

JOINT COMMITTEE ON GOVERNMENT AND FINANCE
WEST VIRGINIA OFFICE OF THE LEGISLATIVE AUDITOR

POST AUDIT DIVISION

LEGISLATIVE AUDIT REPORT

West Virginia Public Service Commission: Third-Party Towing Rule

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GENERALLY ACCEPTED GOVERNMENT
AUDITING STANDARDS STATEMENT

We conducted this performance audit in accordance with Generally Accepted Government Auditing Standards (**GAGAS**). Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

POST AUDIT DIVISION
Justin Robinson, Director

POST AUDIT DIVISION

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West Virginia Public Service Commission: Third-Party Towing Rule

April 24, 2022

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EXECUTIVE SUMMARY: PAGE 1

ISSUE 1: PAGE 3

The Public Service Commission Has, As Required by the Provisions of W.Va. Code 24A-2-2b, Promulgated a Legislative Rule Governing Third-Party Towing That Establishes a Reasonable Rate-Making Process, A Timely Process for Adjudicating Formal Complaints, and Effective Enforcement Activities.

APPENDIX A: PAGE 15
Draft Report Transmittal Letter

APPENDIX B: PAGE 16
PSC Response to Audit Report

APPENDIX C: PAGE 19
Objective, Scope, & Methodology

APPENDIX D: PAGE 20
PSC's Current Rate Schedule for Third-Party Tows

EXECUTIVE SUMMARY

The Legislative Auditor conducted this audit on the West Virginia Public Service Commission in accordance with W.Va. Code §24A-2-2b and §4-2-5. The objective of this review was to evaluate the rules promulgated by the Public Service Commission in accordance with W.Va. Code §24A-2-2b regarding third party tows. This evaluation will primarily assess: (1) the ratemaking policy for reasonableness, (2) the complaint process for timeliness, and (3) the penalties for effectiveness.

Frequently Used Acronyms in This Report

ALJ: Administrative Law Judge

GVW: Gross Vehicle Weight

CPI: Consumer Price Index

PSC: Public Service Commission

FAAAA: Federal Aviation Administration
Authorization Act

Report Highlights

Issue 1: The Public Service Commission Has, As Required by the Provisions of W.Va. Code 24A-2-2b, Promulgated a Legislative Rule Governing Third-Party Towing That Establishes a Reasonable Ratemaking Process, A Timely Process for Adjudicating Formal Complaints, and Effective Enforcement Activities.

- The PSC's current procedures for setting and adjusting the maximum tariff rate for third-party tows is a reasonable process that bases rates on market factors, such as inflation, and employs the use of comparative analysis with the established rates of other jurisdictions.
- The Legislative Auditor compared the PSC's process for adjudicating formal complaints for third-party towing to other consumer complaint processes used by other state entities. The PSC's process is designed to ensure timely resolution of formal consumer complaints.
 - From 2016 through 2020, the PSC adjudicated over 200 formal complaints with an average resolution time of 124 days from the date upon which the complaint was filed.
- While current state law affords limited authority to the PSC to assess penalties or conduct enforcement actions against tow companies performing third-party tows, the Legislative Auditor identified no substantive concerns with the ability of the PSC to carry out its limited regulatory function with respect to third-party towing.

Recommendations

1. The PSC should consider incorporating direct and indirect cost data into its considerations when reviewing and revising the maximum rates for third-party tows.
2. The Legislative Auditor recommends the Legislature consider authorizing the PSC to administer financial penalties for third-party tow providers who do not comply with recommended decisions issued by the PSC or ALJs related to formal complaints.

Post Audit Division Discussion on PSC Response to Audit Report

The PSC has indicated in its response to this audit report (Appendix B) that in its experience in attempting to collect cost data from tow companies it has not been successful. The West Virginia Tow Association objects to providing this type of information citing the information is irrelevant, overly broad, and unduly burdensome. Tow companies also resist in providing this information in individual tow complaint proceedings. Based on the recommendation made in this report that the PSC attempt to collect and incorporate actual cost data from tow companies as part of its rate making and review process, this resistance and objection would not provide an avenue for this to be successful. This is unfortunate, as the collection and use of this data would serve to ensure that the rates set for both consumers and tow companies are fair and reasonable based on more directly related cost data.

Issue 1: The Public Service Commission Has, As Required by the Provisions of W.Va. Code §24A-2-2b, Promulgated a Legislative Rule Governing Third-Party Towing That Establishes a Reasonable Rate-Making Process, A Timely Process for Adjudicating Formal Complaints, and Effective Enforcement Activities.

Issue Summary

During the 2016 Regular Session, the Legislature enacted House Bill 4186, which required the West Virginia Public Service Commission (PSC) to promulgate new rules regarding third-party tows (or non-consent tows). In addition to requiring the new rule, the law required the PSC to establish a process for setting and periodically reviewing the maximum allowable rates for third-party tows, a complaint process, and effective penalties for wrecker companies that violated or otherwise failed to comply with the PSC's regulations. In addition, House Bill 4186 required the Legislative Auditor to conduct an audit¹ on the rule and assess the following:

- Has the PSC established a ratemaking process that is reasonable?
- Does the PSC's policy and process for adjudicating formal complaints resolve those complaints in a timely manner?
- Does the PSC have effective penalties in place to ensure compliance with its regulations for third-party towing services?

The Legislative Auditor conducted a comprehensive review of the PSC's historical ratemaking for third-party tows. In addition, the Legislative Auditor reviewed documentation related to all formal third-party towing complaints received and adjudicated by the PSC from 2016 through 2020 and assessed the PSC's enforcement activities. The results of these analyses identified the following:

- The PSC's current procedures for setting and adjusting the maximum tariff rate for third-party tows is a reasonable process that bases rates on market factors, such as inflation, and employs the use of comparative analysis with the established rates of other jurisdictions.
- The Legislative Auditor compared the PSC's process for adjudicating formal complaints for third-party towing to other consumer complaint processes used by other state entities. The PSC's process is designed to ensure timely resolution of formal consumer complaints.
 - From 2016 through 2020, the PSC adjudicated over 200 formal complaints with an average resolution time of 124 days from the date upon which the complaint was filed.
- While current state law affords limited authority to the PSC to assess penalties or conduct enforcement actions against wrecker companies performing third-party tows, the Legislative Auditor identified no substantive concerns with the ability of the PSC to carry out its limited regulatory function with respect to third-party towing.

