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

IN RE: Petition for Declaratory Judgment
From the Rhode Island Public Towing Association

Docket No. D-10-26

RULING ON PETITION FOR DECLARATORY JUDGMENT

1. Introduction

On May 26, 2010, the Rhode Island Public Towing Association ("RIPTA" or "Petitioner") filed a "Petition for Declaratory Judgment or Declaratory Ruling" ("Petition") with the Rhode Island Division of Public Utilities and Carriers ("Division") pursuant to R.I.G.L. §42-35-8 and Rule 13 (c) of the Division's Rules of Practice and Procedure. In its petition, RIPTA seeks a ruling from the Division on the following issue:

> *Whether the storage fees imposed by a certificated tower on a police department instigated motor vehicle storage impoundment at a private storage lot may be assessed against the owner of said motor vehicle, or is it the liability and financial responsibility of the police department instigating the tow?*

Along with its petition for a declaratory judgment or declaratory ruling, RIPTA also filed a "Motion to Recuse," wherein RIPTA requested the undersigned Division attorney to:

> "…recuse himself from serving as the Hearing Officer herein on the grounds that his prior participation and involvement in this matter, through the issuance of two

> (2) formal written opinion letters on behalf of the Division as to the Division's policy and position in this matter, render him unable to serve as a fair and impartial Hearing Officer."

The genesis of this recusal issue, as well as the origins for the instant "Petition for Declaratory Judgment or Declaratory Ruling" is detailed below.

Travel

RIPTA initially introduced the question posed in its May 26, 2010 Petition to the Division, through December 11, 2009 and January 11, 2010 letters that were addressed to the undersigned Chief Legal Counsel to the Division (hereinafter "Division Counsel"). In his December 11, 2009 letter, Attorney Michael Horan, counsel for RIPTA, made the following request to Division Counsel for an informal opinion:

> "It is my understanding that your office has given a verbal or oral opinion to the Department Authorities and Administrators that if the vehicle owner insists on the return of their vehicle, the public tower must forthwith return the vehicle to that owner, even if it is a police department tow and the police department does not consent to and does not authorize the release.
>
> It is our position that such an opinion, if so, is clearly contrary to the Towing Storage Act. In fact, as legal counsel, I would advise my clients not to release the motor vehicle to that owner relative to a police department tow, if the police department does not consent nor authorize that release. In my opinion, that would subject our clients to a potential lawsuit by the police department for unauthorized release of the motor vehicle since our client acted as agent for the police department in response to the police department's request.
>
> I would appreciate if you would review this matter and issue an opinion in writing to confirm the Department

official position in this regard, in **order** that I may proceed further on behalf of my clients, if necessary."[1]

In response to Attorney Horan's request for "an opinion in writing," Division Counsel offered the following reply on December 21, 2009 (excerpted):

"After reading your letter, it is my belief that a misunderstanding has taken place with regard to a recent informal opinion that was offered by the Division to the Warwick Police Department and to members of the Rhode Island Towing Association. Specifically, the Division did not advise, as you state in your letter, 'that if the vehicle owner insists on the return of their vehicle, the public tower must forthwith return the vehicle to that owner, even if it is a police department tow and the police department does not consent to and does not authorize the release.' I do not know where this misinformation came from, but this is certainly not the position of the Division.

The opinion that was offered by the Division related exclusively to the issue of "storage rates" in connection with police department-ordered impounds. The question that was posed to the Division was whether it is proper to bill the vehicle owner for the storage fees associated with vehicles held by a certificated tower resulting from a police department-ordered impound. In response to this question, the Division opined that it would be improper for a certificated towing company to charge the vehicle owner for the storage days directly linked to a police department-ordered impound. The Division based this informal opinion on two factors. First, the Division observed that charging the vehicle owner for this "involuntary" storage is not authorized under any approved tariff. There is also no specific authorization for these charges under statutory law or Division Rules. Second, as the vehicle is being ordered held by a police department, which, in effect, prevents the vehicle owner from retrieving his or her vehicle, the Division concluded that the police department would be the proper party to bill for these storage services.[2]

I hope this response clears up any confusion on this matter. However, please feel free to call me to

discuss this issue further if any questions or concerns remain."[3]

After receiving the foregoing reply from Division Counsel, Attorney Horan proffered the following competing legal opinion on January 11, 2010 (excerpted):

"…I respectfully disagree with your opinion. It is my opinion that it is clear under the Rhode Island Storage Act (Title 39, Chapter 12.1) that even in Police Department ordered impounds, the vehicle owner is responsible for the storage fees at the private certificated towers impound lot. I do not see any provision for the Police Department being the proper party to bill for these storage fees, *i.e.*

'**Section 39-12.1-1** – WHEREAS, The process of selection of the operator of a towing-storage business for police work in [sic][4] 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.'

'**Section 39-12.1-3(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.'

I believe it is clear from the above references and the general wording and intent of the Towing Storage Act that the vehicle owner is the responsible party for the storage fees and not the Police Department and, as previously indicated, I do not believe that the certificated tower has any authority or right to release the vehicle relative to a Police Department instigation without the prior approval of the Police Department. Please advise."[5]

In response to RIPTA's Counsel's request for reconsideration on the issue presented, Division Counsel supplemented his previous written opinion with a second letter of opinion on January 20, 2010. The pertinent provisions of that supplemental opinion are provided below:

> "I am in receipt of your January 11, 2010 letter, which you have sent in response to the legal opinion I offered in a December 21, 2009 letter, regarding the issue of "storage rates" in connection with police department-ordered impounds. In your response, you cite two sections from "The Towing Storage Act" (§§39-12.1-1 and 39-12.1-3(b)) in defense of your position that it is the vehicle owner who is responsible for all storage fees incurred in connection with police-ordered impounds.
>
> I am very familiar with the provisions contained in The Towing Storage Act ("Act"), and in fact relied on the Act in the preparation of my December 21, 2009 opinion letter. I also relied on Chapter 39-12 of the Rhode Island General Laws and the Division's *Rules and Regulations Governing the Transportation Provided by Motor Carriers of Property* ("Rules").
>
> It is the Division's position that the Act does not authorize police-ordered impounds. In addition to the provision you cited, Section 39-12.1-1 also provides limiting language that clearly defines the scope of the Act in scenarios involving police-ordered (non-consensual) tows. The relevant language provides:
>
> 'That 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 and [sic [6]] vehicle under control of any person arrested for any criminal offense…'
>
> The above provision provides an unambiguous description of the limited authority conferred to the police officer at the scene. Specifically, the police officer

has only the authority 'to have [the vehicle] removed' from the 'public ways.' The sections of the Act you refer to in your letter, which reflect that the vehicle owners are 'to pay costs and charges connected therewith' and to 'be liable for all reasonable costs of recovery, towing and storage,' are narrowly limited to this 'removal' function.

Simply stated, nowhere in the Act does the legislature authorize the police officer to impound the vehicle or charge the vehicle owner for impound-related storage fees. To be clear, the Division is not suggesting that the police department does not have the authority to impound a vehicle - the Division is only opining that such authority is not conferred under the Act. Accordingly, it is the Division's position that if the police department decides to impound a vehicle, under authority conferred pursuant to other State law, it must expect to incur the associated storage expenses.

The Division must emphasize that a certificated towing company is authorized by law to collect storage rates only when the vehicle owner voluntarily elects to delay the pick-up of his or her vehicle from the tower's storage lot. It is precisely for this reason that towing companies are required under the Division's Rules to follow prescribed notification protocols for ensuring that vehicle owners (and lien holders) are made aware that the tower has the vehicle and that storage rates are accruing.

When a vehicle is impounded by a police department, the vehicle owner no longer exercises control over when the vehicle is released. Under your interpretation of the Act, the vehicle owner would have to pay $24 per day for as many days as the police department decides to keep the vehicle impounded at the certificated tower's storage lot, potentially adding days or weeks of storage-related expense to the vehicle owner's towing and storage bill. The Division finds no such authority in the Act for imposing these involuntary storage fees on vehicle owners. Moreover, in view of our understanding of the policy of some police departments to deliberately impound all vehicles towed off the public ways, for whatever reason, until a written "release" by the police department is issued to the vehicle's owner, and, at least in the case of one police department, only during certain business hours, the Division finds it

> unconscionable that vehicle owners would be expected to pay these obligatory additional storage fees.
>
> Indeed, to the contrary, the Act makes it clear that:
>
> '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 that:
>
> 'The towing and storage of a vehicle without the owner's consent, as in [sic][7] the case in most police instigated tows, requires certain procedures to assure the owner that rights of due process of law are not violated...'
>
> In conclusion, the Division acknowledges that police departments possess the legal authority to **order** that a vehicle be impounded. However, if the police department does not have access to a municipally-owned storage lot facility of its own for storing its impounded vehicles, the police department would be required to lease space from a private storage lot owner, at its own expense, to provide for its official impound storage needs."[8]

Subsequently, upon receipt of Division Counsel's January 20, 2010 supplemental opinion, RIPTA filed suit in Superior Court, Providence County, on February 15, 2010, seeking a declaratory judgment from the Court on the "so-called police-ordered impound...storage fees" issue and injunctive relief.[9] After hearing arguments from RIPTA and the Division, the Court decided that the matter should be remanded back to the Division in furtherance of requiring an exhaustion of administrative remedies prior to judicial review. RIPTA subsequently filed the instant Petition, along with a motion for recusal.

2. Motion for Recusal

The Petitioner, citing and relying upon the two aforementioned opinion letters from Division Counsel, argues that Division Counsel is "unable to serve as a fair and impartial Hearing Officer" in this case. The Petitioner asserts that Division Counsel "would be sitting in judgment on his own written opinions, which constitute the basis for these hearings, which clearly creates a total conflicting relationship as Hearing Officer and as the Division's Legal Counsel, who has already enunciated his position herein."[10]

In further support of its motion, the Petitioner principally relies upon the Rhode Island cases of *Davis v. Wood* and *La Petite Auberge, Inc. v. Rhode Island Commission for Human Rights* (citations omitted). The Petitioner argues that these cases universally bar an individual from participating as a hearing officer after that same individual has had some earlier involvement in the same case.[11]

The Division's Motor Carrier Section ("Advocacy Section"), which entered an appearance in this docket, objected to the Petitioner's request that Division Counsel recuse himself.[12] In a supporting memorandum, the Advocacy Section argues that there is plentiful case law (citations omitted) that, based on the facts and regulatory nature of this case, clearly supports the continued participation of Division Counsel in this declaratory judgment matter, infra.

Decision on motion to recuse

The undersigned Division Counsel has carefully considered the arguments of the Petitioner and Advocacy Section on the issue of whether I must recuse myself from serving as the Administrator's legal advisor/hearing officer in the instant declaratory judgment matter. Based upon the arguments presented, as well as my own legal research on the subject, I have concluded that recusal is neither warranted nor acceptable in this case.

