

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 29th day of October 2021.

CASE NO. 20-0796-MC-GI

GENERAL INVESTIGATION RELATING TO STATEWIDE
WRECKER RATES AND RATES FOR ANCILLARY
EQUIPMENT.

COMMISSION ORDER

On reconsideration, the Commission modifies the Final Order and the State Maximum Tariff issued on September 24, 2021, as discussed herein.

BACKGROUND¹

On October 21, 2020, the Commission initiated this proceeding to review the 2017 State Maximum Tariff rates pursuant to its authority under W. Va. Code § 24A-2-2b, as promulgated in Rule 5.13 of the Commission's Rules Governing Motor Carriers, Private Commercial Carriers, and the Filing of Evidence of Insurance and Financial Responsibility by Motor Carriers, 150 C.S.R. Series 9 (Motor Carrier Rules). Comm'n Order (Oct. 21, 2020).

On May 18, 2021, the Commission conducted an evidentiary hearing. The Commission received the proposed Joint Stipulation and Settlement Agreement (Joint Stipulation) executed by Commission Staff and West Virginia Towing and Recovery Association (WVTRA) and all of the pre-filed testimonies into evidence, heard testimony from WVTRA's witnesses, and asked questions of the witnesses and their counsel concerning the issues raised during negotiations. See, Hearing Transcript (Tr.) and Exhibits (Ex.) (May 24, 2021).

On September 24, 2021, the Commission approved the Joint Stipulation, with modifications, and issued a revised schedule of State Maximum Tariff for third-party tows. Comm'n Order at Order ¶¶ 1-2 (Sept. 24, 2021).

¹ This background section is abbreviated. For a complete procedural history, see previous orders and filings in the above captioned consolidated cases found on the Commission web docket at www.psc.state.wv.us.

On October 1, 2021, WVTRA filed a Petition for Reconsideration and/or Reopening (Petition) objecting to the September 24, 2021 Final Order. WVTRA argued that the Commission committed error by admitting and considering the pre-filed testimony of Michael Matousek, Manager of Government Affairs for the Owner-Operator Independent Drivers Association (OOIDA), because OOIDA withdrew from the proceeding. WVTRA also asserted that the Commission erred by improperly modifying the Joint Stipulation and by not permitting Staff to present its witness or evidence at the hearing regarding Staff's acceptance of the Joint Stipulation. WVTRA requested the Commission to reopen this matter and modify the Final Order to exclude the pre-filed testimony of OOIDA and adopt the Joint Stipulation in its entirety, or alternatively remand this matter for further evidentiary hearing. Petition for Reconsideration at 2-6 (Oct. 1, 2021).

Staff responded to WVTRA asserting that the Commission's Final Order and revised State Maximum Tariff rates are reasonable and fully supported by the evidentiary record. Staff requested that the Commission make a finding of fact that its determination of the cap on the administrative fee and the note in Section 2 of the tariff are supported and based upon testimony provided by Chris Reed on behalf of the WVTRA. Staff Response (Oct. 8, 2021).

On October 8, 2021, Mr. Matousek filed a letter on behalf of OOIDA and others² providing comments in support of the Commission's Final Order. Thereafter, on October 12, 2021, Mr. Matousek sent an email to Chairman Lane referencing the above captioned matter and sharing a draft of legislation that OOIDA intends to submit to the West Virginia Legislature regarding the State Maximum Tariff rates. The Commission lodged the communication in the docket for this case. See, Email & Attachment (Oct. 13, 2021). While these communications will remain lodged in the record, the Commission did not consider the information in rendering the decision herein.

On October 14, 2021, WVTRA responded to Staff's response and objected to OOIDA's recent filings. See, WVTRA Responses (Oct. 14, 2021).

DISCUSSION

The Commission will deny WVTRA's Petition on both grounds

The West Virginia Legislature authorized the Commission to establish the maximum wrecker rates for third-party tows, including the rates for the use of special equipment in towing and recovery work in W. Va. Code § 24A-2-2b. The statute requires that the Commission set rates that are fair, effective and reasonable. The

² Traci Nelson of the West Virginia Trucking Association, Matthew Smith, Esq. of the Coalition Against Insurance Fraud, John Lynch of the American Trucking Association and Robert Passmore, CPCU of the American Property Casualty Insurance Association joined OOIDA's letter.