¹ During the 2021 Regular Session, the Legislature passed Senate Bill 655 which delayed the date upon which the PSC's rule was to sunset and the due date for the legislative audit (December 31, 2022).

While the PSC’s current process for setting maximum rates for third-party tows is, in the opinion of the Legislative Auditor, a reasonable process, the Legislative Auditor notes that the inclusion of additional, cost-based considerations could improve the process further. This could be achieved by reviewing a sample of financial records from wrecker companies or by using a measure of inflation that is more specifically tailored to the cost of providing wrecker services. In addition, the Legislature could consider granting the PSC additional authority or penalty powers to enforce the provisions of its rule for third-party towing.

Background

Early 1990’s and the FAAAA

Under current state law, the Public Service Commission is empowered to set and enforce a maximum tariff rate for third-party tows performed in West Virginia. A third-party tow is any tow performed on a motor vehicle without the prior consent or authorization of the vehicle owner or operator. Typically, third-party tows occur when a vehicle is improperly parked on private property or has been involved in a motor vehicle accident and a tow has been ordered by law enforcement on-site.

Historically, the PSC exercised broad regulatory authority over third-party wrecker services, including regulating market-entry and allowable rates service providers could charge. However, in 1994, Congress enacted into law the Federal Aviation Administration Authorization Act (FAAAA) which, among other provisions, federally preempted the authority of the PSC to regulate market entry, service routes, rates for service, or types of services provided by wrecker companies. Enactment of the FAAAA nullified statewide maximum rates for third-party towing put into effect by the PSC as part of a 1990 rate case.

The following year, Congress relaxed the federal preemption so as to allow the PSC to regulate the maximum rates a wrecker company could charge for third-party towing services, and the PSC reinstated its prior maximum tariff rates in 1996.

2006 General Investigation (Case No. 06-1915-MC-GI)

The statewide maximum tariff rate would remain unchanged from 1990 until 2006, when the PSC undertook a General Investigation to examine wrecker companies’ compliance with the PSC’s itemized invoice requirements. Upon the recommendation of PSC staff, the Commission expanded the scope of its review to include a determination of whether the statewide maximum rates in effect at the time were appropriate and fair. The PSC determined that the statewide maximum tariff rates were “*outdated, unjust, and unreasonable.*”

Staff estimated that only 40 percent of all authorized third-party tow service providers were subject to the statewide maximum rates in effect as of 2006. The majority of authorized wrecker service providers had applied for and received special approval for rates in excess of the statewide maximum². Thus, nearly two-thirds of all third-party tow providers in West Virginia were authorized to charge hourly rates well in excess of the maximum. For example, the statewide maximum hourly rate for a third-party tow of a lightweight passenger vehicle (one ton or less) was set at \$25/hour—a rate set in a 1990 rate-case and based on cost data from the late 1980s. However, PSC staff indicated that the **average** hourly fee being assessed at the time was approximately

² Prior to 2016, wrecker companies providing third-party towing services could file for hourly rates that exceeded the statewide maximum through the PSC’s TOW process.

\$43/hour, and the highest approved rate in the state was \$55/hour—more than twice the statewide “maximum.”

The PSC’s 2006 General Investigation (Case No. 06-1915-MC-GI) was resolved by the adoption of a Joint Stipulation Agreement with the West Virginia Towing and Recovery Association which modified the statewide maximum rates for third-party tows to more appropriately align with the market rates in effect at the time.

During the 2016 Regular Session, the Legislature enacted House Bill 4186, which requires the PSC to promulgate new rules regarding third-party tows. The provisions of House Bill 4186 require the PSC’s rule to establish:

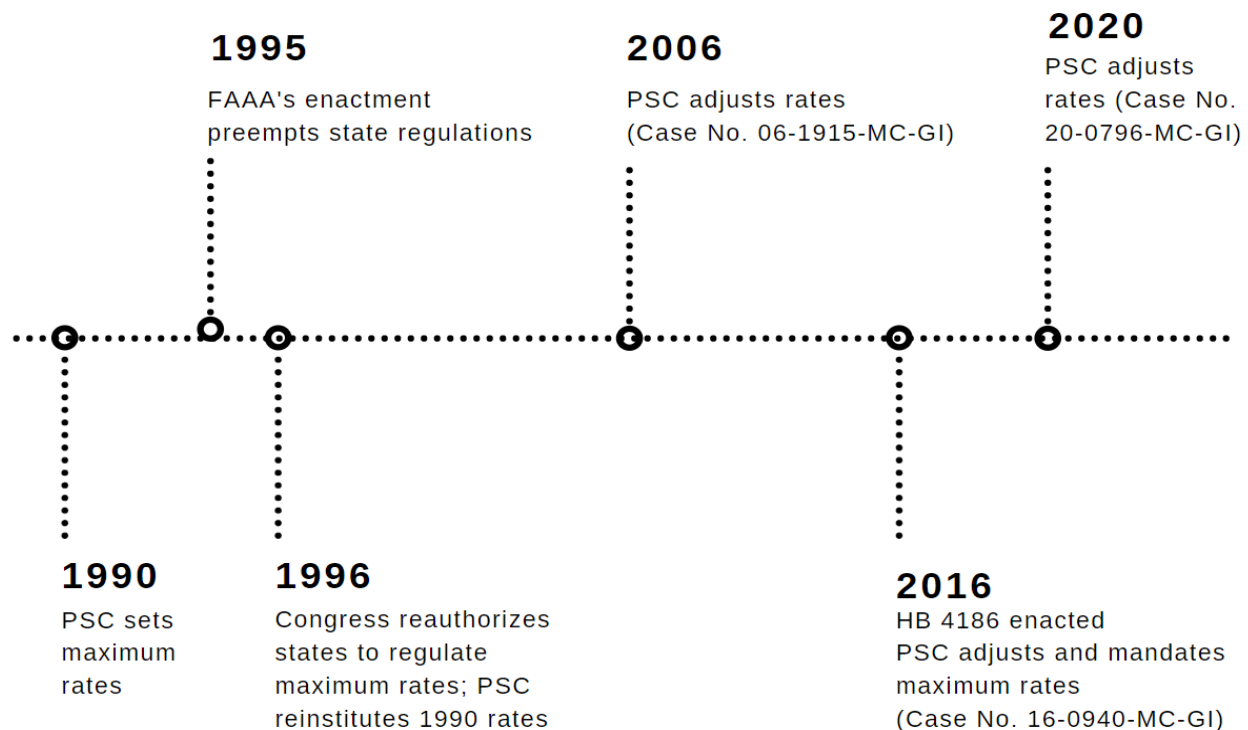
Factors determining the fair, effective and reasonable rates levied by a carrier for recovering, towing, hauling, carrying or storing a wrecked or disabled vehicle...