As an initial observation, it is important to recognize that the declaratory judgment matter before the Division does not constitute a "contested case" under Rhode Island law. R.I.G.L. §42-35-1(3) defines a "contested case" as "a proceeding, including but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a specific party are required by law to be determined by an agency after an opportunity for hearing." However, in stark contrast, in declaratory judgment cases the legal rights, duties and privileges of a "specific party" are not in issue. Instead, the agency is narrowly charged with the obligation of issuing a legal opinion "as to the applicability of any statutory provision or of any rule or **order** of the agency."[13] Moreover, there is no requirement for a hearing, which must be required by law in **order** for an administrative matter to constitute a contested case.[14]

The uncontested nature of declaratory judgment cases before Rhode Island administrative agencies is also abundantly evident from the "rulings" and "prompt disposition" terminology used in the State's Administrative Procedures Act ("APA").[15] The law contemplates the issuance of a "ruling" as opposed to an "**order**" or a "decision" and further, expects that the ruling be delivered in a "prompt" manner. This requirement is clearly at odds with the attendant "notice," "records" and "hearing" rights guaranteed in all contested cases.[16]

The uncontested nature of declaratory judgment cases before Rhode Island administrative agencies is further evidenced from the APA's prescribed treatment of agency declaratory rulings in the event of a subsequent appeal to the Superior Court. The legislature has determined that "rulings disposing of petitions [for declaratory rulings] have the same status as agency orders in contested cases."[17] Clearly, it would be unnecessary for the legislature to provide this judicial review instruction in the APA if the declaratory judgment proceedings taking place before

state administrative agencies were intended to be, and conducted as, "contested cases." Such an appeals-related instruction, in the opinion of the Division, exists solely to streamline the appellate process by providing the Courts with the same limited standard of review used in contested cases under the APA. In the absence of this instruction, the Courts would alternatively be faced with a de novo-type appeal, which would require a significantly more time-consuming examination of the declaratory ruling matter in issue.[18]

As additional support for the Division's conclusion that declaratory ruling cases before Rhode Island administrative agencies are not "contested cases" within the definition provided in the APA, the Division points to the similarities between declaratory judgment proceedings and rulemaking proceedings. Rulemaking proceedings before administrative agencies similarly do not guarantee a hearing or relate to "a proceeding... in which the legal rights, duties, or privileges of a specific party are required by law to be determined by an agency" and have for these reasons been determined not to be "contested cases" under Rhode Island law.[19]

The link between declaratory ruling cases and rulemaking proceedings before administrative agencies is particularly noteworthy in the context of the instant recusal issue. In rulemakings, administrative agencies are focused exclusively on the adoption and promulgation of rules and regulations; rules and regulations that would apply to everyone. The "legal rights, duties, or privileges of a specific party" are not in play, and therefore, the agency has no legal obligation to remain neutral or impartial with respect to the interests of a purported party. The same standard applies in declaratory ruling matters. In such matters, as noted above, an agency's role is to issue a legal opinion "as to the applicability of any statutory provision or of any rule or **order** of the agency." This legal opinion is not provided in response to the "legal rights, duties, or privileges of a specific party," but instead offered as a generic determination of whether an agency statute, rule or **order** would apply in a

given set of facts. Accordingly, here too, an agency has no legal obligation to remain neutral or impartial with respect to the interests of a purported party. Indeed, there is no *de facto* party or parties in a rulemaking or declaratory ruling proceeding before administrative agencies, only petitioners and participants.

In view of the clearly uncontested nature of the instant declaratory judgment matter, the Division categorically finds no merit in the Petitioner's request for a recusal. Removing the Division's chief legal advisor from an administrative proceeding in which the Division's legal opinion on the applicability of a statute (and not the individual rights of a specific party) is solely at issue, would seem illogical and counterproductive under the requirements of the APA. In fact, the Petitioner's attempt to remove Division Counsel from this proceeding appears to be nothing more than a strategic effort at opinion shopping.

In the alternative, and **assuming solely for argument** that declaratory judgment proceedings are "contested cases" within the legal definition, there still is no valid reason for the recusal of Division Counsel. The case law under the factual scenario presented here abundantly and unambiguously invalidates RIPTA's assertion that Division Counsel must "recuse himself from serving as the Hearing Officer…on the grounds that his prior participation and involvement in this matter, through the issuance of two (2) formal written opinion letters on behalf of the Division as to the Division's policy and position in this matter, render him unable to serve as a fair and impartial Hearing Officer."

As a starting point, the Division will first comment on the two cases offered by the Petitioner. The Petitioner's reliance on *La Petite Auberge, Inc. v. Rhode Island Commission for Human Rights* is misguided in this matter. In *Auberge*, after determining that it is not inappropriate for a single administrative body to exercise investigatory, inquisitorial and adjudicative roles in the same case, the Court held that problems with this combination of functions only arise when "the same individuals…involved in the building of an adversary case… [are later] … deciding

the issues." In the instant case however, there are no investigatory, inquisitorial and adjudicative roles to be performed. The only issue present, has, and continues to be, the issuance of an APA-mandated legal opinion regarding the applicability of a statute to a given set of facts. Because Division Counsel is not performing any "incompatible functions," the *Auberge* case has no relevance in this matter.

The Petitioner's reliance on *Davis v. Wood* is misguided for the same reason. The *Davis* Court addressed the inherent inappropriateness of combining prosecutorial and judicial functions in a single individual. However, as observed above, the instant matter is narrowly limited to the issuance of a legal opinion. There is no prosecutorial role being served in this matter, and therefore, *Davis* offers no guidance in this case.

Though the Petitioner proffers little support for its assertion of unfairness and impartiality in its demand for recusal, the case law on the reverse side of this issue is plentiful and overwhelmingly persuasive. The Advocacy Section cites the following examples in its legal memorandum:

> "…merely because a judge or administrative hearing officer has prior knowledge of facts concerned in the matter before him does not require recusal. Neither does prior active participation in a matter that later comes again before that same judge or hearing officer mandate automatic recusal."[20]

> "No decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions of both law and fact."[21]

> "…that the mere fact that a tribunal has had contact with a particular factual complex in a prior hearing, or

indeed has taken a public position on the facts, is not enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing. We believe that more is required."[22]

A litigant must establish facts that indicate a "personal bias or prejudice by reason of a preconceived or settled opinion of character calculated to impair his impartiality seriously and to sway his judgment."[23]

"The moving party has the duty to prove the alleged bias and prejudice stemmed from an extrajudicial source and that the judge based his decision on facts and events not pertinent before the court."[24]

"A defendant's subjective feelings and unsupported accusations are not sufficient grounds for recusal."[25]

"Merely because a judge has ruled adversely against a litigant does not show bias or prejudice on the part of the judge."[26]

"…a judge has as great an obligation not to disqualify himself when there is no occasion to do so as he has to do so when the occasion does arise."[27]

"This Court has also ruled that a hearing examiner who has recommended findings of fact after rejecting certain evidence as not being probative was not disqualified to preside at further hearings that were required when reviewing courts held that the evidence had been erroneously excluded.…Certainly it is not the rule of judicial administration that, statutory requirements apart…a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings. We find no

> warrant for imposing upon administrative agencies a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing."[28]

> "If adverse rulings during the course of litigation were to be accepted per se to disqualify a judge on the ground that his impartiality might reasonably be questioned, then every disappointed litigant would have it within his power to remove a judge from continuing with the case assigned to him."[29]

In addition to the foregoing compelling on-point case excerpts offered by the Advocacy Section, Division Counsel has conducted his own research on the instant recusal issue and has discovered a profusion of case law that addresses the Petitioner's concerns and which provides ample reason for denying the Petitioner's motion. Some of the more persuasive Court decisions, with factual details omitted, are summarized below:

> "Disqualification is not required because the judge has definite views as to the law of a particular case."[30]

> "The alleged bias and prejudice to be disqualifying must…result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."[31]

> "Only a judge's personal bias or prejudice stemming from an extrajudicial source constitutes a disqualifying factor."[32]

> "Judicial predilection or an attitude of mind resulting from the facts learned by the judge from the judge's

participation in the case is not a disqualifying factor."[33]

"…the person alleging prejudice carries a substantial burden. One asserting prejudice must establish that the actions of the trial justice were affected by facts and events which were not pertinent nor before the court."[34]

"Trial justice's alleged interest in upholding his own rulings did not provide basis for recusing…"[35]

"When considering disqualification, the district court is *not* to use the standard of Caesar's wife, the standard of mere suspicion…that is because the disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking."[36]

"While judicial officers are obligated to recuse if they are unable to render a fair or an impartial decision in a particular case, justices have an equally great obligation not to disqualify themselves when there is no sound reason to do so."[37]

"No decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time,

> although these issues involve questions both of law and fact."[38]

> "Opinions held by judges as a result of what they learned in earlier proceedings are not 'bias' or 'prejudice' requiring recusal, and it is normal and proper for a judge to sit in the same case upon remand and successive trials involving the same defendant."[39]

> "Merely because a judge or administrative hearing officer has prior knowledge of facts concerned in the matter before him does not require recusal. Neither does prior active participation in a matter that later comes again before the same judge or hearing officer mandate automatic recusal."[40]

In conclusion, Division Counsel finds that RIPTA's request for a declaratory ruling is not to be treated as a "contested case." Consequently, recusal would be a *non sequitur* under such circumstances. Moreover, even if a declaratory judgment proceeding were considered a "contested case," which the law overwhelmingly suggests otherwise, Division Counsel finds no factual or legal support for the Petitioner's assertion that Division Counsel is "unable to serve as a fair and impartial" hearing officer and/or legal advisor to the Division's Administrator. Indeed, under such circumstances, the law clearly discourages recusal in **order** to prevent potential hearing officer "shopping" abuses. For the foregoing reasons, the Petitioner's motion to recuse must be denied.

3. Procedural Schedule

In response to RIPTA's petition, the Division conducted an initial scheduling conference on June 9, 2010. The Petitioner and the Division's Motor Carrier Section (an indispensable participant) entered appearances through counsel.

During the conference, RIPTA requested permission to notify the State's 39 police departments, and the Rhode Island State Police, of its pending petition before the Division and to invite them to also participate in the matter. The Division granted this request, and agreed to delay further action on RIPTA's petition until the police departments and the State Police had an opportunity to consider RIPTA's petition and invitation to participate.[41] In furtherance of this decision, the Division scheduled an additional scheduling conference for July 21, 2010 to provide sufficient time for additional participants to join the docket.

Subsequently, on July 9, 2010, the Division received entries of appearance and motions to intervene from the city of Warwick and the towns of Jamestown and Charlestown. Also on July, 9, 2010, the Division received notice from the Rhode Island State Police indicating an interest in having an opportunity to participate. Additionally, during the scheduling conference conducted on July 21, 2010, representatives from several police departments, including an officer from the Rhode Island Police Chiefs Association, appeared and expressed an interest in participating in the instant declaratory judgment matter. These police department officials also requested a further delay in the proceedings in **order** to make their respective solicitors aware of the matter and to suggest that they enter formal appearances in the docket. The Executive Director of the Rhode Island League of Cities and Towns also appeared and expressed an interest in this matter.

In view of the additional interest referenced above, the Division adopted a procedural schedule that provided sufficient time for interested cities and towns, the Rhode Island State Police and the Rhode Island League of Cities and Towns to decide if they wished to formally enter an appearance in this docket and submit a legal memorandum on the issue presented to the Division by RIPTA. As this issue relates solely to an interpretation of law, the Division determined that a hearing was neither required nor necessary.[42] Subsequently, the Division adopted a

supplemental procedural schedule on July 22, 2010, that required all "formal participants in this docket" comply with the following conditions and schedule:

> "1. All participants shall be represented by counsel. Entries of appearance must be submitted on or before **August 30, 2010**.
>
> 2. Legal memoranda shall be submitted on or before **September 28, 2010**.
>
> 3. Reply memoranda shall be submitted on or before **October 12, 2010**.
>
> 4. Contents of legal memoranda must address the issue presented by the Petitioner, supra, in the context of the statutory provisions contained in Rhode Island General Laws, Chapter 39-12.1 and Sections 39-12-11 and 39-12-12.
>
> 5. In preparing legal memoranda, participants should remain aware of the following facts related to this matter: (a) that in accordance with State law, and approved tariffs, storage charges for the first 24-hour period are exclusively the responsibility of the vehicle owner, (b) that all storage charges resulting from delays directly attributable to the vehicle owner shall always be the responsibility of the vehicle owner, and (c) that the "storage impoundment" matter in issue **relates exclusively to "holds" placed on vehicles by the police departments instigating the tows** (these "impoundments" or "holds" remain in effect until the police departments "release" the vehicles to their owners; in any case where the police department instigating the tow does not place a "hold" on the towed vehicle, the vehicle owner remains exclusively responsible for all valid storage charges associated with the tow).

