 23, to Tr. at 40, line 12. There was no effort to explain why the company thought it appropriate to seek "cost plus 20%" for some consumables, but not for such other consumable items as fuel which are not billed separately at all (i.e., they are subsumed in the basic hourly vehicle charge).

[49] Under Item 3(1) of the proposed tariff (Sterry Street Exhibit 3 at Appendix 5), use of the crane and similar items listed in Item 4 of the proposed tariff (Exhibit 3 at Appendix 6) include a 4-hour minimum charge. That is, if Sterry Street dispatches a crane to assist in doing a tow, the minimum charge on the tow slip for that service will be $4,100.00 ($775.00 x 4 hours, plus a $1,000.00 set-up fee) even if the crane is only away from Sterry Street's premises for less than an hour. The charge for a crane under the proposed tariff will never be just $1,775.00.

[50] Tr. at 40-42,

[51] Tr. at 42.

[52] Tr. at 43.

[53] Tr. at 43-48; Sterry Street Exhibit 3 at Appendix 6.

[54] Tr. at 48-49; Sterry Street Exhibit 3 at Appendix 6. It would have been helpful to be told how often Sterry Street had to replace one of the airbags due to damage or simple wear and tear. If, on average, each use requires the replacement of one airbag, then a minimum charge of $8,000.00 might be somewhat low. On the other hand, if they only have to replace one airbag, on average, every ten uses, then $8,000.00 might be considered high. Without more specific data, we are left to our own devices in evaluating the reasonableness of the proposal.

[55] Tr. at 49-50; Sterry Street Exhibit 3 at Appendix 6.

[56] Tr. at 50-51; Sterry Street Exhibit 3 at Appendix 6. The full justification offered was: "Just the cost of doing business, I mean, you know." Tr. at 51, line 2.

[57] Tr. at 52-53; Sterry Street Exhibit 1 at 7.

[58] Tr. at 51-52; Sterry Street Exhibit 4.

[59] Tr. at 52-54, 90-92; Sterry Street Exhibit 5. The Division notes that where a regulated entity provides services other than those that are being regulated at the same facility, only that portion of the expenses that are attributable to the regulated portion of the services may be considered in arriving at an appropriate tariff for those regulated services. So, for example, if about 15% of the electric service is being used to support the towing operation (office lights, computers, copier, lighting of the tow trucks for repair and cleaning, lighting of secure storage area, etc.) and 85% is being used for the body shop operation (office lights, computers, copier, operating repair machinery, lighting of the autobody repair area, lighting of sales area, etc.), then only about 15% of an $8,000.00 electric utility bill (i.e., $1,200.00) could be attributed to the towing operation in support of its tariffed rates, while the remaining 85% of the electric bill ($6,800.00) would be attributed to the non-towing services being offered. Unfortunately, Sterry Street did not

provide the appropriate break-down for apportioning these shared expenses. Most of these general facility expenses – including taxes, insurance, building maintenance, administrative overhead, advertising, etc. – are shared and should be appropriately apportioned among Sterry Street's, and any co-located affiliates', various enterprises.

[60] Tr. at 54-55.

[61] Tr. at 55-57.

[62] Tr. at 57-61.

[63] Tr. at 63-65.

[64] Tr. at 65-66.

[65] Tr. at 67.

[66] Tr. at 68-70.

[67] Tr. at 70-75.

[68] Tr. at 76-79.

[69] Tr. at 79-82.

[70] Tr. at 88-90.

[71] Tr. at 90-92.

[72] Tr. at 92-93.

[73] Tr. at 95.

[74] Tr. at 95-96.

[75] Tr. at 97-98.

[76] Tr. at 98-99.

[77] Tr. at 100.

[78] Tr. at 100-102.

[79] Tr. at 102, lines 5-10.

[80] Tr. at 102-104.

[81] Tr. at 104-107. Arguing that a tower must turn down a more distant job or run the risk of losing out to a competitor on a hypothetical potential local job makes little sense. Particularly a tower like Sterry Street already operating in multiple states (through affiliated companies) with very few competitors for heavy-duty tows involving complex recovery work. If a tower tells local authorities that all of its vehicles are currently in use, those authorities may not be happy but they will certainly understand – and will still come back to that tower for future work because they have few alternatives. A company that invests in as much equipment as Sterry Street has cannot afford to turn down a job in hand simply because that may preclude it from doing a potential second job that has not even been requested.