. . .The process to review existing maximum statewide wrecker rates and special rates for the use of special equipment in towing and recovery work to ensure that rates are just, fair and reasonable. . .

In addition, the law requires the PSC to establish a “*process for filing a complaint, the review and investigation process to ensure it is fair, effective and timely.*” In May 2016, the PSC issued a General Order formally proposing amendments to its existing motor carrier rule to effectuate the provision of House Bill 4186.

Since the PSC’s legislative rule has been in effect (150 C.S.R. 9), it has adjusted the statewide maximum rates for third-party tows twice: 2016 and 2020. The timeline in Figure 1 shows the history of the PSC’s ratemaking activities with respect to third-party towing from 1990 through 2020.

Figure 1. Third-Party Tow Ratemaking in West Virginia—1990-2020



Source: *Legislative Auditor's analysis of PSC order and other documentation related to rate revisions.*

The Public Service Commission's Process for Reviewing and Adjusting the Statewide Maximum Rates for Third-Party Tows is Reasonable, Ensures That Rate Adjustments Are Market-Driven, and Align with the Rates Charged by Other States and Jurisdictions.

W.Va. Code §24A-2-2b requires the PSC to establish fair, effective, and reasonable rates related to third-party tows. In addition, this sets forth a list of considerations the PSC must undertake in setting the allowable rates for towing and storage. These considerations include but are not limited to:

- the type and number of vehicles required;
- the use of special or ancillary equipment;
- the time required to complete the tow;
- the number of employees;
- the materials and/or cargo involved in the tow; and
- comparisons with prices in the broader region.

In order to determine if the PSC's established process for reviewing and adjusting rates for third-party tows is reasonable, the Legislative Auditor reviewed the PSC's current statewide maximum rates for third-party tows to determine the extent to which the enumerated factors from W.Va. Code §24A-2-2b are incorporated. In addition, the Legislative Auditor reviewed all documentation related to the PSC's two rate adjustment orders (2016 and 2020) since enactment

of the legislative rule to assess any additional factors or considerations used by the PSC in setting rates for third-party tows.

The PSC's current set of maximum rates stem from a September 2021 order issued by the PSC and establish a schedule of rates to cover a broad range of third-party tows. The full schedule of rates can be found in Appendix D.

The current rate schedule demarcates the two primary types of third-party tows: "Tow and Go" hourly rates (i.e., non-accident tows from private property) and "Accident and Recovery" tows, as typically ordered from law enforcement at the scene of a motor vehicle accident. Tow rates for each type of third-party tow are assessed on a per-hour basis and in tiers based on the Gross Vehicle Weight (GVW) of the towed vehicle and range from "Light Duty Towing" (GVW 7,000lbs or less) to "Super Heavy-Duty Towing" (GVW 26,001+lbs).

In addition, the rate schedule establishes maximum allowable fee assessments related to additional labor, tows performed on weekend or holidays, indoor and outdoor storage of towed vehicle, high-risk or bio-hazard exposure while performing certain third-party tows (such as those involving a chemical spill), and the use of specialized or ancillary equipment while performing a tow.

The Legislative Auditor reviewed documentation from the PSC related to each instance wherein third-party tow rates have been modified since passage of House Bill 4186. According to the PSC's records, third-party tow rates were modified in 2016, just after passage of the legislation and promulgation of the legislative rule, and again in 2020. Based on the documentation, the Legislative Auditor determined that the adjustments to third-party tow rates in both 2016 and 2020 employed similar methodology.

Primarily, the PSC has adjusted rates for inflation. According to staff testimony given during a 2017 hearing before the PSC, ". . .we applied the CPI factor today or as of the date it was created, which was approximately a 23-percent increase." Similarly, staff testified in 2021 that, "Changes to . . . rates were based solely on the Bureau of Labor Statistics CPI inflation calculator. The calculation was based on CPI increase from July 2017 to January 2021."

In addition to proposing rate adjustments based on inflation, PSC staff testified that they reviewed hourly rates from other states or jurisdictions that similarly set maximum wrecker rates. In conducting this review, staff testified that it attempted to limit analysis to surrounding states or states with similar topography. (Virginia, Maryland, Tennessee). Based on these analyses, staff indicated to the PSC that West Virginia's maximum rates for third-party tows were lower than those assessed in other states, and therefore, reasonable.

To assess the reasonableness of the PSC's methodology for adjusting third-party tow rates, the Legislative Auditor conducted a comparative analysis with other states and jurisdictions that set maximum wrecker rates. The focus of this analysis was to: (1) identify the primary factors considered by other states and jurisdictions when revising or modifying their wrecker rates; and (2) compare the PSC's current rate schedule with the rates established by other states and jurisdictions to assess West Virginia's prices compared to the broader market.

The Legislative Auditor obtained information from four other jurisdictions—Louisiana, Colorado, Utah, and Alexandria, Virginia—regarding the processes and considerations employed by each when modifying or adjusting rates.

Both the state of Louisiana and Colorado set maximum wrecker rates for third-party tows by statute. The rate schedules established by the respective states operate similarly to that maintained by the PSC in that it covers the two primary types of third-party tows (private property and vehicle accident tows) across a tiered system of vehicle weights. In addition to establishing rates by state law, Colorado and Louisiana statutes also dictate how and when wrecker rates are to be modified via state law. In Colorado, wrecker rates are updated on an annual basis by applying the Consumer Price Index for the Denver-Aurora-Lakewood area. Similarly, Louisiana law indicates that its wrecker rates will be increased or decreased in accordance with a specific measure of CPI (CPI for the South Region, Urban Population Parameter, “Transportation Commodities Less Motor Fuel Parameter.”)

The Legislative Auditor received a letter from the city of Alexandria, Virginia detailing its considerations when setting and modifying wrecker rates established by the city. Alexandria only establishes maximum rates for one type of third-party tow (private property tows), and indicated in its response:

The City of Alexandria follows the above framework for establishing towing and storage rates. These rates are set by City Council ordinance in coordination with adjacent local government tow rates. Vehicles are often towed from one jurisdiction and stored in another. For example, many of the vehicles towed from Alexandria are taken to tow yards in neighboring Fairfax County. To avoid confusion, the City tries to establish rates that are consistent with neighboring Fairfax and Arlington Counties. To answer your question, the City of Alexandria sets towing and storage rates to be consistent with adjacent jurisdictions. Although the consumer price index and inflation are considered, they are only a small piece of the overall decision.