Commission promulgated the statute as Motor Carrier Rule 5.13 which requires the Commission to periodically review maximum statewide wrecker rates to ensure that rates are fair, effective, and reasonable and to base its review primarily on the cost of providing services. To aid in its review and adjustment of the existing wrecker rates, the Commission initiated this general investigation, pursuant to Rule 6.3.1 of the Commission's Rules for Practice and Procedure, 150 C.S.R. Series 1 (Procedural Rules). As part of the general investigation, the Commission allowed for public comments and granted interested parties intervenor status, which included WVTRA and OOIDA.

First, WVTRA contends that the Commission erred by admitting OOIDA's pre-filed testimony of its witness Mr. Matousek. However, counsel for WVTRA never objected to the admission of Mr. Matousek's testimony. Procedural Rule 13.8 requires parties to make timely objections to the admissibility of evidence at the time such evidence is offered. There were several opportunities during the hearing and shortly thereafter, for WVTRA to object to the admissibility of OOIDA's pre-filed testimony. See, May 18, 2021 Hearing Transcript (Tr.) at 6, 8-9, 11-14, 16-23, 34-35 (May 24, 2021); See, Exhibits from Hearing (May 24, 2021).

At the hearing held on May 18, 2021, as a preliminary matter, Chairman Lane accepted and admitted the testimony that Staff and the intervening parties had filed in the case. Specifically, the Chairman stated "Without objection, all testimony has been marked and will be admitted into the customary manner, using the initials of the witness, and D for Direct and R for Rebuttal." Thereafter, counsel for WVTRA asked, "Your Honor, you said that all testimony is admitted into the record. Is the [Joint Stipulation] likewise admitted as an exhibit into the record?" Tr. at 9-10 (emphasis added).

Later during counsel for WVTRA's direct examination of WVTRA's president, Mr. Reed, Chairman Lane inquired about the differences between what Staff and WVTRA agreed to in the Joint Stipulation and the position that OOIDA had in its pre-filed testimony. Tr. 29-30. Specifically, the exchange included the following:

Chairman: Okay. Okay. The other difference between the joint stipulation and OOIDA's testimony was a cap on the administrative fee; is that correct?

Mr. Reed: Yes.

Chairman: The current tariff is five percent of service and Staff recommended five percent and the Towing Association agreed to five percent, but OOIDA wanted that cap to \$500 or lesser of the two.

Mr. Reed: Right.

Thereafter, the Chairman requested and Mr. Reed proceeded to explain WVTRA's objection to the cap. Id. This was an appropriate inquiry by the Chairman even if the issue had never been raised by OOIDA if the Commission felt that a cap should be considered. The Commission's job is to obtain information on the record that it believes is pertinent to the discharge of its duties. This includes asking questions of witnesses while affording parties the opportunity to timely object to the questions asked by the Commission.

Lastly, the docket contains the transcript and exhibits from the hearing, which include the pre-filed testimony of Mr. Matousek listed under the "Intervenor's Exhibits" marked as "MM-D" for the direct testimony of Mr. Matousek and "MM-R" for the rebuttal testimony of Mr. Matousek. See, OOIDA Exs. MM-D and MM-R, WVTRA Exs. CR-D and CR-R.

Despite the events noted above, WVTRA did not timely object to the admission of OOIDA's pre-filed testimony during the pendency of this general investigation as required by Procedural Rule 13.8. Also, counsel for WVTRA did not object to its witness, Mr. Reed's testimony regarding OOIDA's position during the hearing or to the admittance of Mr. Reed's rebuttal testimony to Mr. Matousek's pre-filed testimony. The Commission will therefore reject WVTRA's request for reconsideration on this ground.