In response to the supplemental procedural schedule established on July 22, 2010, several additional participants entered appearances in this docket. All told, twelve (12) cities and towns expressed an interest in joining with the Petitioner in submitting legal memoranda in the instant declaratory judgment matter. The following counsel entered appearances:

For the Petitioner/RIPTA: Michael F. Horan, Esq.

For the Division's Motor Carrier (Advocacy) Section:	Karen Lyons, Esq. Spec. Asst. Attorney General
For the City of Warwick and Towns of Jamestown and Charlestown:	Peter D. Ruggiero, Esq.
For the Town of Foster:	John J. Bevilacqua, Esq.
For the Town of Middletown:	Francis S. Holbrook, II, Esq.
For the City of Cranston:	Anthony Cipriano, Esq., and Christopher M. Rawson, Esq.
For the Town of Westerly:	John J. Turano, Esq.
For the Town of Smithfield:	Edmund L. Alves, Jr., Esq.
For the Town of Cumberland:	Thomas E. Hefner, Esq.
For the Town of Coventry:	Jon M. Anderson, Esq.
For the City of Pawtucket:	Margaret Lynch-Gadaleta, Esq.
For the Town of West Warwick:	Albert A. DiFiore, Esq.

4. Position of the Petitioner

In its legal memorandum, the Petitioner initially identified the statutory law through which the State's towing companies obtain licensing authority from the Division to perform non-consensual tows at the behest of Rhode Island's police departments (R.I.G.L. Chapter 39-12). The Petitioner also provided a copy of the relevant authorized tariff, which reflects the Division-approved rates that must be charged for related towing and storage services.[43]

The Petitioner next cites four sections within the "The Towing Storage Act" (R.I.G.L. Chapter 39-12.1) (hereinafter, the "Act"), which it relies upon as the bases for its assertions that the Act both authorizes vehicle impounds by police departments and that vehicle owners must be held exclusively responsible for paying the related storage charges. The Petitioner first relies on the following

excerpts from R.I.G.L. §39-12.1-1, which are contained in the Act's "Declaration of purpose and policy" Section:

> 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. (underline added)[44]

The Petitioner next relies on the following excerpts from R.I.G.L. §39-12.1-3, which the Petitioner notes "specifically addresses the issue of 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's tariff. (underline added)[45]

The Petitioner next relies on the following excerpts from R.I.G.L. §39-12.1-4, which section the Petitioner notes is entitled, "Notice and processing of abandoned and unclaimed motor vehicles by certificated tower."

> (3)(b)(4) That recovery, towing and storage charges are accruing as a legal liability of the registered and/or legal owner.
>
> (3)(b)(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. (underline added)[46]

The Petitioner lastly relies on R.I.G.L. §39-12.1-6, which section the Petitioner contends "specifically and unequivocally gives the certificated tower 'a possessory lien on the vehicle and registration plates…in accordance with the published tariff.'"

The Petitioner argues that "pursuant to the above-referenced Rhode Island statutes, it has been the established policy and procedure in the State of Rhode Island for the certificated tower to bill, and for the motor vehicle owner to pay, the towing and storage fees in a police instigated tow, pursuant to the established tariff rates."[47] In further support of this assertion, the Petitioner also offered the following declaration:

> "No police department has ever been held liable nor [sic] responsible for any such police instigated tows and storage, and no police department has ever been billed by the certificated tower for these regulated services. The motor vehicle owner has always been recognized by the certificated tower, the police departments and the Division as the responsible party for payment of these towing and storage fees." [48]

In its concluding remarks, the Petitioner contends that the sections of law in the Act that it has cited in its legal memorandum clearly show that the General Assembly intended that police departments have "the power and authority to have designated motor vehicles removed by the certificated tower at the police department's direction to the certificated tower's private storage facility and that [the] motor vehicle owner is responsible for the towing and storage fees related to that police instigated tow."[49] The Petitioner thereupon requested that the Division issue the following declaratory judgment in this docket:

> Pursuant to the Rhode Island Towing Storage Act, Chapter 12.1 of Title 39, Rhode Island General Laws, that the legal owner or registered owner of a motor vehicle towed to a certificated tower's private storage facility at the direction of a police department as a police-instigated tow and impound is liable for the towing and storage costs for that motor vehicle, in accordance with the approved tariff rates.[50]

5. Initial Position of the Advocacy Section

The Advocacy Section began its legal analysis in this matter with a recommendation that the Division "be guided by the very well established rules of statutory construction set-forth in a long line of cases handed down from the Rhode Island Supreme Court."[51] The Advocacy Section proffered a number of cases to guide the Division in its consideration of the Petitioner's asserted interpretation of the Act; such as cases that hold that when construing a statute the 'ultimate goal' is to give effect to the General Assembly's intent;[52] that the primary indicia of the Legislature's intent 'can be found in the plain language used in the statute;'[53] that the language of a statute must be given its 'plain and ordinary meaning;'[54] and that when a statute is silent or ambiguous, the courts should defer to the agency's legal interpretation.[55] In the instant matter, the Advocacy Section observes that the Act is silent on the issue of the right of police departments to impound vehicles removed from the roadways or on the issue of storage fees in a police instigated vehicle 'hold.'[56]

The Advocacy Section asserts that the Act was enacted by the legislature in the interest of the public with enforcement thereof resting with the Division. The Advocacy Section argues that this enforcement power includes a "responsibility to protect the public from unreasonable charges at the hand of the carrier, especially in instances where the towing service has been initiated by law enforcement."[57]

Like the Petitioner, the Advocacy Section also relies on the "declaration of purpose and policy" section of the Act (R.I.G.L. §39-12.1-1) to support its position, supra. However, unlike the broad interpretation espoused by the Petitioner, the Advocacy Section contends that this section only narrowly (only under certain conditions) authorizes the exercise of police powers to "remove vehicles from the highways." Citing specific language from Section 1 of the Act, the Advocacy Section

argues that police departments may only **order** the removal of a vehicle "if it creates a hazardous condition," or "if it is abandoned or unattended," or "if it violates parking ordinances," or "if it is under the control of any person arrested for any criminal offense."[58] Based on this limiting language, the Advocacy Section maintains that "once the vehicle is removed, [the] police duty to clear the highway is complete." The Advocacy Section asserts that the provision in the Act that reflects that the vehicle owner is responsible for the towing fees and any related storage fees is narrowly connected only to this removal function. The Advocacy Section reiterates that the Act is "silent" on "the issue of police 'holds,'" and that "nothing in the…Act allows for storage fees to accrue if the owner is not allowed to retake the vehicle due to a police 'hold' on the vehicle."[59]

The Advocacy Section also distinguished the charges that are rightfully billable to the vehicle owners in cases of abandoned and unattended vehicles from the police "hold" cases in issue in this matter. After reproducing the provisions of R.I.G.L. §39-12.1-3 (entitled: Removal of abandoned, abandoned and of no value, and unattended vehicles) in its memorandum, the Advocacy Section points out that "there is no provision in this section for the accrual of storage fees when the owner may not retake the vehicle." The Advocacy Section asserts that the legislative intent is clear (in cases of abandoned and unattended vehicles) that the vehicle owner may take the vehicle at any time. The Advocacy Section contends that the "debated issue surfaces when the owner is prevented from retaking the vehicle because of the need for a police release."[60]

In further support of its interpretation of the Act, the Advocacy Section points out that the section of the Act that addresses "notice and processing of abandoned and unattended motor vehicles by [the] certificated tower" (R.I.G.L. §39-12.1-4) includes a mandate to the tower that it release the vehicle when the owner appears, proves ownership and pays the charges. The Advocacy Section

relies on the following language in R.I.G.L. §39-12.1-4(b) to demonstrate that the legislative intent is for the tower to always have to release the vehicle when the owner appears to retake possession:

> §39-12.1-4 …(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 R.I.G.L. §39-12.1-13 and shall describe:
>
> …(6) That the registered and/or legal owner **may take possession** (emphasis added) at any time during business hours by appearing, proving ownership, and paying all charges due the certificated tower pursuant to its published tariff.

The Advocacy Section concluded this discussion with the observation and assertion below:

> "In *tota re perspecta*, these sections of the …Act, do not provide for charges arising from storage due to the police instigated 'hold.'[61]

The Advocacy Section next addressed the regulatory requirement that towing companies adhere to their approved rate tariffs. After first identifying the relevant statutory underpinnings behind the tariff requirements (R.I.G.L. §§39-12-11 and 39-12-12), the Advocacy Section asserted that "charging storage fees when the owner is prevented from retaking their vehicle due to a police 'hold'" is outside the scope of any approved tariff, and, consequently, patently unreasonable and prohibited under the law. The Advocacy Section emphasized that the Administrator of the Division has sole authority over the storage charges permitted in any towing company's tariff, and that the storage charge in issue has never been authorized.[62]

The Advocacy Section also briefly addressed how this matter has been treated in other jurisdictions. After first noting that the Rhode Island Courts have never addressed the issue, the Advocacy Section demonstrated that it was able to locate applicable court decisions from cases heard in Louisiana and Ohio. In both of those cases, the courts held that the vehicle owners could not be held responsible for the storage charges that accrued during police impounds.[63]

In its summation, the Advocacy Section argues that the Act clearly limits the powers delegated to the police to a vehicle "removal" function only, and only under four (4) "specified circumstances," namely:

> (1) When needed, to clear public ways of conditions that create a hazardous situation for the motoring public;
>
> (2) To remove "abandoned, abandoned and of no value, and unattended vehicles" from the public ways;
>
> (3) To remove and/or relocate illegally parked vehicles; and,
>
> (4) To remove any vehicle under the control of any person arrested for any criminal offense.[64]

The Advocacy Section stressed that the "Act does not authorize the police to direct the retention of any vehicle once the four (4) specified actions have been completed."

The Advocacy Section also reminds the Division that the Act "delegates similar authority to private property owners, to allow them to have vehicles removed from their property." To buttress its point, the Advocacy Section argues that "clearly there is no expectation that they [private property owners] could also require towers to hold on to a towed vehicle indefinitely."[65] The Advocacy Section concludes, therefore, that it would be improper to read the Act one way for the

police and another way for private property owners when the authority conferred under the Act is the same for both.[66]

The Advocacy Section emphasizes that while the police have no legal authority to pay for the work they **order**, "they only have the authority under 39-12.1-1 to **order** a vehicle removed; there is no authority under this section, real or implied, to have a vehicle impounded."[67] The Advocacy Section declares that "if the police direct that a vehicle be held until they are ready to have it released, they must be exercising police authority granted under some other provision of law." The Advocacy Section argues that because the "exemption from paying the towing-storage business applies only to work ordered under 39-12.1-1 … for the police to be exempt for storage fees attributable to an impound directed under another section of law, that other section of law would also have to shift the cost to the vehicle owner."[68]

In closing, the Advocacy Section also emphasized that under the Act the police can only choose the towing-storage business to be used if there is no one in possession of the vehicle the police want to have relocated or removed. The Advocacy Section contends that "if there is someone present who has possession of the vehicle, or who can legally assume possession of the vehicle, that person, and not the police, gets to decide who will conduct the actual tow and the place the vehicle will be towed to (unless the police have no other means of quickly eliminating traffic congestion or removing a hazardous condition)." The Advocacy Section asserts that "[c]learly, the legislature did not intend to give the police primary control over all vehicles towed nor did it intend to allow the police to routinely impound vehicles under this statute."[69]

6. Positions of the Cities and Towns

Although twelve (12) cities and town initially entered appearances in this docket, only ten (10) cities and towns submitted legal memoranda on behalf of their police departments' interest in this matter.[70] A summary of their legal positions on this declaratory judgment matter is provided below:

a. Smithfield's Position

The town of Smithfield ("Smithfield") opened with the following position:

> "…that in all instances in which motor vehicles are towed to private storage lots or facilities at the direction of the police, the owners of the vehicles should be liable and financially responsible for towing and storage fees, in accordance with the policies and procedures Smithfield has employed to date."[71]

Smithfield followed this position with two fact patterns describing its policies and practices related to two types of towing scenarios. The two scenarios are reflected below:

> 1. When a motor vehicle is towed for the purpose of "impoundment," a police "hold" is placed on the vehicle until the reason(s) for the impoundment cease to exist. Impoundment is undertaken when there is a specific need to retain the vehicle for official police purposes, such as the search or investigation of the vehicle. At the end of the impoundment period, the hold is released, and the motor vehicle owner is immediately notified. He or she is required to provide proof of ownership and a valid driver's license to the Smithfield Police prior to retrieving the vehicle. Motor vehicles which are impounded are generally towed to the Smithfield Police headquarters parking lot. However, after the impoundment period, they may be towed to a private storage facility.
>
> 2. When motor vehicles are towed for reasons or purposes other than impoundment, or after the impoundment hold is released, they are towed to private towing facilities. The owner of the vehicle is immediately notified, and is required to provide proof of ownership and a valid driver's license to the Smithfield Police prior to retrieving the vehicle. If the individual seeking to retrieve the vehicle is unable to provide proof of

> ownership (or proof of permission from the owner), and that individual fails to produce a valid driver's license, the vehicle will not be released for retrieval. The owner of such vehicle is financially responsible to the private towing facility for all towing and storage charges accrued until retrieval.[72]

Regarding the two scenarios presented above, Smithfield declares that "it is important to understand that there are two entirely different types of 'releases' implicated here." Smithfield maintains that the "first type of release is simply the release of a motor vehicle to an owner after he or she procures proper proof of ownership and a valid driver's license. The second is a 'release' of a 'hold' for an 'impoundment.'"[73] Smithfield argues that it is "essential that each release be treated differently. Otherwise, a legal interpretation which treats them the same would compromise Smithfield's police instigated tow system."[74]

In defense of its policy and practice to refuse to release motor vehicles until proper proof of ownership and a valid driver's license are produced, Smithfield contends that the policy ensures that vehicles are being released to the rightful owners, and to avoid releasing vehicles to "owners with suspended licenses and other impairments." Smithfield asserts that this "release" policy "is sound and should not be disturbed."[75]

Smithfield also asserts that "its release procedure for holds for impoundment purposes makes eminent sense." Smithfield contends that it is "critical to be able to impound vehicles for investigatory purposes." Smithfield clarified, however, that because these vehicles are towed directly to police headquarters, "Smithfield does not charge fees for storage during these impoundment periods."[76]

Smithfield next addressed the concern it has with the opinion provided in Division Counsel's January 20, 2010 letter, which Smithfield states:

> "…concludes that R.I. Gen. Laws §39-12.1-1 affords limited authority to police departments to arrange for the towing and storage of motor vehicles, for only those reasons which are listed in one 'whereas' clause in the statute. Therefore, it concludes, if tows are ordered for any reasons other than those listed in R.I. Gen. Laws §39-12.1-1, police departments and not owners should be required to pay storage charges consequently incurred."[77]

Smithfield relates that such an interpretation "would compromise the entire police instigated towing system in Smithfield." Smithfield additionally asserts that "it is not a correct interpretation of Rhode Island law," as "[n]othing in Rhode Island statutory law prohibits the policy and practice Smithfield has historically employed."[78] Smithfield contends that "nowhere" in the statutory provisions cited in the Division's opinion is there "an all-inclusive list of all instances in which police powers may be invoked to direct the non-consensual towing of motor vehicles." Instead, Smithfield proffered the following broader interpretation of the Act:

> "In **order** to carry out their important duties of law enforcement and investigation, police must exercise authority to impound vehicles for other purposes, such as, for example, search warrants. Other valid and necessary reasons for police-instigated non-impound tows, include, for example, the need to tow unregistered vehicles, or motor vehicles whose owners are stopped with suspended licenses. It is therefore inconceivable that simply because the Rhode Island Towing Storage Act contains a simple 'whereas' clause in its preamble, the General Assembly thereby intended that towing and storage fees incurred for the array of legitimate police-investigated tows, for various reasons not specified in this preamble, should be borne by local police departments."[79]

Smithfield additionally argues that the Division's interpretation "fails to comport with legitimate law enforcement procedures." Smithfield contends that if

the Division's interpretation is accepted, it "would have a chilling effect on police-instigated tows, with potential dire effects." Smithfield predicts that based on the costs involved, "some departments may be forced to institute their own towing operations, thereby increasing their expenses, and removing business from towing businesses in Rhode Island."[80]

To support its interpretation of the Act, Smithfield relies on that provision within the Act that "acknowledges the 'legal duty' of law enforcement to **order** towing, without the concomitant duty of paying the cost."[81] Smithfield argues that the statute "makes it clear that police should have no duty to pay towing and storage fees for privately owned motor vehicles."[82] In further support of this position, Smithfield also relies on those provisions within the Act that mandate that the vehicle owners shall remain responsible for all the towing and storage fees associated with the removal of abandoned and unattended vehicles from both private property and the public roadways.[83] Smithfield contends that there should be no concerns over the current arrangement law enforcement has with the towers as the public is protected in these cases by the requirement that the towers only charge rates that have been first approved by the Division.[84]

Smithfield also raises the following question:

> "[W]hen a vehicle owner fails to provide proper proof of ownership and a valid driver's license to retrieve a towed vehicle from a private storage facility, and Smithfield therefore refuses to 'release' that vehicle, does this create a 'delay directly attributable to the vehicle owner'"?

Regarding this issue, Smithfield urges the Division to adopt an interpretation that would treat a failure to provide proof of ownership or a valid driver's license as constituting "a delay directly attributable to a vehicle owner." Smithfield argues

that this requirement is necessary if it is to be able to avoid the potential liability that may result from an "improper release of personal property, to potentially dangerous drivers."[85] Smithfield fears that an opposite interpretation would place it "in the untenable position of either having to release vehicles to non-owners or unlicensed drivers, or having to pay storage charges until those items are produced." Smithfield declares that "[t]his would place police in an impossible and nonsensical position."[86]

b. West Warwick's Position

The Town of West Warwick ("West Warwick") joined in the legal memorandum of the Petitioner.

West Warwick maintains that police department 'impounds' or 'holds' occur "only in instances when required by state law and in which instances it is clear that the vehicle owner remains responsible for the vehicle and any cost incurred as a result of such ownership."[87] As an example, West Warwick declares that one type of 'impound' or 'hold' occurs where there is a violation of laws regarding the registration of vehicles. West Warwick thereupon made reference to several sections of law in the Motor Vehicle Code (R.I.G.L. Title 31) that define certain vehicle registration requirements and related penalties for violations of those requirements. West Warwick asserts that "[t]he law is clear and unambiguous, unregistered vehicles are not to be operated upon the highways of this state."[88] West Warwick also asserts that it "is further evident that it is the duty of the police department involved to prohibit that vehicle from returning to the highways of the state until there is proof that the vehicle is registered, the fees are paid or that it is registered in another state."[89] West Warwick adds that the Act "unambiguously places the responsibility on the owners to take the steps necessary to enable the

vehicle to return to the state highways. This obligation includes payment of all costs incurred."[90]

West Warwick argues that the same law enforcement obligation extends to vehicles that the police departments find to be unsafe. West Warwick contends that these vehicles must also be 'impounded.' West Warwick asserts that "[a]ny police department that becomes aware of or has reason to believe that a vehicle is unsafe would be derelict in its duty for failure to remove that vehicle from the highway until such time as it has been inspected by an authorized inspector."[91] West Warwick also emphasizes that "[t]he timing of such inspection is not within the control of the police department... [but, rather] strictly within the control of the authorized inspectors."[92]

West Warwick argues that each of the above instances of "'impound' or 'hold' is required by state law." West Warwick observes that in each instance it is clear that "the law provides that the privilege of operating a vehicle on the highways includes a responsibility to do so in accordance with the law." According to West Warwick, "that responsibility includes incurring the expenses of paying for the "impound" or "hold" because of the owner's failure to abide by the motor vehicle laws of the state."[93]

West Warwick also expressed concern regarding the matter of the release of a vehicle. West Warwick contends that it is reasonable for police departments to demand proof of ownership before releasing a vehicle in **order** to protect the police departments from potential liability.[94]

Addressing the issue of storage charges, West Warwick asserts that the Act "imposes upon the vehicle owner the obligation to pay costs incurred in a nonconsensual tow and storage." West Warwick observes that all relevant charges are approved by the Division.

In its final argument, West Warwick asserts that the tariff rates in effect "clearly contemplates and places the obligation to pay storage during an 'impound' or 'hold'." In support of this position, West Warwick maintains that the "notice" requirements in the towers' tariffs "contemplates storage during 'impounds and 'holds' because it imposes payment on the owner during the first seven days and requires notice after the 7th calendar day."[95]

After presenting its arguments on the matter, West Warwick requested that the Division issue a declaratory judgment that includes the following two findings:

> 1. That the legal owner or registered owner of a motor vehicle towed to a certificated tower's private storage facility at the direction of a police department as a police-instigated tow and impound is liable for the towing and storage costs for the motor vehicle, and
>
> 2. That the police department ordering a tow and storage as is required by the motor vehicle laws of the State of Rhode Island do not incur any obligation or liability for the storage costs of that motor vehicle.[96]

c. Cranston's Position

The City of Cranston ("Cranston") stated in its legal memorandum that it disagrees with the opinions contained in Division Counsel's two opinion letters to the Petitioner.[97] Cranston argues that "[i]t is extremely important to note that when the language of a statute is clear and unambiguous, the statute must be interpreted literally and the words of the statute must be given their 'plain and ordinary' meanings."[98] Noting that the Act has been in effect since 1994, Cranston points to the following two specific provisions within the Act in support of its position that all towing and storage costs are to be borne by the vehicle owner and not the police department:

> 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 added).[99]

Cranston asserts that the language contained in the foregoing provisions clearly show that "the legislature specifically wrote into the statute that the vehicle owner pays for 'costs and charges connected therewith' (related to the towing-storage business that is unique to law enforcement)."[100] Cranston observes that the "vehicle owner is listed in the full and final paragraph of the statute as the "payor of any and all related costs." Cranston argues that the "plain and ordinary meaning of '**costs and charges connected**' with the '**towing-storage business**' is **storage costs**!"[101] Cranston asserts that "[n]owhere in the statute does it imply, let alone state, that law enforcement bears any costs for the execution of its police powers."[102] Cranston insists that it "cannot be asked to prove a negative."[103] Cranston concludes that while the Division "may argue that it is 'improper' to charge the vehicle owner storage fees, it is completely legal by statute."[104]

In its final comments, Cranston respectfully requests that the Division hold that "the owner of a motor vehicle has the legal duty to pay costs and charges

connected with towing and storage related to Rhode Island law enforcement's execution of its police powers as stated in R.I.G.L. sec. 39-12.1-1."[105]

d. Coventry's Position

The Town of Coventry joined in the legal memorandum of the Petitioner.[106]

e. Middletown's Position

The Town of Middletown joined in the legal memorandum of the Petitioner.[107]

f. Warwick's, Jamestown's and Charlestown's Position

The City of Warwick and the towns of Jamestown and Charlestown joined in the legal memorandum of the Petitioner.[108]

g. Westerly's Position

The Town of Westerly joined in the legal memorandum of the Petitioner.[109]

h. Pawtucket's Position

The City of Pawtucket joined in the legal memorandum of the Petitioner.[110]

7. Reply Memoranda

Only the Advocacy Section and the Town of West Warwick submitted reply memoranda in this docket. Both were submitted in a timely fashion, consistent with the prescribed October 12, 2010 deadline.

a. West Warwick's Reply Memoranda

In its Reply Memoranda, West Warwick joined in the legal memorandum of the Town of Smithfield as to the portions thereof that respond to the memorandum of the Division's Motor Carrier Section.