Thus, the city of Alexandria employs both methodologies currently used by the PSC when adjusting maximum rates for third-party tows. In addition, a consultant study conducted in 2015 for the Utah Department of Transportation, Motor Carrier Division and Research Division recommended that the state of Utah “employ [the use of price indices] when adjusting the maximum tow related fees for inflation using available Bureau of Labor Statistics data and local property values.”

For the comparison of current rate schedules, the Legislative Auditor was able to obtain rate data from seven states and jurisdictions for comparison to the PSC’s current rate schedule for third-party tows. All seven jurisdictions set maximum rates for private property tows, and three jurisdictions (Colorado, Louisiana, and Utah) set maximum rates for both of the primary types of third-party tows. Figures 2 and 3 provide a detailed breakdown of the PSC’s current rate schedule compared to other jurisdictions for both Private Property Tows and Vehicle-Accident Tows. Because of variations in how the jurisdictions tier their maximum rate schedules according to vehicle weight ratings, the Legislative Auditor’s analysis grouped rates across four weight-tiers: Light Duty (GVW 7,000lbs or less), Medium Duty (7,001-10,000lbs), Heavy Duty (10,001-26,000lbs), and Super Heavy Duty (26,000+lbs).

Figure 2
Comparison of PSC Rates with Other Jurisdictions
Private Property Tows

	West Virginia	Alexandria	Colorado	Georgia	Louisiana	Nashville	Ohio	Utah
Light Duty	\$102	\$135	\$204	\$175	\$108	\$155	\$129	\$168
Medium Duty	\$138	\$250	\$234	\$300		\$275- \$375		
Heavy Duty	\$211	\$500	\$316	\$450	\$236		\$216	\$280
Super Heavy Duty	\$332		\$357	\$850	\$304			

Source: Rates obtained from statute and/or rules of respective states and jurisdictions, rounded to the nearest dollar.

Figure 3
Comparison of PSC with Rates Other Jurisdictions
Vehicle-Accident Tows

	West Virginia	Colorado	Louisiana	Nashville	Utah
Light Duty	\$160	\$233	\$147	\$175- \$450	\$168
Medium Duty	\$267	\$278			\$280
Heavy Duty	\$374	\$363	\$304		\$347
Super Heavy Duty	\$620-\$1,069	\$420	\$371		

Source: Rates obtained from statute and/or rules of respective states and jurisdictions, rounded to the nearest dollar.

The data in the tables above corroborate the determinations made by PSC staff during testimony provided to the PSC during its 2016 and 2020 hearings regarding rates. West Virginia’s current rate schedule for third-party tows is in line with, and often lower than, the rates charged by other states or municipalities that set maximum rates.

The Legislative Auditor concludes that the PSC’s process for setting and adjusting the maximum rates for third-party tows is reasonable. Since the Legislature passed House Bill 4186, the PSC’s process has incorporated the considerations enumerated by the Legislature in W.Va. Code §24A-2-2b. Moreover, a review of the documentation related to the PSC’s two rate adjustments since 2016 find that the rates are adjusted based on market factors, such as inflation (via the use of a consumer price index) and a comparison of market rates. Evidence obtained from a number of other states and municipalities indicate that consideration of these market factors is a common best practice among jurisdictions that establish maximum rates for third-party towing services. Finally, by comparing the PSC’s current rate schedule for third-party tows to the rate schedules from other jurisdictions, it is evident that the PSC’s rate setting process has produced rates that are often below those charged by other states and municipalities.

While, the Legislative Auditor is of the opinion that the PSC’s current process meets a standard of reasonableness, the PSC could potentially improve its rate setting policy by incorporating direct and indirect cost data into its considerations. Direct cost data could be obtained by analyzing financial data from a statistically significant sample of authorized wrecker companies.

Indirect cost data could be incorporated through the use of a more specific measure of inflation that more specifically relates to the costs of providing towing and wrecker services, such

as the CPI “Transportation Commodities Less Motor Fuel Parameter” currently used by the state of Louisiana. This measure of inflation specifically tracks the changes in price for items that comprise some of the core cost components for providing wrecker services such as vehicles (new and old) and motor vehicle parts and equipment, such as motor oil, engine coolant, tires, etc.

The Public Service Commission Has Established a Process for Receiving and Adjudicating Formal Complaints That is Designed to Achieve Timely Resolution.

W.Va. Code §24A-2-2b, as enacted by the passage of House Bill 4186, requires the PSC to include in its legislative rule a “*process for filing a complaint, the review and investigation process to ensure it is fair, effective and timely.*” The Legislative Auditor interviewed PSC staff to obtain an understanding of the formal complaint process established by it, pursuant to W.Va. Code.

Consumers can file formal or informal complaints with the PSC. Informal complaints are received by the PSC either by telephone, online (via its informal complaint form), or via letter. Once received, PSC staff attempt to resolve the complaint by speaking with the utility. According to the PSC, approximately 97 percent of informal complaints are resolved within 30 days of filing.

When a formal complaint is filed and received by the PSC, the complaint is processed and assigned to an Administrative Law Judge (ALJ) and member of the PSC staff for a review. When the PSC assigns a complaint to the ALJ Division, a recommended decision is requested within 210 days³. The PSC will then send notice to the defendant (third-party tow provider), who will have 10 days to file an official response to the consumer complaint.

Within the first 90 days of the formal complaint being filed, PSC staff with the Utilities and Legal Divisions conduct an investigation, establish the pertinent facts for the case, conduct interviews, review documents, and ultimately issue a final joint recommendation to resolve the case. The parties to the complaint may agree to the final recommendation issued by staff and settle the case or file objections and proceed to a hearing before the ALJ. While the PSC reports that the majority of cases do not require a hearing, complaint cases that do go before an ALJ should result in a recommended decision by the ALJ within 210 days of the complaint’s filing.

The Legislative Auditor sought to compare the PSC’s established complaint process for third-party tow complaints with other consumer-complaint processes in the state. According to the PSC’s motor carrier rule, the process for adjudicating third-party tow complaints is substantively similar to the process employed by the PSC for resolving other consumer complaints under its jurisdiction. 150 C.S.R. 9.5.12b indicates:

*All third-party tow complaint cases will be immediately referred to the Division of Administrative Law Judges upon filing and **in all other respects the case will be processed in the same manner as residential billing dispute cases**, as that process may be modified by further Commission Order.* (Emphasis added).