Next, although closely related to the argument discussed above, counsel for WVTRA argues that the Commission erred by considering OOIDA's pre-filed testimony in the review and determination of statewide maximum wrecker rates. Although the Legislature requires the Commission to consider specific factors when determining fair, effective and reasonable rates, these statutory factors are not exhaustive.³ The Commission is not limited in the information it reviews and considers during its review of the rates and its determination of fair, effective, and reasonable rates. See, W. Va. Code § 24A-2-2b; See, Motor Carrier Rule 5.13. Furthermore, the Commission is not bound by the rules of evidence in the investigations, preparations and hearings of cases. See, W. Va. Code § 24-1-7, Procedural Rule 13.1. As such, the Commission did not err by considering the concerns and issues raised by OOIDA's pre-filed testimony, when

³ Factors determining the fair, effective, and reasonable rates levied by a carrier for recovering, towing, hauling, carrying, or storing a wrecked or disabled vehicle. The commission shall consider, but shall not be limited to:

- (A) Tow vehicle or vehicles and the special equipment required to complete recovery or tow;
- (B) Total time to complete the recovery or tow;
- (C) Number of regular and extra employees required to complete the recovery or tow;
- (D) Location of vehicle recovered or towed;
- (E) Materials or cargo involved in recovery or tow;
- (F) Comparison with reasonable prices in the region;
- (G) Weather conditions; and
- (H) Any other relevant information having a direct effect on the pricing of the recovery, towing, and storage of a recovered or towed vehicle. W. Va. Code § 24A-2-2b(b)(1) (emphasis added).

executing its legislative mandate. Therefore, the Commission will deny WVTRA's reconsideration argument asserted on this ground.

It is worth noting, arguendo, that even in the absence of OOIDA's pre-filed testimony, the Commission would still be presented with OOIDA's rate concerns because Mr. Reed nor counsel for WVTRA sought to make "any changes, additions or modifications" to Mr. Reed's pre-filed rebuttal testimony that discusses Mr. Matousek's pre-filed testimony. See, Tr. at 18-19; See also, WVTRA Ex. CR-R1 at 1-2 (discussing Mr. Matousek's direct testimony).

In this instance, contrary to WVTRA's assertions regarding OOIDA's pre-filed testimony, the Commission fulfilled its "duty to receive evidence and rule upon all objections and motions, and to take such other actions as may be necessary and appropriate to the discharge of the Commission's duties, consistent with statutory authority." See, Procedural Rule 12.2.2.

Lastly, WVTRA contends that the Commission erred by improperly modifying the Joint Stipulation and by not permitting Staff to present its witness or evidence to demonstrate Staff's support of the Joint Stipulation. We have previously addressed WVTRA's contention regarding the Commission's treatment of proposed stipulations:

As helpful and useful as Joint Stipulations are to the Commission to carry out its statutory duties, the Commission is not bound to accept a Joint Stipulation. All parties entering into a Joint Stipulation before the Commission are well aware that the Joint Stipulation is a recommendation by the parties to the Commission of what they believe is a reasonable resolution of the issues covered by the Joint Stipulation. Parties are also aware, and we have stated repeatedly in our Orders, that a Joint Stipulation of the parties is not binding on the Commission. As a result, parties have for years included language in their Joint Stipulation to attempt to reserve some right to challenge a modification by the Commission of a Joint Stipulation.

Bluefield Gas Co., Case Nos. 17-0546-G-390P and 17-0565-G-42T, Comm'n Order at 5 (Mar. 2, 2018), discussing, Virginia Electric and Power Co. and Utilicorp United, Inc., Case No. 85-553-E-PC, Comm'n Order (Jan. 6, 1987) (holding that the stipulation's language was binding only upon the parties and that the Commission retained the authority to accept, reject or modify any stipulation presented to it). The filing of the Joint Stipulation by Staff and WVTRA did not alter or obviate the Commission's statutory duty in this proceeding to determine rates that are fair, effective, and reasonable and primarily based on the cost of service. See, W. Va. Code § 24A-2-2b; See, Motor Carrier Rule 5.13. Thus, the Commission was not bound by the Joint Stipulation and was

well within our authority to modify provisions therein in order to perform our statutory duty.

Additionally, a review of the transcript reveals that at no time did the Commission prevent Staff from presenting its witness or evidence in support of the Joint Stipulation. For these reasons, the Commission rejects WVTRA's request for reconsideration on these grounds.