[82] Tr. at 107-109.

[83] Tr. at 109-110.

[84] Tr. at 110-112.

[85] The Federal Occupational Safety and Health Administration.

[86] Tr. 112-115.

[87] Tr. at 115-118.

[88] Tr. at 118-120.

[89] No such ordinances from any jurisdiction anywhere were actually cited, much less any jurisdiction in Rhode Island.

[90] Tr. at 120-123.

[91] Tr. at 123-124.

[92] Tr. at 124-126.

[93] Tr. at 126.

[94] Tr. at 127.

[95] Tr. at 127-128.

[96] Tr. at 128-129.

[97] Tr. at 130.

[98] Tr. at 131

[99] Tr. at 131-132.

[100] Tr. at 132-134; Advocacy Section Exhibit 1 at 1-2, par. 4; Sterry Street Exhibit 3, response to Division First Set of Data Requests, Request 4, pp. 3-4. Sterry Street based this upcharge on one approved by the State of Louisiana. This begs the question of whether or not Sterry Street personnel are properly trained, equipped and licensed to handle hazmat. If they are not, should they be performing those services at any rate? We think not. In cases such as this, Sterry Street should bring in properly trained outside personnel if it has no such personnel in house.

[101] Tr. at 134 to 136.

[102] Tr. at 136-138; Advocacy Section Exhibit 1 at 2, par. 15; Sterry Street Exhibit 3, response to Division First Set of Data Requests, Request 15, pp. 6-8. The Division's Data Request noted that Sterry Street's competitor charges $500.00 per hour, four-hour minimum, for a crane with no set-up charge, while Sterry Street proposes to charge $775.00 per hour, four-hour minimum, plus a $1,000.00 set-up charge. Thus, the minimum crane charge for the competitor would be $2,000.00, while the minimum crane charge for Sterry Street would $4,100.00, more than twice as much. Sterry Street's Data Response was that it's higher proposed rate merely reflected significantly higher cost of living and fuel costs (since its competitor's tariff was approved), the higher purchase and operating cost of Sterry Street's newer and more capable crane, and the greater safety factors in using that crane. Sterry Street also pointed out that its proposed charge compared well with that of towers who had to rent a crane from outside sources and then imposed their own upcharge on top of the rental charge.

[103] Tr. at 138-141; Sterry Street Exhibit 3 at Appendices 52-53. According to Dave's Towing's letter at Appendix 52, Town Line responded with both a crane and a gvw 26,000 pound flatbed with a laborer. The letter does not indicate whether Town Line's flatbed

truck was also used, or whether it was only Town Line's crane and Dave's tow truck that were involved in moving the dump truck. The charges for this tow at Appendix 53 do not break down Town Line's charges by vehicle, either, so it is conceivable that the dump truck owner in this case may have been billed for a flatbed truck that was not actually used for anything other than transporting a laborer – and then had Dave's 30% upcharge imposed on top of that. Even if all three vehicles were used, the Appendices do not indicate whether or not Dave's owned a second tow truck that could have been used – and should have been used – rather than renting the second truck from Town Line.

[104] Tr. at 141-142; Advocacy Section Exhibit 3.

[105] Tr. at 142-144.

[106] Tr. at 144-145.

[107] Tr. at 145.

[108] Tr. at 145.

[109] Tr. at 145-146.

[110] Tr. at 146.

[111] Tr. at 148-151.

[112] Tr. at 151-152.

[113] Tr. at 153-157.

[114] Tr. at 157-158.

[115] Tr. at 158-159.

[116] Tr. at 159-161.

[117] Tr. at 161-163. The Hearing Officer has not found any post-hearing memorandum suggesting modification to the proposed tariff language for the rotator.

[118] Tr. at 163-164.

[119] Tr. at 164-165.

[120] Tr. at 165-169.

[121] Tr. at 171-172; Sterry Street Exhibit 3, response to Division First Set of Data Requests, Request 15, pp. 6-8.

[122] Tr. at 172-173.

[123] *See* Advocacy Section Exhibit 1 for its First Set of Data Requests. The Advocacy Section refers to its Data Requests as "Division" requests.