³ Parties to a formal complaint are offered the opportunity to enter into mediation throughout the process to attempt to resolve the complaint. If the parties elect to mediate, the PSC’s process and timeline are suspended for the duration of the mediation. Mediations are typically processed within forty-five days.

In addition, the Legislative Auditor compared the PSC’s complaint process to another common consumer complaint process. Occupational licensing boards, organized under Chapter 30 of the West Virginia Code, are responsible for regulating the safe practice of numerous professions in the state of West Virginia (medicine, pharmacy, physical therapy, etc.). W.Va. Code §30-1-5(c) provides that each occupational licensing board has 18 months to issue its final decision related to formal complaint from the date upon which the complaint was filed:

*Every board referred to in this chapter shall investigate and resolve complaints which it receives and shall, within six months of the complaint being filed, send a status report to the party filing the complaint and the respondent by certified mail with a signed return receipt and **within one year of the status report’s return receipt date issue a final ruling**, unless the party filing the complaint and the board agree in writing to extend the time for the final ruling. (Emphasis added).*

In addition to analyzing the design of the PSC’s formal complaint process for timeliness, the Legislative Auditor reviewed documents related to all formal complaints received by the PSC for third-party tows from 2016 through 2020. In total, the PSC received 229 formal third-party tow complaints over the five-year period. Figure 4 provides a breakdown.

Figure 4 Formal Complaints, By Year 2016-2020	
Year	Number of Formal Complaints
2016	45
2017	53
2018	33
2019	52
2020	46
Total	229
Source: Complaint data from the PSC, 2016-2020	

The Legislative Auditor reviewed documents related to each of the 229 complaints resolved by the PSC from 2016 and 2020 to determine how many days each case required for final resolution. The results of this analysis determined that on average, the PSC adjudicated formal complaints related to third-party tows within 126 days of the complaint being filed. Further, only 39 complaints required more than 200 days to reach a final resolution, with approximately 47 percent of all formal cases being resolved in 100 days or less. Moreover, the Legislative Auditor identified 23 cases from 2016 to 2020 that required a full hearing before an ALJ. The average time to adjudicate these 23 cases was approximately 264 days, or more than twice the time required to adjudicate all cases.

For comparison, the Legislative Auditor reviewed data from a selection of occupational licensure boards with respect to their average time taken to resolve 244 formal complaints. From 2016 to 2020, the average time for boards to resolve complaints ranged from as low as 72 days to a maximum of 778 days (in excess of two calendar years).

While Current State Law Does Not Authorize the PSC to Assess Penalties on Wrecker Companies, The Legislative Auditor Identifies No Substantive Concerns with Its Ability to Carry Out Its Limited Regulatory Function Over Third-Party Tows.

In addition to assessing the PSC's ratemaking and complaint processes, House Bill 4186 also requires the Legislative Auditor to assess the PSC's penalties and enforcement activities for effectiveness. The PSC indicated to the Legislative Auditor that W.Va. Code provides that wrecker companies that violate the provisions of W.Va. Code Chapter §24A may be subject to prosecution for a misdemeanor offense. However, nothing in current Code authorizes the PSC to levy financial penalties or damages for wrecker companies who violate state law of PSC regulations related to third-party tows.

If the PSC determines, via the formal complaint process, that a wrecker company has violated the laws with respect to third-party towing services, the PSC may order relief for the complainant. According to the PSC, this most commonly occurs when a formal complaint is filed alleging that a consumer was overcharged for a third-party tow. If the PSC finds in favor of the complainant, the PSC will order the wrecker company to issue a refund to the consumer.

While the PSC cannot mandate or force a wrecker company to comply with the recommendations resulting from formal complaint resolution, the PSC enforces its orders by issuing recommendations that local authorities remove noncompliant wrecker companies from local third-party tow rotation lists. Third-party tow rotation lists are maintained by counties and municipalities across the state as a fair and equitable way to assign a wrecker company to respond to vehicle accidents that occur within their jurisdictions. Therefore, removal of noncompliant wrecker companies from these rotation lists can have the effect of severely impacting the amount of business a company receives from providing third-party towing services. In addition, an ALJ may order the removal of noncompliant wrecker companies from local rotation lists.

The PSC indicates that it has encountered no issues in getting wrecker companies to comply with PSC orders stemming from formal complaints. However, the Legislative Auditor notes that the threat of removing wrecker companies from local third-party tow rotation lists may not always be a viable option. Based on data provided by the PSC, the Legislative Auditor identified 11 counties in West Virginia with 2 or fewer wrecker companies authorized to perform third-party tows, including one county (Pleasants) with no authorized wreckers providing third-party towing services. Figure 5 provides a detailed breakdown.

Figure 5 Counties with Two or Fewer Authorized Third-Party Tow Providers	
County	Third-Party Tow Providers
Pleasants	0
Clay	1
Gilmer	1
Tucker	1
Tyler	1
Wirt	1
Calhoun	2
Doddridge	2
Lincoln	2
Putnam	2
Wetzel	2

Source: Data provided by the PSC.

In counties with a low number of authorized providers of third-party towing services, the Legislative Auditor is concerned that removing (or threatening to remove) wrecker companies from the rotation lists used by 911 personnel to respond to vehicle accidents may not be feasible, or in the best interest of public safety. **Therefore, the Legislative Auditor recommends the Legislature consider authorizing the PSC to administer financial penalties for third-party tow providers who do not comply with recommended decisions issued by the PSC or ALJs related to formal complaints.** If the Legislature authorizes the PSC to levy financial penalties, consideration should also be given to establishing a process by which wrecker companies may appeal such penalties, as a matter of due process.

Conclusion

With passage of House Bill 4186, the Legislature set a clear expectation that the Public Service Commission would establish, via legislative rule, a ratemaking process for third-party towing rates that was reasonable, a formal complaint process that adjudicated third-party tow complaints in a timely fashion, and enforcement activities that ensured that aggrieved parties recover the costs of unreasonable or unallowable towing charges. It is the opinion of the Legislative Auditor that the PSC has met the intent of the Legislature with its legislative rule governing third-party tows in West Virginia.