The Commission will modify the Final Order and State Maximum Tariff

Although we committed no procedural error, we have further considered the question of a cap on Administrative Fees. Upon further consideration, the Commission will not include a dollar amount cap on the fees. We have clarified that the fee applies only for Accident and Recovery services. We have also clarified that multiple wreckers dispatched to a site where Accident and Recovery work is being performed are not entitled to charge the Accident and Recovery rates unless they are required to perform Accident and Recovery work. We have also required records supporting the use of multiple wreckers at Accident and Recovery scenes. We believe that our clarification of the limits on charging for Accident and Recovery work and additional record keeping to support Accident and Recovery billings will assure that Accident and Recovery billings are supportable and reasonable. Upon reconsideration of the Administrative Fee we conclude that an uncapped Administrative Fee applicable only to valid Accident and Recovery work is reasonable. Therefore, the Commission will amend the Final Order and the revised schedule of maximum state tow rates attached thereto to authorize an Administration Fee equal to five percent of the Accident and Recovery Wrecker service cost, excluding fuel surcharge fee, high risk exposure, bio-hazardous exposure and storage fees.

FINDINGS OF FACT

1. During the hearing, counsel for WVTRA did not object to the admittance of OOIDA's pre-filed testimony into evidence. See, Hearing Transcript (May 24, 2021).
2. Staff and WVTRA executed a Joint Stipulation that inter alia proposed changes to the State Maximum Tariff rates and charges. Joint Ex. 1 (May 24, 2021).
3. The Commission reviewed the 2017 State Maximum Tariff rates based on the information made available in this general investigation, including the pre-filed testimony, as well as the Joint Stipulation, and determined that the Joint Stipulation rates were fair, effective, and reasonable and based primarily on the cost of service, except for two provisions that the Commission modified, which included adding an explanatory note regarding the Accident and Recovery Wrecker Rate and capping the Administrative Fee to the lesser of five percent of service or \$1,000. Comm'n Order at 4-6, Conclusion

of Law ¶ 4, Ordering ¶ 1 (Sept. 24, 2021).

4. WVTRA requested that the Commission modify the Final Order to exclude the pre-filed testimony of OOIDA and adopt the Joint Stipulation in its entirety, or alternatively remand this matter for further evidentiary hearing. WVTRA Petition for Reconsideration at 2-6 (Oct. 1, 2021).

CONCLUSIONS OF LAW

1. Counsel for WVTRA failed to state a timely objection to the Commission's admittance of OOIDA's pre-filed testimony into evidence, as required by Procedural Rule 13.8.

2. The Commission may exercise its discretion in determining what information it may consider when reviewing and establishing fair, effective and reasonable rates, therefore the admission and consideration of OOIDA's the pre-filed testimony was not an error. See, W. Va. Code §§ 24A-2-2b; 24-1-7; See, Motor Carrier Rule 5.13; See, Procedural Rule 13.1.

3. A joint stipulation is a recommendation by the stipulating parties respecting what they regard as a reasonable settlement of the issues for consideration by the Commission. Appalachian Power Co. and Wheeling Power Co., Case No.14-0546-E-PC, Comm'n Order at Concl. Of Law No. 15 (Dec. 30, 2014).

4. It is reasonable to amend the Final Order and the revised schedule of State Maximum Tariff rates attached thereto to allow an Administration Fee equal to five percent of the Accident and Recovery Wrecker service cost, excluding the fuel surcharge fee, high risk exposure, and bio-hazardous exposure and storage fees, as listed under Section 2 of the tariff.

ORDER

IT IS THEREFORE ORDERED that the Petition for Reconsideration filed by the West Virginia Towing and Recovery Association, to the extent it alleges procedural error and a reversal of our decision regarding a cap on the Administrative Fee, is denied.

IT IS FURTHER ORDERED that the Commission Final Order entered on September 24, 2021, and the revised schedule of maximum state tow rates attached thereto is amended to read as follows:

Administration Fee

5% of service

This rate is allowable for Accident and Recovery services only. The fee is applied to all invoice charges excluding the fuel surcharge fee and high risk exposure, bio-hazardous exposure and storage fees.

IT IS FURTHER ORDERED that the Commission Final Order entered on September 24, 2021, remains in full force and effect except as modified by this Order.

IT IS FURTHER ORDERED that on entry of this Order this case shall be removed from the Commission docket of open cases.

IT IS FURTHER ORDERED that the Executive Secretary serve a copy of this Order by electronic service on all parties of record who have participated in this case, all registered third-party tow operators who have filed an e-service agreement, and by United States First Class Mail on all registered third-party tow operators who have not filed an e-service agreement, and on Staff by hand delivery.

A True Copy, Teste,



Connie Graley, Executive Secretary

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