[124] Sterry Street Exhibit 3, response to Division First Set of Data Requests, Request 2, pp. 2-3.

[125] Sterry Street Exhibit 3, Amended Tariff, Item 4.

[126] Sterry Street Exhibit 3, Amended Tariff, Item 3(3).

[127] Sterry Street Exhibit 3, response to Division First Set of Data Requests, Request 5, at 4, citing Department of Environmental Management's *Hazardous Waste Management Regulation no.* 6.01(A)(2); Sterry Street Exhibit 3, Amended Tariff, Item 3, No. 3.

[128] Sterry Street Exhibit 6, response to Hearing Officer Data Request 2.1.1.

[129] Sterry Street Exhibit 6, response to Hearing Officer Data Request 1.1.2.

[130] Sterry Street Exhibit 6, response to Hearing Officer Data Request 1.1.7.

[131] The "six-hour job" refers to the time on-scene, not to any time spend on routine maintenance on the equipment, and re-setting it, following the equipment's return to Sterry Street's premises. However, the filing suggests that those costs are covered by the rate sought as well.

[132] Sterry Street Exhibit 6, response to Hearing Officer Data Request 1.1.8.

[133] Sterry Street Exhibit 6, response to Hearing Officer Data Request 1.1.9.

[134] Sterry Street Exhibit 6, response to Hearing Officer Data Request 1.1.9, and Appendix A to Sterry Street Exhibit 6.

[135] *In Re Consent Agreement Regarding Rates For Non-Consensual Towing And Storage*, Division Report and Order number 18328 dated and effective August 19, 2005, in Division Docket number 05 MC 78 at Appendix 1, p. 14.

[136] Sterry Street Exhibit 6, response to Hearing Officer Data Request 1.1.14.

[137] Sterry Street Exhibit 6, response to Hearing Officer Data Request 1.1.20.

[138] Towers are required to maintain copies of their tow slips and related documents for three (3) years and be prepared to present them to the Division upon request. They are also required to keep complete records of their operating expenses, operating revenues, and "any other pertinent information in connection with such operations." *See generally,* Rules 8, 9(b) and 10 of the Division's *Rules And Regulations Governing Transportation Provided By Motor Carriers Of Property. See also* R.I.G.L. §39-3-14 (Accounting and records of utilities). If a tower is keeping the required records, that should facilitate its filing of those records in support of a rate case.

[139] Advocacy Section Exhibit 4, response to Hearing Officer Data Request 1.2.1.

[140] Advocacy Section Exhibit 4, response to Hearing Officer Data Request 2.2.1.

[141] Pre-filed direct testimony, required by Rule 23(e) of the Division's *Rules of Practice and Procedure*, is often waived by the Hearing Officer in less complex matters that do not require a great deal of financial analysis, but they are expected in contested rate filings such as this one as a means of assisting the Division in reviewing the reasonableness of the proposed rates. *See generally In Re John A. Bandoni, Jr., d/b/a Alexander Taxi, Petition to Amend Rates and Charges – Taxicab Services*, Division Report and Order number 19891, dated and effective January 29, 2010 in Division Docket number 09 MC 42.

[142] The Hearing Officer could have insisted that the tow slips be proceeded, but the burden of proof rests with the Petitioner, Sterry Street. If Sterry Street did not want to assist the Hearing Officer by providing the requested information, that is Sterry Street's decision to make. We are left to draw our own conclusions in the absence of that important information.

[143] In fairness to both Sterry Street and the Advocacy Section, the Hearing Officer was unable to find a fully contested tow rate case for at least the last 20 years. Most of the recent tow rate cases have either involved a negotiated settlement agreement (i.e., Sterry Street's light and medium duty tow tariff) or incremental minor changes to charges approved without a formal hearing (i.e., Sterry Street's 2000 heavy duty tariff). Thus,

there would have been little past practice regarding towing rate changes on which to rely in assembling a rate case.

[144] *See* Sterry Street Exhibit 3 at Appendix 14.

[145] *See* Sterry Street Exhibit 3 at Appendices 7-114.