The PSC has established a process for reviewing and adjusting maximum rates for third-party tows that meets the standard of reasonableness, has produced rates lower than those assessed in a number of other states and jurisdictions, and employs methodologies used for setting third-party towing rates around the United States. While the current process established by the PSC is reasonable, it is the opinion of the Legislative Auditor that adding cost data as a factor for consideration could improve the process further. Moreover, the Legislative Auditor notes that the PSC’s current rule supports this idea by stating, “*The Commission will base its review of the maximum statewide wrecker rates primarily on the costs of providing services.*”

Further, the PSC has established a process for adjudicating formal complaints related to third-party tows that is timely in both its design and in practice, with most complaints being fully

resolved in less than 100 days. Finally, the PSC indicates that it has encountered no issues with getting wrecker companies to comply with its decisions, particularly as it relates to refunding consumers for inappropriate charges. However, granting the PSC limited authority to mandate refunds or assess penalties in certain circumstances could significantly bolster its ability to properly and fully enforce its third-party tow regulations.

Recommendations

1. The PSC should consider incorporating direct and indirect cost data into its considerations when reviewing and revising the maximum rates for third-party tows.
2. The Legislative Auditor recommends the Legislature consider authorizing the PSC to administer financial penalties for third-party tow providers who do not comply with recommended decisions issued by the PSC or ALJs related to formal complaints.

Appendix A
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April 15, 2022

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Charleston, WV 25301

Chairwoman Lane:

This is to transmit a draft copy of the Post Audit Division's report on the West Virginia Public Service Commission. This report is tentatively scheduled to be presented during the April interim meeting of the Post Audits Subcommittee, which is currently scheduled on **Sunday, April 24, 2022**, beginning at 3:00p.m. in Room 451-M. It is expected that a representative from the PSC be present at the meeting to respond to the report and answer any questions committee members may have during or after the meeting.

If you would like to schedule an exit conference to discuss the draft report prior to its release, please contact Terri Stowers, Assistant to the Director, at 304-347-4880 or at terri.stowers@wvlegislature.gov by Wednesday, April 20, 2022 to schedule a meeting. In addition, if you wish to provide a written response to be included in the final report, this must be submitted to us no later than **Noon on Friday, April 22, 2022**, in order for it to be included in the final report. Thank you for your cooperation and please feel free to contact our office with any other questions or concerns.

Sincerely,

A handwritten signature in blue ink that reads "Justin Robinson".

Justin Robinson,
Director

Enclosure

Appendix B



Public Service Commission

Jessica M. Lane, General Counsel

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April 22, 2022

By electronic mail (Justin.Robinson@wvlegislature.gov)

Justin Robinson, Director

West Virginia Legislative Auditor's Office

Post Audit Division

Building 1, Room W-329

1900 Kanawha Boulevard East

Charleston, WV 25305-0610

Re: Report on third-party tow regulation

Dear Mr. Robinson:

Thank you for the opportunity to respond to your Draft Report on third-party tow regulation by the Public Service Commission. I apologize that I am late submitting these comments. The PSC has the following for consideration by the post-audit subcommittee:

At the bottom of page 7 top of page 8, and again in Recommendation 1 on page 12, the Report states that "the PSC's current process meets a standard of reasonableness, the PSC could potentially improve its rate setting policy by incorporating direct or indirect cost data into its considerations. Direct cost data could be obtained by analyzing financial data from a statistically significant sample of authorized wrecker companies."

- In response, PSC experience is that tow companies are very resistant to providing direct cost data unless an operator has prepared financial data in support of an individual rate proceeding filed under 150 C.S.R. 2, Rule 30.1 (Historical M.C. Tariff Rule 42) to seek rates in excess of the statewide rates. Staff has requested high level data in the statewide maximum investigation without success. The West Virginia Tow Association objected on grounds that the information is irrelevant, overly broad and unduly burdensome. The tow companies also resist providing this type of information in individual tow complaint proceedings.

In addition, the PSC has the following suggested edits:

1. p. 8 footnote 3 – Please add this sentence - “Mediations are typically processed within forty-five days.”
2. There are several statements in the Report that reflect a slight misunderstanding of ALJ recommended decisions and PSC orders. To clarify, ALJ recommended decision become final PSC orders 20 days after issuance if no party to the case files exceptions and the PSC does not stay the recommended decision in order to review the matter itself.
 - The PSC suggests the following corrected text be substituted on page 10, third full paragraph:

If the PSC determines, via the formal complaint process, that a wrecker company has violated the laws with respect to third-party towing services, the PSC may order relief for the complainant. According to the PSC, this most commonly occurs when a formal complaint is filed alleging that a consumer

was overcharged for a third-party tow. If the PSC finds in favor of the complainant, the PSC will order the wrecker company to issue a refund to the consumer.

- For the same reason, the PSC suggests the following corrected text on page 10, fifth full paragraph:

The PSC indicates that it has encountered no issues in getting wrecker companies to comply with PSC orders stemming from formal complaints. ...

- And on page 12, first paragraph, on the fourth line, please delete the word “recommended” so that the phrase reads, “getting wrecker companies to comply with its decisions,”

Thank you for this opportunity to comment.

Best regards.

Sincerely,

Jessica M Lane

Jessica M. Lane,
General Counsel

cc: Charlotte R. Lane, Chairman

Appendix C

Objective, Scope, and Methodology

The Post Audit Division within the Office of the Legislative Auditor conducted this audit of the West Virginia Public Service Commission pursuant to Chapter 4, Article 2, Section 5 of the *West Virginia Code*, as amended.

Objectives

The objective of this audit was:

“To evaluate the rules promulgated by the Public Service Commission in accordance with W.Va. Code §24A-2-2b regarding third party tows. This evaluation will primarily assess: (1) the rate-making policy for reasonableness, (2) the complaint process for timeliness, and (3) the penalties for effectiveness.”

Scope

The scope of this objective comprises calendar years 2016 through 2020. The scope encompassed an analysis of each instance wherein the Commission undertook a General Investigation for the purpose of reviewing third-party tow rates, which included all documents, orders, hearing transcripts, and other documentation regarding those proceedings. In addition, the scope included a review of all documents related to formal complaints adjudicated by the PSC regarding third-party tows for the five-year period. The scope did not include an analysis of informal complaints, nor did it seek to assess the appropriateness of any decision made by the Commission regarding any specific complaint resolution.

Methodology

Post Audit staff gathered and analyzed several sources of information and assessed the sufficiency and appropriateness of the information used as evidence. Testimonial evidence was gathered through interviews or email correspondence with various employees at state spending units. The purpose for testimonial evidence was to gain a better understanding or clarification of certain issues, to confirm the existence or non-existence of a condition, or to understand the respective agency’s position on an issue. Such testimonial evidence was confirmed by either written statements or the receipt of corroborating or physical evidence.