West Warwick also criticized the Division for taking a position that would "impose upon police departments an **order** that they ignore the duties and obligation placed upon the departments by other sections of the Rhode Island

General Laws."[111] West Warwick again identified the obligation of law enforcement agencies to keep unregistered and unsafe motor vehicles off our public roadways as the primary reason for its support of the Petitioner's position in this matter.[112]

b. Advocacy Section's Reply Memorandum

In response to the positions espoused by the Petitioner and the cities and towns, the Advocacy Section decided to submit a reply memorandum in this docket. In its reply memorandum, the Advocacy Section emphasized that it "is not disputing the authority of the police to place a 'hold' on a vehicle or to impound a vehicle." Instead, the Advocacy Section points out that its "position is that the underlying statute, the Towing Storage Act, does not authorize such 'holds' or payment of storage fees accrued when the police mandate that the tower keep the vehicle from its rightful owner."[113] The Advocacy Section makes the following assertion:

> "Nowhere in the … Act … or anywhere else for that matter – is there *any* rationale for a 'blanket hold' by police personnel for every type of police-ordered non-consensual tow. Indeed, the Act, in R.I.G.L. 39-12.1-3 (d), provides very clear opportunity for the vehicle owner to direct where the vehicle is towed: 'When the hazardous condition has been eliminated' [by removing the vehicle from the roadway], 'the person's choice' [certificated tower chosen by the person in possession of the towed vehicle which the police wanted moved] 'shall be employed to remove the vehicle **to the place selected by the person in possession**.' (**Emphasis** added.) If that vehicle owner (or the person in possession of the vehicle at the time of the police-ordered tow) directs that the vehicle be taken somewhere other than the tower's lot (and there is no investigatory reason for the police to have an interest in the vehicle), no release is required; the vehicle owner (or person in possession) can direct it to be taken to his/her home, his/her mechanic, or even a nearby parking lot. There is no valid reason the police should suddenly have additional 'impound' authority over a vehicle simply

> because the vehicle owner (or person in possession) did not exercise his/her right to direct where the vehicle be towed."[114]

The Advocacy Section argues that the Petitioner "fails to point to any language in the statute (or, indeed, in any statute) that authorizes the tower to hold, or not-release, a vehicle upon demand of the owner and continue to charge accruing storage fees."[115] The Advocacy Section also attacked the Petitioner's reference to "established policy" in its argument, observing that the Petitioner "fails to point to any written policy to support this contention." The Advocacy Section also criticized the Petitioner's argument that the police have never been held liable or responsible for towing and/or storage charges relative to non-consensual tows, again, observing that the Petitioner "offers no language to indicate that the owner is to be charged if the vehicle is held at the direction of the police."[116] The Advocacy Section notes that despite the Petitioner's repeated argument "that the Division is 'wrong,' the Petitioner offered no "substantive support or legal citations to support this theory."[117]

The Advocacy Section argues that the Petitioner's reference to R.I.G.L. §§39-12.1-4(3)(b)(4) and 12.1-4(3)(b)(6) contains no language that authorizes the police to **order** that a vehicle be held "against the owner's wishes, nor does it say anywhere that the vehicle owner should be responsible for accrued fees associated with his own property being held against his will."[118] The Advocacy Section asserts that allowing police departments to "essentially 'hold' or 'impound' every vehicle by requiring a 'release' (the antonym of 'hold'), clearly runs counter to the intent of the Act and counter to Constitutional protections against improper taking."[119]

The Advocacy Section reiterates that to follow the Petitioner's logic, the Act would additionally authorize private property owners to place a 'hold' on the vehicles being removed from their property pursuant to the non-consensual trespass tow provisions in the Act. The Advocacy Section argues that the Petitioner's position, if accepted, would allow for a private property owner to also request proof of "a 'valid' driver's license" before release by the tower, which the Advocacy Section called an "absurdity."[120]

The Advocacy Section next argued that if there is "such an overriding, intrinsic need for 'releases'…every police department would require such a release." The Advocacy Section related that it has investigated the matter and found that "the State Police require no such release and only about half of the state's municipal police departments require a release for every type of police-ordered tow." The Advocacy Section opined that this "speaks volumes about the necessity (or lack thereof) for 'holds' and 'releases.'"[121]

The Advocacy Section contends that such an allowance for "holds" and "required releases" for every tow "is ripe for abuse." The Advocacy Section states that in researching this issue it discovered that the Johnston Police Department "has a policy that requires such a release for EVERY type of police-ordered tow and the Department only provides such releases on weekdays and, moreover, only between the business hours of 8 a.m. and 4 p.m." The Advocacy Section emphasizes that this policy invariably causes unnecessary inconvenience and storage costs for those vehicle owners whose vehicles are towed in the town of Johnston. The Advocacy Section asserts that such inconvenience and additional costs "clearly was not intended in the Act."[122]

As an example of a contrary "release" policy, the Advocacy Section identified the town of Lincoln, which "requires no release for *any* tow it orders." Based on the Advocacy Section's research, if the Lincoln Police Department "has an investigatory

interest in a vehicle, it is towed to the Department's own impound lot… [o]therwise, it is towed to the certificated tower's lot (if the owner does not direct otherwise as is his/her right) and may be retrieved simply by paying the appropriate tariff-based towing/storage fees." The Advocacy Section added that if the vehicle is towed in Lincoln for being 'unregistered', "the vehicle may be released to the owner only upon proof of registration **or** if the owner arranges to have it towed off the original police-selected tower's lot."[123] The Advocacy Section observes that such "a requirement – or allowance – places the cause of any delay in retrieving the vehicle squarely on the owner and, thus, the Division would agree that storage fees would properly accrue to the vehicle owner." The Advocacy Section further observes that Lincoln's "policy also does not require the certificated tower to act as an agent of the police."[124]

The Advocacy Section contends that one reason for enacting the Act was to protect the public against unreasonable fees by towers. The Advocacy Section argues that the Act "was not intended to give police unfettered access to free parking of 'seized' vehicles." The Advocacy Section argues that when a police department decides to impound a vehicle, it "may opt for an impound lot of its own or pay the storage fee at a towing facility."[125]

The Advocacy Section also criticized the positions that were proffered by Coventry, Middletown, Warwick, Westerly, Charlestown and Jamestown. The Advocacy Section observed that these municipalities "offered nothing more than identical memos indicating that they agreed with" the Petitioner. The Advocacy Section reasoned that since the Petitioner's position "is fatally flawed for the reasons set out above, their agreement with that position is similarly fatally flawed."[126]

Regarding West Warwick's position, the Advocacy Section argues that West Warwick's attempt to somehow link vehicle registration and safety requirements under R.I.G.L. Title 31 to purported authority for mandatory 'impounds' and 'holds' under the Act has no basis in law. The Advocacy Section asserts that it "has found no provision in state law that makes such requirements and no party to this matter has offered a single cite in support of such a claim."[127]

The Advocacy Section also addressed Smithfield's position. With respect to the Town of Smithfield using its own impoundment lot for storing impounded vehicles, the Advocacy Section observed that because Smithfield does not charge storage fees for these impoundments, the Advocacy Section sees no inconsistencies with the Act. The Advocacy Section also supported Smithfield's policy to transfer vehicles from the Town's impoundment lot to a certificated tower's lot for pick-up when the vehicle owner is properly notified that they may retrieve their vehicle at the private lot and where any delays in retrieval (and resulting increases in storage costs) rest exclusively with the vehicle owner.[128]

However, the Advocacy Section criticized Smithfield's policy to require 'proof of ownership and/or a valid driver's license' before a certificated tower may release vehicles to their proper owner. The Advocacy Section called this policy "improper and unwarranted" under the Act. The Advocacy Section reiterated that "no police department has any inherent interest in to whom that vehicle is released, or whether the individual retrieving the vehicle has a valid driver's license, simply by virtue of the fact that the Police Department in question ordered the tow in the first place."[129] The Advocacy Section asserts that the "certificated tower cannot hold onto the vehicle against the owner's wishes because the tower is acting as some sort of 'deputized agent' of the police." The Advocacy Section argued that such an interpretation could lead to other release pre-conditions, such as checks for required eyeglasses and sobriety. The Advocacy Section asserts that "[i]f the

vehicle owner wants his property and has satisfied the *appropriate* tow bill, he **must** be given his vehicle in accordance with… [the Act]. If he breaks the law with that vehicle afterward, it is a police matter."[130]

The Advocacy Section also argued that "there is no requirement whatsoever that a vehicle owner produce a valid driver's license as 'proof of ownership.'" The Advocacy Section maintains that any reasonable form of identification, including a passport, suffices under the law. The Advocacy Section added that "under Smithfield's position, there still is no assurance of the validity of a driver's license presented or the appropriateness of that individual to get behind the wheel of a released vehicle." The Advocacy Section observes that such a release condition does not reveal whether the "driver's license is suspended (or otherwise invalidated)."[131]

For the reasons stated above, the Advocacy Section contended that Smithfield's 'release' policy is "arbitrary" and "wholly improper." The Advocacy Section maintains that if "the police officer wishes to place a 'hold' on a vehicle for any reason, and has some specific statutory authority for doing so, he is free to have the vehicle towed to the Police Department's own impound **in accordance with that statutory authority**." However, under the Act, the Advocacy Section argues, "the police authority over the vehicle ends once it no longer represents a hazard, and thus they can find no authority there for imposing a 'hold.'"[132] The Advocacy Section therefore concludes that if "the officer chooses for whatever reason to instead have the vehicle towed to a tow lot and essentially confiscated by virtue of a 'hold,' that vehicle owner should not be responsible for accruing storage fees."[133] To be clear, however, the Advocacy Section stressed that it "is not saying that Police Departments have to pay any storage charges…" but, rather, only "that the vehicle owner is not responsible for storage fees that may accrue

while the vehicle is being 'held' or 'impounded' by police **order** **for police purposes** against the vehicle owner's wishes."[134]

In its concluding remarks, the Advocacy Section emphasized that neither the Petitioner nor any of the participating cities and towns "have cited **ANY** statutory authority for police to impose a 'hold' on any vehicle towed and stored under … [the Act]." In fact, the Advocacy Section wondered why "only half of the municipal police departments (and not the State Police) operate in such a manner."[135] The Advocacy Section asserts that the Act only "provides the authority for police personnel to do the bare minimum required to clear the roadways of vehicles and nothing more." The Advocacy Section underscores that "there is absolutely no discussion about, or authority for, police personnel impounding or holding said vehicles at their discretion or whim for their own purposes." The Advocacy Section also quips that "there is also no discussion about the vehicle owner having to pay 'unreasonable' storage fees needlessly foisted upon them."[136]

As a final observation in support of its position, the Advocacy Section posed the following hypothetical(s) and question:

> "…R.I.G.L. §39-12.1-3(d) clearly states that the **vehicle owner** (or at least, the person in possession of the vehicle at the time of the police-ordered tow) has the right to direct the tower to tow the vehicle to a destination or location of that person's choice. Given that, and if the owner or person in possession exercises his/her legal right to have the vehicle towed to the vehicle owner's home, the police could not impose a 'hold' on that vehicle sitting in the owner's driveway. Conversely, why, then if the vehicle is towed instead to the tower's storage lot because the vehicle owner or person in possession did not exercise his/her rights would the police suddenly have some intrinsic authority to impose a 'hold' on the vehicle? Clearly, the police cannot exercise authority they have not been granted…"

8. Findings and Conclusions

The Division has carefully considered the positions proffered by the Petitioner, as well as the positions proffered by the ten (10) cities and towns that participated in support of the Petitioner's perspective in this declaratory judgment proceeding (collectively, the "Coalition"), and, despite the fact that all are fervently behind the adoption of an expanded interpretation of police department "impound" authority under "The Towing Storage Act," none has proffered a persuasive legal argument to support such a position. Indeed, the Coalition was unable to identify a single statutory reference to the words "impound" or "hold," (or like words for that matter) in the context of police-instigated vehicle towing and storage, in any Rhode Island law.