[146] *See* Sterry Street Towing, Inc., Towing Tariff effective April 3, 2000, at Sterry Street Exhibit 1, Appendices 7 – 11. This tariff also contains a towing rate for medium duty tows (8,001-15,000 gvw). Sterry Street Exhibit 1, Appendix 9. However, this tariff was superseded for medium duty tows only in 2005. *See In Re Consent Agreement Regarding Rates For Non-Consensual Towing And Storage*, Division Report and Order number 18328 dated and effective August 19, 2005, in Division docket number 05 MC 78. Sterry Street Towing (MC-812) was an original signatory (*see* Appendix 2 to that Report and Order) to the Consent Agreement (*see* Appendix 1 to that Report and Order) approved by Report and Order number 18328.

[147] These charges are all a flat charge per tow rather than an hourly charge. Any charges in the tariff other than a flat charge are explicitly described as such in the 2000 tariff.

[148] Sterry Street Exhibit 3 at Appendix 3, Item 1.

[149] Sterry Street Exhibit 3 at Appendix 3, Item 2(8).

[150] Sterry Street Exhibit 3 at Appendix 6, Item 4.

[151] Sterry Street Exhibit 3 at Appendix 5, Item 3(1).

[152] Sterry Street Exhibit 6 at Apendix 5, Item 3(1).

[153] Sterry Street Exhibit 3 at Appendix 5, Item 3(2).

[154] Sterry Street Exhibit 6, response to Hearing Officer Data Request 1.1.9, and Appendix A to Sterry Street Exhibit 6.

[155] *In Re Consent Agreement Regarding Rates For Non-Consensual Towing And Storage*, Division Report and Order number 18328 dated and effective August 19, 2005, at Appendix 1, p. 14.

[156] Sterry Street Exhibit 6 at Appendix 5, Item 3(3).

[157] The Advocacy Section refers to these data requests as “Division” data requests, rather than as “Advocacy Section” data requests. It would have been better to have captioned them as “Advocacy Section” data requests.

[158] *See In Re Petition For Declaratory Judgement From The Rhode Island Public Towing Association*, Division Ruling On Petition For Declaratory Judgement, Division Order number 20200, dated and effective December 6, 2010, in Division Docket number D-10-26, for a treatise on this issue. Order number 20200 was subsequently upheld by the Rhode Island Superior Court.

[159] Sterry Street Exhibit 3 at Appendix 6.

[160] Sterry Street Exhibit 3 at Appendix 9.

[161] Tr. at 50-51; Sterry Street Exhibit 3 at Appendix 6. The full justification offered was: “Just the cost of doing business, I mean, you know.” Tr. at 51, line 2.

[162] Sterry Street Exhibit 6, response to Hearing Officer Data Request 2.1.1.

[163] *See generally* testimony of Mr. Martins, Tr. at 76-82.

[164] Sterry Street Exhibit 3 at Appendix 6.

[165] Testimony of Mr. Martins, Tr. at 171-173; Sterry Street Exhibit 3, response to Division First Set of Data Requests, Request 15, pp. 6-8.

[166] Tr. at 40-42; 95-99. We have already disapproved the 4-hour minimum charge.

[167] Tr. at 43.

[168] Sterry Street Exhibit 3 at Appendix 6.

[169] Sterry Street Exhibit 3 at Appendix 6.

[170] Tr. at 48-49; Sterry Street Exhibit 3 at Appendix 6. It would have been helpful to be told how often Sterry Street had to replace one of the airbags due to damage or simple wear and tear. If, on average, each use requires the replacement of one airbag, then a minimum charge of $8,000.00 might be somewhat low. On the other hand, if they only have to replace one airbag, on average, every ten uses, then $8,000.00 might be considered high. Without more specific data, we are left to our own devices in evaluating the reasonableness of the proposal.

[171] Sterry Street Exhibit 6, response to Hearing Officer Data Request 1.1.7.

[172] Sterry Street Exhibit 3 at Appendix 6.

[173] Sterry Street Exhibit 3 at Appendix 6.

[174] Sterry Street Exhibit 6, response to Hearing Officer Data Request 2.1.1.

[175] Sterry Street Exhibit 3 at Appendix 6.

[176] Sterry Street Exhibit 6, response to Hearing Officer Data Request 1.1.9.

Filename:	D:\Clerkbase\Content\PUC-ri\orders\2015\22241.htm

D:\Clerkbase\Content\PUC-ri\orders\2015\22241.htm