Audit staff analyzed various source documents, such as the final orders from the Commission or an administrative law judge, hearing transcripts, staff memorandums, and complaint files, among others. Audit staff also gathered supporting evidence from other states and jurisdictions for the purpose of benchmarking. These pieces of evidence were gathered from other jurisdictions’ statutes, rules, audit reports, consultant reports, or direct correspondence with those charged with governance in those jurisdictions.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix D

Maximum Statewide Wrecker Rates

NOTE: The wrecker rates shown in the following tables apply only to third-party tows by those wrecker operators who have not requested and received a Commission approved tariff. “Third-party tow” means the tow of a motor vehicle by a wrecker vehicle if that tow is performed without the prior consent or prior authorization of the owner or operator of the towed motor vehicle. If you have questions about the Commission approved rates for third-party tows, call toll free 1-800-344-5113, extension 344.

Commission Approved Maximum Statewide Wrecker Rates Case No. 20-0796-MC-GI

By Order issued on September 20, 2021, the Public Service Commission of West Virginia adopted a revised schedule of the statewide maximum tariff applicable to third-party tow operators. The Commission ordered the following:

This schedule of maximum state tow rates will go into effect for the members of West Virginia Towing and Recovery Association on October 4, 2021, and on October 24, 2021, for all other third-party tow operators registered with the Commission’s Transportation Division.

1. Tow and Go Hourly Rates

This rate applies to wrecker trucks for non-accident towing services such as private property towing, disabled vehicle towing and traffic violation tows.

Vehicle	Rates per Hour
<u>Light Duty Towing</u> Automobiles and trucks with Gross Vehicle Weight (GVW) of 7,000 lbs. or less	\$102.00
<u>Medium Duty Towing</u> Trucks with GVW of 7,001 lbs. to 10,000 lbs.	\$138.00
<u>Heavy Duty Towing</u> Trucks and buses with GVW of 10,001 lbs. to 26,000 lbs.	\$211.00
<u>Super Heavy Duty Towing</u> Tractor Trucks with GVW over 26,001 lbs. Tow Dolly	\$134.00 \$332.00 \$50.00 flat rate

2. Accident and Recovery Wrecker Rates

Rates to include the wrecker, driver and any specialized equipment with a purchase cost of \$500.00 or less, manufacturer's supplied footage of winch line based on wrecker used, and a Crash/Utility Trailer/Service Truck or any vehicle used to transport specialized equipment and/or laborers to and from accident scene.

The Accident and Recovery Wrecker Rates are for a single wrecker vehicle unless an additional vehicle or vehicles are required as specified herein. If an additional wrecker or wreckers are dispatched to the scene of an accident and are used other than for work that requires multiple wreckers (righting overturned vehicles, hauling or winching vehicles, etc.), the rate for such additional wrecker or wreckers shall be the Tow and Go Hourly Rates from Section 1. Where more than one wrecker is used, the towing company shall maintain adequate records to support the need for multiple wreckers and the use of the Accident and Recovery Wrecker Rates for more than one wrecker vehicle.

Vehicle	Rates per hour
<u>Light Duty Towing</u> Passenger cars, motorcycles and trucks with GVW of 7,000 lbs. or less	\$160.00
<u>Medium Duty Towing</u> Passenger cars, motorcycles and trucks with GVW of 7,001 lbs. to 10,000 lbs.	\$267.00
<u>Heavy Duty Towing</u> Mid-size vehicles, delivery trucks, utility vehicles, motorhomes, parcel trucks, ambulances, small dump trucks, landscape trucks, flatbed and stake trucks, refrigerated and box trucks, small and medium school and transit buses with GVW of 10,001 lbs. to 26,000 lbs.	\$374.00
<u>Super Heavy Duty Towing</u> Large vehicles, large delivery trucks, motor-coaches, refuse trucks, cement mixers and tractor-trailer combinations with GVW of 26,001 lbs and over	
Tractor	\$134.00
20-39 Ton Wrecker	\$620.00
40-60 Ton Wrecker	\$858.00
30-85 Ton Rotator Wrecker	\$1,069.00
<u>Administration Fee</u> This rate is allowable for Accident and Recovery services only. The fee is applied to all invoice charges excluding the surcharge fee, high risk exposure, bio-hazardous exposure and storage fees.	5% of service

3. Additional Labor

The rates shown from Sections 1 and 2 include the services of one man (the driver). If additional labor is essential and/or required, such additional labor shall be provided by the carrier at the rate of **\$53.00 per hour per helper**. The minimum charge for such labor shall be **\$53.00 per helper** and is only allowable when a laborer is essential to towing and/or recovery services. This rate is to include any transportation for the laborer to and from an accident scene.

4. Additional Charge for Weekends, Evenings and Holidays

Due to overtime wages paid on weekends, evenings (5:00 p.m. to 8:00 a.m.) and all federal holidays, an additional charge of **\$19.00 per hour** shall be added to all charges provided in Sections 1, 2 and 3 and to Material Handling Equipment, Cargo Transportation and Scene Coordinator listed in Section 8 when said services are performed on weekends, evenings and federal holidays, and only if such overtime wages are paid to employees and proper documentation can be submitted upon request.

5. Storage

Whenever vehicles are towed by a carrier to the carrier's place of business, storage shall be provided as follows:

Vehicle	Outside Storage Per Day	Inside Storage Per Day
Automobiles (passenger cars) and trucks with GVW of 7,000 lbs. or less	\$27.00	\$37.00
Trucks with GVW of 7,001 to 10,000 lbs.	\$32.00	\$43.00
Trucks with GVW of 10,001 lbs. or more	\$37.00	\$49.00
Semi-trailers and buses	\$50.00	\$94.00
Cargo (if stored outside of original transport container unit)	\$50.00	\$94.00
Refrigerated Cargo		\$150.00

Note: Refusal to release vehicle during evenings, weekends and/or state and federal holiday will result in no storage fees permitted for each day release is refused.

Note: Inside storage shall only be at the request of the owner, operator, an appropriate member of law enforcement or if essential or necessary to preserve the condition of the vehicle. If indoor storage is carrier's policy or if company only offers indoor storage, it shall be charged at the outside storage rate.