The legal memoranda submitted by the Coalition in this docket routinely referenced the abundant clarity of law enforcement's authority under the Act to **order** the impoundment of any and all motor vehicles removed from the State's roadways. These Coalition members also assert that this clarity similarly extends to the authority of police departments to elect to store these impounded vehicles at the private storage-lot facilities of Division-regulated (certificated) towing companies for as long as the police-ordered impoundment remains in effect; and, further, that all of the related storage fees ($24 per 24-hour period), notwithstanding the involuntary nature of this storage (from the vehicle owner's point of view), are to be borne exclusively by the vehicle owner. According to the Coalition, the above-described authority is all very clear under the Act. In a word, the Division finds this assertion of such "clarity," shocking, for the Act is totally devoid of any specific or implied reference to law enforcement "impoundment" authority.

Law enforcement's authority under the Act, as the Advocacy Section correctly points out, is extremely limited in scope. The reason for the limited scope is that the Act was originally enacted to protect the business interests of the State's certificated towers, who sponsored the legislation through RIPTA back in 1994.

[137] Notwithstanding suggestions to the contrary, the Act was not enacted to enhance the authority of law enforcement, whose limited mention is almost exclusively consigned to the Act's preamble provisions. Parenthetically, because the Act relates to towing, its location is properly in R.I.G.L. Title 39, which title relates to all laws involving "public utilities and carriers."

The Act, enacted in 1994, was designed to centrally codify and update a then mishmash of towing laws and regulations into one chapter of the General Laws. [138] The intent behind the enactment of the Act was also chiefly to provide compensation and tort liability protections for the towers. Some examples of these protections are summarized below:

1. The Act makes it clear that only "certificated towers," with the requisite expertise, equipment, facilities and insurance, may perform the tows. The related provisions eliminate the possibility of uncertificated/unregulated towing operations (e.g., "limited towing" companies) performing any of the vehicle removal functions described in the Act.[139]

2. The Act also makes it clear that vehicle owners may choose their own preferred towing company when their vehicle becomes disabled on the roadways. The related provisions ensure that all certificated towers, rather than only those towers selected by police departments, would remain eligible to remove vehicles under the circumstances described in the Act.

3. The Act provides authority for towers to remove vehicles from the roadways (at the behest of the police) and from private property (at the behest of the property owner), without the consent of the vehicle owner. The related provisions safeguard certificated towers from the potential liability associated with towing a vehicle without the owner's permission.

4. The Act makes it clear that the vehicle owner, and not law enforcement, remains responsible for costs of towing and storage related to removing a defined

group of vehicles from the highway, infra. The Act similarly makes it clear that the vehicle owner, and not the private property owner, is responsible for all costs of towing and storage related to removing vehicles from private property. Toward this end, the Act confers "possessory lien" and "foreclosure" rights to the towing companies on all vehicles removed from the highways and from private property under the provisions contained in the Act. Collectively, these provisions provide towing companies with a clear path to seek compensation from the vehicle owners for the towing and storage services authorized under the Act.

5. The Act further provides towing companies with abbreviated procedures for disposing of certain abandoned, abandoned and of no value, and unattended vehicles. The related provisions allow for disposal without satisfying otherwise required notice and processing steps.

As noted above, a careful examination of the totality of the Act plainly indicates that the legislative intent was to provide clear safeguards and protections to the State's regulated towing companies. The mention of "law enforcement" in the Act, like the mention of "the owner or person in control of any parcel of property," is entirely incidental to the principal effort, in 1994, of centralizing and codifying laws that protect certificated towers from potential liability and to facilitate payment for all towing and storage services related to the removal of vehicles from the public roadways and from private property. The incidental reference to law enforcement is confined to the narrow mention of law enforcement's inherent "police powers" "to have public ways cleared of conditions which, in the opinion of the officer, creates a hazardous condition to the motoring public." This authority to "clear the public ways" was also clarified to extend to the removal of "abandoned, abandoned and of no value, and unattended vehicles" "illegally parked vehicles" and "any vehicle under the control of any person arrested for any criminal offense."[140] In the end, the purpose of this language is to define the parameters of a non-consensual tow, a definition that provides incalculable protection to the

State's regulated towing industry from the potential liability associated with towing a vehicle without the vehicle owner's permission.

The same liability avoidance language is similarly evident in the Act's "private trespass towing" section (R.I.G.L. §39-12.1-12), which, after setting forth the procedural steps that the private property owner and the tower must follow before removing a vehicle, provides that the tower's adherence to these procedures "shall be a complete defense to any civil and criminal charges resulting from the removal of the vehicle."

Due to the absence of any "impoundment" authority in the Act, the Coalition's reliance on language in the Act that provides that law enforcement "has no legal duty to pay costs and charges" is grossly out of context. The foregoing provision is exclusively and inextricably linked to law enforcement's "removal" authority, nothing more. Further, this "removal" exercise is limited to the four scenarios outlined in the Advocacy Section's memorandum, supra. The "no legal duty to pay costs and charges" provision plainly reflects that when non-consensual towing is warranted (limited to the four scenarios noted above), the vehicle owners, and not the police departments, remain responsible for the towing and storage costs. As the Advocacy Section properly points out, when a statute is unambiguous, its language must be given its "plain and ordinary meaning." Such is the case with regard to the context of the aforementioned law enforcement-related "hold harmless" provision, and, for this reason, the Division sees no legitimate justification for expanding its meaning.

The Division also must reject Cranston's argument that because the Act contains no provisions that would require law enforcement to pay for anything, it would be improper for the Division to expect law enforcement to bear "any costs for the execution of its police powers." Somehow Cranston has concluded that its police powers include a duty to impound all vehicles that its police department orders removed from the roadways, and that it derives this impoundment power

directly from the Act, a curious argument in view of the fact that there is absolutely no mention of "impoundment" powers in the Act, supra. Simply, as it relates to this matter, because the Act does not contain impoundment authority, the Act cannot be used as the de facto funding mechanism for law enforcement to shift its impoundment costs to the ratepayers of the State's certificated towers. As Cranston accurately points out, the Act does not indicate that law enforcement is responsible for any towing and storage costs; what Cranston fails to recognize (or accept) however, is that law enforcement's authority under the Act is limited to a "removal" function only.

Next is Smithfield's position that "in all instances in which motor vehicles are towed to private storage lots…at the direction of the police, the owners of the vehicles **should** be liable and financially responsible for towing and storage fees…" (emphasis added). Smithfield takes this position because a contrary Division holding "would compromise Smithfield's police instigated tow system." Smithfield is concerned because if it is required to pay private towers for the storage related to its impounds, it "may be forced to institute… [its] own towing operations, thereby increasing… [its] expenses." Inexplicably, Smithfield is also concerned that such a change in policy would hurt towing company businesses in the State. The Division finds this position more to do with Smithfield wanting to maintain the status quo in Smithfield, for its own financial benefit, and to avoid having to implement changes to its "impoundment" policy. Indeed, the Division finds it likely that all of the participating cities and towns in this docket are involved for the same reason.

Ironically, Smithfield does conduct its investigatory impoundments in a proper fashion. The Town has these impounded vehicles towed to its own town-owned storage lot. No storage charges accrue to the vehicle owners during these impoundment periods. The Division has no objection to this policy; to the contrary, the Division finds this practice to be perfectly legal and the most desirable practice

from a "chain of custody" perspective. However, Smithfield's perennial policy to have all of its non-investigatory impounds towed to a certificated tower's private storage lot in **order** to subsequently demand proof of ownership and a valid driver's license before release is totally without legal foundation under the Act. More profoundly, there is no legal basis under the Act that justifies the storage charges that accrue to vehicle owners during this involuntary impoundment period.

The major weakness in Smithfield's position that its non-investigatory impounds may properly be held at private storage lots pending the issuance of a written "release," is that vehicle operators may alternatively direct that their vehicles be removed to locations other than back to the tower's storage lot. As the Advocacy Section has observed, this option is clearly afforded under the Act. R.I.G.L. §39-12.1-3(d) provides:

> "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 certificated 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."

This section unambiguously shows that the vehicle operator retains the right to select his or her own tower to remove the vehicle to a location of their choice. But, even in cases where the police officer decides to preempt a vehicle operator's choice of tower (in cases where safety concerns require such preemption), the vehicle operator still retains the legal right to direct the police department's choice of tower to deliver the vehicle to a destination other than back to the tower's storage lot. This right is memorialized in every certificated tower's approved tariff, as evidenced by the following tariff provision:

> "Non-Consensual Tow To a Destination Other Than The Tower's Lot:
>
> When the owner of a vehicle that is the subject of a non-consensual tow requests that the tower deliver the

> vehicle to [a] site other than the tower's tow yard, the tower will be allowed to charge up to $3.00 per mile, in addition to the initial authorized tow rate...."[141]

The problem with Smithfield's argument is that not only does the Act not authorize "impoundments" of any nature, including non-investigatory impoundments, the law does not permit certificated towers to refuse a direction from the vehicle's operator that the vehicle not be taken to the tower's storage yard. Thus, if the police department is without authority to **order** the vehicle removed to their tower's storage lot, the police department obviously has no authority to establish, by department policy, the pre-condition requirements (i.e. proof of ownership and a valid driver's license) for the vehicle's release.

Related to the above issue, the Division also rejects Smithfield's and West Warwick's claim that the "release" policy is necessary (a requirement of proof of ownership and a valid driver's license) in **order** to avoid "liability." In response to this claim, the Division points out that the State's certificated towers have been exercising professional judgment with respect to the matter of vehicle releases since time immemorial. They do not need law enforcement to guide them through this perfunctory aspect of doing business. Moreover, for those municipalities that do not require "releases" (e.g., the Town of Lincoln), it is apparent that "liability" clearly is not an issue.

Next, West Warwick argues that police department "impounds" or "holds" occur "only in instances when required by state law." However, West Warwick neither identifies any state law that mandates such impoundments, nor any law that reflects that the impounded vehicles may be stored, against the wishes of the vehicle owners, at the storage lots of certificated towers. West Warwick instead reasons that because the State's Motor Vehicle Code (Title 31) prohibits unregistered and unsafe vehicles from operating on the roadways, then, by extension, police departments may **order** these vehicles impounded and stored in

privately-owned storage lots. West Warwick cited no statutory provisions to buttress this assertion.

Based on West Warwick's argument, and due to the dearth of related research from the participants, the Division decided to take the initiative and comprehensively examine the State's Motor Vehicle Code for the purpose of determining what, if any, law enforcement impoundment authority language may actually exist there. The findings, while not unexpected, were illuminating and, in the Division's opinion, dispositive of this issue once and for all. The following sections in Title 31 were the only sections found to relevant, and are summarized below:

… R.I.G.L. § 31-8-1 provides that "[n]o person shall operate, nor shall an owner knowingly permit to be operated, upon any highway…, any vehicle required to be registered pursuant to this title…" There is an $85 fine for a violation of this section. There is no word of impoundment authority.

… R.I.G.L. § 31-8-2 provides that "[n]o person shall operate, nor shall an owner knowingly permit to be operated, upon any highway, a motor vehicle the registration of which has been cancelled, suspended, or revoked. Any violation of this section is a civil violation. There is no mention of impoundment authority.

… R.I.G.L. § 31-12-12 provides a list of powers, granted by the legislature, to local authorities to exercise reasonable police powers "with respect to the streets and highways under their jurisdiction." The only mention of impoundment relates to specific authority conferred to the City of Woonsocket to "impound, by means of a 'Denver boot'" any vehicle that has violated the City's parking ordinances "five (5) or more" times in the preceding calendar year. The impoundment occurs at the location where the Denver boot is installed. Towers are not involved in these impoundments.