6. Special Rates for High Risk Exposure

A flat charge of **\$750.00 per accident or incident or chemical spill** shall apply whenever there is a “high risk exposure” payable only if an environmental team is called in to access the situation. This charge is in addition to all other applicable rates and charges contained herein. High risk exposure means and includes any for-hire transportation of a vehicle or part thereof, wherein a wrecker operator (see note below) or an employee thereof, in responding to an accident or chemical spill involving said vehicle, is exposed to any waste material, substance, or other item listed as a “hazardous material,” “specific chemical waste” or “chemical” in 49 C.F.R Section 172.101 or in excess of vehicle’s operating system.

Note: Unless it has received an identification number from the Department of Environmental Protection (DEP) and has complied with applicable West Virginia Department of Highways procedures, a company may not legally clean up, store or transport hazardous waste. Any hazardous waste, hazardous material or hazardous substance spilled from its container upon the ground surface becomes a hazardous waste.

7. Special Rate for Bio-Hazardous Exposure

A flat charge of **\$250.00 per accident or incident** shall apply whenever there is a “bio-hazardous waste or material exposure.” Biohazard waste includes infectious waste such as hypodermic needles, blades, slides, blood, bodily fluids or waste contaminated with potentially infectious agents or other materials that are deemed a threat to public health or the environment. In order for the fee to be charged, the biohazard must be open, obvious, clearly visible and impact the ability to tow the vehicle. The fee should not be charged if the police or other first responders remove the biohazard prior to towing. Police documentation is preferable and should be presented when available, if unable to obtain police documentation, photographic evidence showing the biohazard rate is required.

8. Specialized/Ancillary Equipment and Allowable Fees

The following rates apply to the use of specialized/ancillary equipment necessary in performing safe and efficient recovery in major Accident and Recovery work. Items must be justified for use.

	<u>Rates</u>
<u>Material Handling Equipment</u>	<u>\$160.00 per hour</u>
Rate to include any heavy duty equipment required to assist in the recovery of the vehicle and/or cargo such as, but not limited to, Bobcat/skid steer loader, forklifts, backhoes, end-loaders, etc. Rate to include operator and no additional laborer rate shall be charged.	

Mobilization

\$300.00 flat rate

Rate to include the transportation of any heavy duty equipment to and from recovery scene that is required to assist in the recovery of the vehicle and/or cargo.

Cargo Transportation

\$125.00 per hour

Rates to include any equipment needed in the recovery, transportation and maintaining the integrity of cargo such as, but not limited to, refrigerated trailer, lowboy trailer and/or traveling axle, box trucks, dump trucks and roll-off equipment. Rate to include operator and no additional laborer rate shall be charged.

Air Cushions

\$1,200.00 per incident

No additional charge for transportation of equipment to and from accident scene.

Scene Lighting (diesel powered)

\$300.00 flat rate

Commercial and/or major recovery accidents.

Scene/Accident Coordinator

\$80.00 per hour

This rate is only to be charged on commercial accidents that require multiple wreckers and/or multiple specialized equipment to be used in recovery. This rate is not to be applied for traffic control at the scene of the accident or any type of administrative duties at the accident and/or at the towing company's facility.

Sub-Contracted Service Fee

Cost plus 15%

A copy of contract must be kept on file.

Non-Reusable Cleanup Material Fee

Cost plus 15%

A copy of purchase invoice must be kept on file.

Rental Equipment Fee

Cost plus 15%

When charging Rental Equipment Fee at cost plus 15%, towing company may also charge for the operator of equipment separately unless the cost of rental plus 15% fee and cost of laborer exceed the hourly rate for material handling equipment, at which time tow company will charge the Material Handling Equipment rate per hour. A copy of the rental contract and/or receipt must be kept on file.

Note: No Rental Equipment Fee or Sub-Contract Service Fee to be applied when there is a mutual-aid contract for vehicles or equipment or when a company is using another company's vehicles (trucks, wreckers and/or rotator).

9. Allowable Fees

	<u>Rates</u>
<u>EFT, ACH, Credit Card Fee</u>	<u>Pass Thru at Cost</u>

A service charge may be imposed on EFT, ACH, credit card as long as the person paying is informed of the fee in advance. The amount shall be equal to the actual charges from the financial institution for processing payment.

<u>Gate/Reopen Fee</u>	<u>\$50.00 flat rate</u>
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The Gate/Reopen Fee is applicable after business hours and only when the towing company is closed and there is no administrative employee present or on duty to release an impounded vehicle. The fee applies only when an administrative employee or company representative must report to the impound lot when the business is closed to release a vehicle or to release personal property after normal hours. Releasing of personal property is not required after hours; however, should a company choose to release property after hours, the Gate/Reopen Fee should be collected at time of property retrieval. The person requesting release of the vehicle or personal property in this circumstance must be informed of the fee in advance. If the towing company refuses to release vehicle due to "after hours," no storage shall be charged for days of refusal.

<u>WV Turnpike Tolls</u>	<u>Pass Thru at Cost</u>
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Carrier must provide upon request documentation of toll charge.

Rules and Regulations

1. The rates provided herein shall apply to the transportation by wrecker (tow) truck of wrecked and/or disabled motor vehicles over the public highways.
2. All hourly rates provided herein shall be calculated from the time the carrier leaves his base of operation to the final towing destination and available for the next service and, except as otherwise provided, shall be rounded to the nearest quarter hour. Except in the case where a wrecker operator is patrolling a privately owned parking lot by contract, the starting time of the applicable tow rate shall be calculated from the time the actual tow operation begins.
3. Carriers are required to allow all third-party tow customers to obtain their personal possessions (any personal item which is not attached to the vehicle). Items not to be included are, but are not limited to, stereo, battery, license plate, etc. from towed vehicles without payment of all or part of their respective tow bills during normal business hours.
4. The storage fee provided herein shall accrue at the beginning of each day (excluding the day the vehicle is delivered to the storage facility). In calculating the total applicable storage charge, a day shall be each 24 hour period commencing at the start of the next business day and shall apply only if the vehicle has not been retrieved before the carrier's normal close of business on the day the vehicle is delivered to the carrier's storage facility.
5. Carriers shall maintain adequate records to allow expeditious periodic review of their compliance with this tariff. Such records must include, but are not limited to, sequentially numbered invoices, a copy of which must be provided each customer and a copy of which must be retained for a period of at least two (2) years by the carrier.
6. If a vehicle has been hooked with hoisting apparatus or loaded by the wrecker service and the vehicle has not left the premises and the owner or operator produces the ignition key and removes the vehicle immediately, the applicable tow charge shall not exceed one-half (1/2) the otherwise minimum charge as set forth in the applicable tariff.



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