… R.I.G.L. § 31-21-2 authorizes a police officer to "move" a vehicle "to a position off the paved or main traveled part of the highway." No impoundments are authorized.

… R.I.G.L. § 31-21-3 authorizes a police officer, who "finds a vehicle, whether attended or unattended, disabled upon any bridge or causeway or in any tunnel where the vehicle constitutes an obstruction to traffic … to provide for the removal of the vehicle to the nearest garage, service station, or other place of safety." No impoundments are authorized.

… R.I.G.L. § 31-21-10.1 authorizes a police officer to remove a vehicle, by means of towing, that is parked on a highway in excess of twenty-four (24) hours. The law provides that "[a]ny charges incurred for the towing shall be recoverable from the owner of the vehicle by the state or the municipality paying for the towing by civil action commenced in the district court… The civil action shall not be available, however, if the owner of the vehicle pays towing charges directly to the person who furnished the towing services." No impoundments or storage fees are authorized.

… R.I.G.L. § 31-22-14 provides that the "owner, or person having custody and control as authorized by the owner, of any motor vehicle which is towed away from any public roadway because it is in violation of a state law or city or town ordinance, or which is towed from the scene of an accident or breakdown, or which is towed as the result of the lawful detention of an unlicensed operator, including those operating after denial, suspension, or revocation of license, shall be liable for the cost of towing, storage, and other incidental expenses in connection with the towing." This section adds that the "owner or operator of this section shall be responsible for the towing, storage and incidental expenses and for the towing or transportation fees to a demolisher or crusher and any crushing preparation fees…" No impoundments are authorized.

… R.I.G.L. § 31-27-4.3 authorizes the seizing and forfeiture of a motor vehicle that was used in a high-speed pursuit.

… R.I.G.L. § 31-38-2 authorizes as follows: "…members of the state and local police…may at any time require the…driver of the vehicle to stop and submit the vehicle to an inspection and test with reference to it as may be appropriate." "In the event the vehicle is found to be in unsafe condition or any required part or equipment is not in proper repair and adjustment, the officer shall give a written notice to the…driver and shall send a copy to the director of the department of revenue. The notice shall require that the vehicle be placed in safe condition and its equipment in proper repair and adjustment, specifying the particulars with reference to it, and that the notice be approved within five (5) days." After receiving the copy of the aforementioned "notice," the director of the department of revenue "may require the …owner, or driver to submit the vehicle to the state inspection facility for inspection. If the notice is not complied with, the director may suspend the registration of the vehicle described in the notice." There is no mention of impoundment authority.

… R.I.G.L. § 31-38-3 provides that "no… person driving a vehicle shall refuse to submit the vehicle to an inspection and test as required by § 31-38-2." This section further provides that "[e]very…owner, or driver, upon receiving a notice as provided in § 31-38-2, shall comply with it and shall within five (5) days forward the approved notice to the department of revenue. In the event of noncompliance with this subsection, the vehicle shall not be operated on any highways of this state."

This section further provides that "[a]ny vehicle which is found to be in such unsafe condition as to brakes, steering, or other equipment as to be hazardous to permit it to be…driven from the place of inspection, then the vehicle shall not be permitted to be operated under its own power. The registration shall be

immediately suspended by the department of revenue and the plates and certificates immediately returned to the department of revenue."

This section additionally provides that "[i]n the event repair or adjustment of any vehicle or its equipment is found necessary upon inspection, the…owner of the vehicle may obtain the repair or adjustment at any place he or she may choose, but in every event an approval shall be obtained, otherwise the vehicle shall not be operated upon the highways of this state."

No impoundments are authorized under this section.

Notwithstanding the adamant arguments from the Coalition, through the above examination, the Division finds that nowhere in the State's Motor Vehicle Code is there any authority granted to law enforcement to **order** an "impound" or "hold" on a vehicle, against the vehicle owner's wishes, for violations of any civil motor vehicle infraction, including registration or safety-related infractions. Although law enforcement is afforded limited authority to **order** motor vehicles removed from the highway for registration violations and safety concerns, the law clearly does not authorize police departments to either impound a vehicle pending proof of registration, or for the purpose of holding the vehicle until a safety inspection can be performed, as some members of the Coalition have asserted is their "duty" under the law. More importantly, as there is no authority for impoundments by police departments, there is absolutely no authority for purportedly impounded vehicles to be stored in the lots of certificated towing companies pending a "release" from the police department that ordered the hold.

The Division used the words "limited authority" above, in its discussion of the "removal" of vehicles from the roadways, due to the fact that the Motor Vehicle Code does not deny the vehicle's operator or owner the right to independently arrange towing services in cases of registration violations or serious safety concerns. The Division therefore, must conclude that for these infractions the vehicle's operator or owner would possess the same rights as enumerated under

the Act, namely, that they retain the right to choose their own tower under such circumstances unless the police officer on the scene determines that the vehicle is creating "a hazardous situation for the motoring public," thereby triggering the police officer's option to have the vehicle cleared or removed.

It is also critical to emphasize, that the Division found no legal authority in the law for police departments, as a matter of individual department policy, to **order** a general "hold" on a vehicle until such time as a "release" is issued. Demanding "proof of ownership" and a "valid driver's license," as West Warwick and Smithfield routinely do, has no basis in law (that the Division could find), and certainly does not merit the additional storage charges that would otherwise not accrue.

West Warwick next makes a convoluted argument that the "notice" requirements in the towers' Division-approved towing and storage tariff "clearly contemplates and places the obligation to pay storage during an 'impound' or 'hold.'" The Division finds this argument completely baseless. The "notice" requirements in the tariff, and in related rules and regulations, exist for the sole purpose of quickly locating the vehicle owner (and lienholder) after a non-consensual tow has taken place in **order** to minimize storage fees, not to increase them as West Warwick suggests.

Next, the Petitioner and West Warwick have individually argued that the storage rates being charged by certificated towers for these periods of police department-ordered "impoundment" are reasonable and in accordance with the Division-approved tariff. The Division disagrees. A careful examination of the tariff in issue presents no evidence of any approved rates for "involuntary" impoundment storage. Indeed, the Division's rules and regulations on the subject of tariffs and vehicle storage[142], as well as the relevant provisions of the Rhode Island General Laws[143], are replete with requirements for certificated towers to only charge rates

that have been approved by the Division's Administrator. No member of the State's regulated towing industry has ever proposed such a rate in its tariff, and no such rate has ever been approved by the Division's Administrator.[144]

Finally, not only has the Coalition improperly built "impoundment" authority into the Act, amazingly, the Coalition also maintains that the Act creates an "agency" relationship between the police department ordering the vehicle's removal and the towing company performing the tow.[145] However, for an agency relationship to exist three elements must coalesce: (1) the principal must manifest that the agent will act for him, (2) the agent must accept the undertaking, and (3) the parties must agree that the principal will be in control of the undertaking.[146] Nothing in the Act provides the legal basis to support such an association. Further, there is clearly no contractual relationship between law enforcement and the towing industry that would give rise to such an agency relationship. Moreover, the downside to an agency relationship is that "the law is quite clear that a principal is subject to liability for the acts of its agent, provided that the agent was acting within the scope of his authority."[147] **Accordingly, if the Coalition is truly in agreement on this "agency relationship," the cities and towns included in the Coalition should also be prepared to have to defend against law suits arising from any negligent act committed by the tow truck operator or towing company during the time the removed vehicle is in their possession.** The Division seriously doubts that the cities and towns included in the Coalition would knowingly accept the risk concomitant to such an agency relationship.

Additionally, though the "agency relationship" argument proffered by the Petitioner is innovative, the Division would never permit its regulated certificated towers to circumvent their regulatory obligations through a purported "agency" or

other "contractual" relationship with a municipality. In Rhode Island, the business of performing non-consensual tows is regulated exclusively by the Division. No attempted usurpation of this authority by a local police department will be tolerated.

Conclusion

Although many more voices have been heard on the issue presented by the Petitioner, the Division must find that its previous opinion on this matter remains correct: the Act does not authorize impoundments. The Petitioner and the city and town participants have, for the most part, based their entire cases on references to the Act that provide that:

> "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." [and]
>
> "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 tower's tariff," (*supra*).

Unfortunately, neither of these provisions, nor any other provisions contained in the Act, or apparently any other Rhode Island statute for that matter, authorize law enforcement agencies to have the vehicles they request "removed" from the roadways "impounded," and released only after they issue a written "release." Accordingly, the forgoing provisions do not apply. These provisions only apply to the costs related to towing and storage connected to the "removal" of the vehicle from the roadways, not a police-ordered "impoundment."

As the Division has discussed throughout the findings herein, the Act narrowly authorizes police departments "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..."[148] Where in this very narrow "removal" authority does law enforcement derive "impoundment" powers? Where in the State's Motor Vehicle laws (Title 31) does law enforcement derive "impoundment" powers? The reason the Coalition was unable to move beyond obfuscations, generalities and elaborate equivocations is due, simply, to the fact that the law does not support the "impoundment" practices in issue. Finally, if the Coalition truly believes that the Act provides the "impoundment" authority law enforcement relies upon in carrying out their duties, the Division must query what authority law enforcement relied upon for "impoundment" authority before the enactment of the Act in 1994?

The Division has emphasized that a certificated towing company is authorized by law to collect storage rates only when the vehicle owner voluntarily elects to delay the pick-up of his or her vehicle from the tower's storage lot. It is precisely for this reason that towing companies are required under the Division's rules and regulations to follow prescribed notification protocols for ensuring that vehicle owners (and lienholders) are made aware that the tower has the vehicle and that storage rates are accruing. However, when a vehicle is impounded by a police department, the vehicle owner no longer exercises control over when the vehicle is released, and therefore, has no control over the storage costs that subsequently accrue. The Division finds this result to be unjust and unreasonable, and in violation of the applicable tariff.

The Division does not understand how this police department impoundment and involuntary storage practice was able to evolve into the problem that it has become. Though the Division had been aware over the years (even prior to 1994)

that some police departments had adopted "release" policies, the practice was understood to be limited to a small minority of departments and, further, that the practice was not believed to be having a pecuniary affect on ratepayers. This latter understanding was based on the belief that releases were invariably being issued during the 24-hour period immediately following the tow, which would, if true, have no impact on rates.[149] However, it appears that the practice has expanded to include many more police departments and that the impoundment periods are now exceeding the initial 24-hour storage period, which is now having a direct and, in some cases, a substantial adverse impact on storage fees. Due to this anti-consumer/ratepayer development, the Division is no longer able to ignore the practice, and upon careful review has determined that the involuntary storage fees being charged by the State's regulated certificated towers is unauthorized and in violation of law. For this reason the Division shall take all necessary regulatory steps to see to its permanent discontinuance.

Accordingly, it is

(**20200**) ORDERED:

1. That on May 26, 2010, the Petitioner posed the following question:

   "Whether the storage fees imposed by a certificated tower on a police department instigated motor vehicle storage impoundment at a private storage lot may be assessed against the owner of said motor vehicle, or is it the liability and financial responsibility of the police department instigating the tow"?

   In reply to this question, as discussed at length herein, the Division finds that the vehicle owner cannot be held responsible for the "involuntary" storage fees resulting from police department "holds" imposed on vehicles resulting from non-consensual police department instigated tows. Further, notwithstanding its initial opinion on the subject, the Division finds that certificated towers may not hold these vehicles against the wishes of their owners, and must release these vehicles to their owners upon demand and

after all appropriate fees have been paid. "Appropriate" fees, in cases of non-consensual police department instigated tows, shall constitute the charge for the tow service required to "remove" the vehicle from the public roadway, an after-hours release fee (when applicable), and all storage time linked to retrieval delays directly caused by the vehicle owner (or lienholder).

2. That the Division also hereby adopts the conclusions, findings and rulings contained herein as its comprehensive response to RIPTA's May 26, 2010 Petition for Declaratory Judgment.

3. That the Division will not officially opine on the propriety of impounds that take place on municipally-owned property.

Dated and Effective at Warwick, Rhode Island on December 6, 2010.

_____	APPROVED:_____
John Spirito, Jr., Esq.	Thomas F. Ahern
Hearing Officer	Administrator

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[1] Attorney Horan's December 11, 2009 letter is attached to RIPTA's Petition as "Exhibit C."

[2] In the December 21, 2009 response letter, Division Counsel included a footnote at this location that noted: "[t]he Division did not address the issue of whether the police department (or City or Town) ought to pay the Division-approved "non-consensual" tow related storage fees, or whether a non-regulated "consensual" storage charge should apply."

[3] Division Counsel's December 21, 2009 reply to Attorney Horan is attached to RIPTA's Petition as "Exhibit D."

[4] The word "is" should appear here.

[5] Attorney Horan's January 11, 2010 letter is attached to RIPTA's Petition as "Exhibit E."

[6] The word "any" should have been used here.

[7] The word "is should appear here.

[8] Division Counsel's January 20, 2010 reply to Attorney Horan is attached to RIPTA's Petition as "Exhibit F."

[9] See C.A. NO.: PC10-1016.

[10] Petitioner's "Motion To Recuse," p. 1.

[11] Id., pp. 1-2.

[12] The Advocacy Section filed its Objection on June 16, 2010.

[13] R.I.G.L. §42-35-8.

[14] See Property Advisory Group, Inc. v Rylant, 636 A.2d 317, 318 (R.I. 1994). R.I.G.L. §42-35-8 contains no provision mandating a hearing.

[15] R.I.G.L. §42-35-8.

[16] See R.I.G.L. §42-35-9.

[17] R.I.G.L. §42-35-8.

[18] See Herald Press, Inc. v. Norberg, 122 R.I. 264, 405 A.2d 1171 (R.I. 1979). The Court held that a taxpayer appeal was a "contested case" under the APA, and therefore, the taxpayer was not entitled to a de novo review in the superior court.

[19] See Interstate Navigation Company v. Division of Public Utilities and Carriers, 202 WL 1804072 (R.I. Super.).

[20] Herald Press, Inc. v. Norberg, 122 R.I. 264, 272-273 (1979); Withrow v. Larkin, 421 U.S. 35 (1975).

[21] FTC v. Cement Institute, 333 U.S. 683, (1948), citing Withrow at 95.

[22] Withrow at 48.

[23] Cavanagh v. Cavanagh, 375 A.2d 911, 917 (RI 1977).

[24] In re: Zachary B. Antonio, 612 A.2d 650, 653 (RI 1992).

[25] State v. Sampson, 884 A.2nd 399, 405 (RI 2005).

[26] In re: Marjorie R. Yashar, 713 A.2d 787, 790 (RI 1998).

[27] State v. Clark, 423 A.2d 1151, 1158 (RI 1981).

[28] Withrow at 95.

[29] Markus v. United States, 545 F. Supp. 998 (SD NY 1982).

[30] Moore, et al, v. McGraw Edison Company, 804 F.2d 1026 (8th Cir. (1986))

[31] Id., citing United States v. Grinnell Corp., 384 U.S. 563 (1966).

[32] State v. Millsap, 704 N.W. 2d 426 (2005).

[33] Id.

[34] State v. Nidever, 120 R.I. 767, 390 A.2d 368 (1978).

[35] Pezzucco v. State, 652 A.2d 977 (R.I. 1995).

[36] Cigna Fire Underwriters Company v. MacDonald, 86 F.3d 1260 (1st Cir. 1996).

[37] Mattatall v. State, 947 A.2d 896 (R.I. 2008); Ryan, et al v. Roman Catholic Bishop of Providence, 941 A.2d 174 (R.I. 2008).

[38] Withrow v. Larkin, 421 U.S. 35 (1975), citing from FTC v. Cement Institute, 333 U.S. 683 (1948).

[39] Liteky v. United States, 510 U.S. 540 (1994).

[40] National Council on Compensation Insurance v. Paradis, 1994 WL 930908 (R.I. Super.)

[41] RIPTA mailed relevant information packages to each of the State's police chiefs, and to the Colonel of the Rhode Island State Police, on June 15, 2010.

[42] There is no requirement contained in the law (either in R.I.G.L. §42-35-8 or Rule 13(c) of the Division's Rules of Practice and Procedure) that mandates a hearing on the instant petition.

[43] Petitioner's Legal Memorandum, pp. 4-5, and "Exhibit J."

[44] Petitioner's Legal Memorandum, pp. 5-6. These provisions are excerpts from.

[45] Petitioner's Legal Memorandum, p 6.

[46] Petitioner's Legal Memorandum, pp. 6-7.

[47] Petitioner's Legal Memorandum, p. 7.

[48] Id.

[49] Id., pp. 8-9.

[50] Id., pp. 9-10.

[51] Advocacy Section's Legal Memorandum, p. 4.

[52] State v. Menard, 888 A.2d 57, 60 (R.I. 2005).

[53] Martone v. Johnston School Committee, 824 A. 2d 426, 431 (R.I. 2003).

[54] Accent Store Design, Inc. v. Marathon House, Inc., 674 A 2d. 1223, 1226 (R.I. 1996).

[55] City of Providence School Department v. Rhode Island State Labor Relations Board, 2005 WL 1530480 (R.I. Super 2005) *citing* Labor Ready Northeast, Inc. v. McConaghy, 849 A. 2d 340, 345-346 (R.I. 2004).

[56] Advocacy Section's Legal Memorandum, pp. 4-5.

[57] Id., pp. 4-5, citing from Sterry Street Towing, Inc. v. Division of Public Utilities and Carriers, 2005 WL 1109610 (R.I. Super. 2005).

[58] Id., p. 6.

[59] Id.

[60] Id., p. 7.

[61] Id., p. 8.

[62] Id., p. 9.

[63] Id., pp. 9-10, citing Jordan v. City of Baton Rouge, 529 So. 2d 412, 416 (1988) and Dayton Police Department v. Pitts, 2010 WL 1267885 (Ohio App. 2 Dist).

[64] Id., p. 10.

[65] Id.

[66] Id.
[67] Id., p. 11.
[68] Id.
[69] Id.
[70] For reasons unknown to the Division, the towns of Foster and Cumberland declined to submit legal memoranda in this docket. It must also be noted that the Division established a [hard copy] filing deadline of September 28, 2010 for the submission of all legal memoranda in this docket. This deadline was established during a procedural conference conducted on July 21, 2010. All of the cities and towns were made aware of this deadline. Notwithstanding, two of the ten cities and towns, Westerly and Pawtucket, filed their memoranda after the deadline had passed (Westerly filed its memorandum electronically on September 29, 2010 - the Division cannot confirm whether Westerly filed the required hard copy or not; Pawtucket's hard copy was received at the Division on October 12, 2010. Despite the lateness of these filings, the Division has decided to accept and consider the filings as if they had been timely submitted.
[71] Smithfield Legal Memorandum, pp. 1-2.
[72] Id., p. 2.
[73] Id., p. 3.
[74] Id.
[75] Id.
[76] Id.
[77] Id., pp. 4-5, also citing Petition, at Exhibit E.
[78] Id., p. 5.
[79] Id., pp. 5-6.
[80] Id., p. 6.
[81] Id., citing from R.I.G.L. §39-12.1-1.
[82] Id.
[83] Id., pp. 6-7, citing from R.I.G.L. §39-12.1-3 and R.I.G.L. §39-12.1-4(3)(b)(4).
[84] Id., p. 7.
[85] Id., p. 8.
[86] Id.
[87] West Warwick Legal Memorandum, p. 1.
[88] Id., pp. 1-2.
[89] Id., p. 2.
[90] Id.
[91] Id.
[92] Id.

[93] Id.
[94] Id.
[95] Id., pp. 2-3.
[96] Id., p. 3.
[97] City of Cranston Legal Memorandum, p. 1.
[98] Id., p 2, citing from Sindelar v. Leguia, 750 A.2d 967 (R.I. 2000), and Star Enterprises v. DelBaron, 746 A2d 692 (R.I. 2000).
[99] Id., p. 2.
[100] Id.
[101] Id.
[102] Id., pp. 2-3.
[103] Id., p. 3.
[104] Id.
[105] Id.
[106] See town of Coventry's Legal Memorandum.
[107] See town of Middletown's Legal Memorandum.
[108] See city of Warwick's and towns of Jamestown and Charlestown's combined Legal Memorandum.
[109] See town of Westerly's Legal Memorandum.
[110] See city of Pawtucket's Legal Memorandum.
[111] West Warwick's Reply Memorandum, p. 1.
[112] Id., pp. 1-2.
[113] Advocacy Section Reply Memorandum, pp. 1-2.
[114] Id., p. 2.
[115] Id., p. 3.
[116] Id.
[117] Id.
[118] Id.
[119] Id., pp. 3-4.
[120] Id., p. 4.
[121] Id.
[122] Id., pp. 4-5.
[123] Id., p. 5.

[124] Id.
[125] Id., pp. 5-6.
[126] Id., p. 6.
[127] Id., pp. 6-7.
[128] Id., p. 7.
[129] Id., pp. 7-8.
[130] Id., p. 8.
[131] Id., pp. 8-9.
[132] Id., p. 9.
[133] Id.
[134] Id., pp. 9-10.
[135] Id., p. 10.
[136] Id.
[137] The undersigned Division Counsel is aware of this fact as RIPTA consulted with the undersigned Division Counsel regarding the Act's draft legislation in 1994. RIPTA's counsel at the time was Albert DiFiore, Esq., who is representing West Warwick in this docket.
[138] Many of the earlier enacted towing-related statutes still remain scattered throughout R.I.G.L. Title 31.
[139] There exists one exception to the requirement that only certificated towing companies may perform towing services. Specifically, R.I.G.L. §39-12-3 exempts from regulation the operation of tow trucks "owned and operated by a cooperative group and used exclusively for the transportation of the property of the cooperative group or its members" (e.g. AAA Motor Club).
[140] R.I.G.L. §39-12.1-1.
[141] See "Rates for Non-Consensual Towing and Storage," Section 4(a)(iii).
[142] See "Rules and Regulations Governing the Transportation Provided by Motor Carriers of Property," effective April 4, 2005.
[143] R.I.G.L. §§ 39-12-11 and 39-12-12.
[144] It is also important to note that providing expeditious "notification" of storage to a vehicle's owner and any lienholder, in cases where the vehicle owner (or lienholder) is unaware that his or her vehicle has been towed, is also mandatory so as to prevent unnecessary delays and costs in the retrieval of a vehicle. The Division's rules and regulations are designed to minimize storage costs wherever possible. It would be incongruous for the Division to knowingly authorize a storage rate that would permit the holding of a vehicle against the will of the vehicle's owner. Clearly any incentive to minimize storage costs would be lost in such case.
[145] See "Exhibit C" to the Petition, wherein RIPTA argues that it would be inadvisable for a tower to release a vehicle without the police department's permission "since our client acted as agent for the police department…"
[146] *Lawrence v. Anheuser-Busch, Inc.*, 523 A.2d 864, 867 (R.I.1987).

[147] (See Drake v. Star Market Co. Inc., 526 A.2d 517 (R.I. 1987); Piscettelli v. Defelice Real Estate Inc., 512 A.2d 117, 119-20 (R.I. 1986); and Brimbau v. Ausdale Equipment Rental Corp., 440 A.2d 1292, 1295 (R.I. 1982).

[148] R.I.G.L. §39-12.1-1.

[149] The relevant tariff provides for a $24 storage fee per 24-hour period, calculated from the time of delivery to the tower's storage lot.