

December 11, 2015

Cynthia J Martineau, Executive Director
Towing and Recovery Assn. of America
700 12th Street NW, Suite 700
Washington, DC 20005

RE: **THE FAST ACT of 2015 & ROTATION TOWING RATES**

Dear Cindy:

You have asked if the recently-enacted FAST Act gives police agencies the power to “regulate” the rates for tow calls dispatched pursuant to a rotation call list?

I. SUMMARY OF THE FAST ACT of 2015

As you know, earlier this month, President Obama signed into law the Fixing America's Surface Transportation Act, also known as the “FAST Act of 2015.” That law, which provides funding for the nation’s highways and bridges over the next five years, included two changes to the federal transportation laws specifically related to the automotive towing industry. One of those provisions amends the 1994 federal “deregulation law,” 49 U.S.C. § 14501(c), which generally forbids state and local governments for regulating the towing industry in matters relating to the price charged for towing, the routes serviced, or the services provided.

In 1995, Congress made an exception to the 1994 deregulation law that allowed states and local governments to regulate the *price* charged for nonconsensual tows. That law — which allowed only for the regulation of the price charged for nonconsensual tows — has remained unchanged for 20 years.

Now, in the 2015 FAST Act, Congress modified the 1995 exemption to read as follows:

[The 1994 federal deregulation law] does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision *relating to the regulation of tow truck operations*, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

Thus, the 2015 law extends the power of state and local governments over nonconsensual towing from regulation of just the “price” charged for nonconsensual towing to the regulation of all nonconsensual “tow truck operations.” The legislative history of the act make it clear that Congress intended to give state and local governments broad regulatory authority over the private property impound (PPI) business.

II. IMPACT ON ROTATION TOWING RATES

Does the FAST Act give police agencies new power to “regulate” rotation tow rates?

No. The recent FAST Act amendment does not change anything regarding the authority of law enforcement to control towing rates under a rotation-type towing system.

First of all, as noted above, the *previous* federal statute allowed for regulation of the price charged for nonconsensual towing. In other words, assuming that rotation tow calls are nonconsensual in nature, if a law enforcement agency wanted to “regulate” the price charged for those tows, it could have done so under the old law.

But more importantly, towing rates that are a component of a voluntary rotation list system are not derived through a true “regulation” process. Police agencies control the rates charged in a voluntary rotation list program through a group “offer-and-acceptance” process with the participating towing companies.

“Regulation” defined

One of the most common misperceptions in the towing industry is that law enforcement agencies are illegally “regulating” rates when they develop a schedule of allowable fees that can be charged by their rotation tow list participants. Regulation occurs when a government entity imposes a rule or order on the interactions or conduct of *others*. A PPI towing ordinance is a good example of regulation. When the government enacts a set of rules and dictates a maximum rate to be charged for private property tow-aways it is controlling the terms of the relationship between two other parties: the towing company and the vehicle owner. The government has no direct involvement in the transaction.

Rate controls in a rotation towing system

When a police agency sets forth a rate schedule it is *not* directing the interactions or conduct of *others*. No doubt because a vehicle owner (or her insurer) typically pays the towing fees generated from a rotation tow call, a police-generated rate schedule certainly appears to be a “regulation” of the transaction between a towing company and the vehicle owner. But the law does not see it that way.

In the 1999 case of *Cardinal Towing v. City of Bedford (Texas)*, the U.S. Court of Appeals for the 5th Circuit considered whether predetermined police towing fees constituted unlawful rate regulations. After first noting the “odd structure of the towing industry,” the federal appellate court observed that, although towing services provided at the request of a police

department are provided for the benefit of the vehicle owner, the call for service is actually made by the investigating law enforcement agency, which also chooses the towing company to perform the tow. The court said that the police agency is acting as a consumer and “should be treated as a consumer.”

In other words, the towing firm’s real “customer” in a rotation towing system is the law enforcement agency, not the vehicle owner — despite the fact that the vehicle owner pays the bill. Since the police agencies are the customers, when they declare what fees can be charged by the towing firms that voluntarily choose to participate on their rotation towing lists they are not “regulating” the transaction between those firms and the vehicle owners. They are simply making a direct business arrangement with their own rotation towing companies.

By circulating a rate schedule police agencies are, in essence, transmitting an offer to dispatch an equal share of its “pool” of tow calls to all the qualified towing companies that will agree to service the calls at the stated rates. Each towing company then has the option to take it or leave it. Those that accept the offer are placed on the rotation tow list. If no qualified towing company agrees to tow for the offered rate, the police agency would be forced to reassess its proposal and perhaps offer higher rates. That process is not rate regulation. It is simply the competitive free enterprise system at work.

Will the new law change *anything* with regard to rotation towing rate setting?

As explained above, the FAST Act does not change anything regarding the legal ability of law enforcement to establish towing rates in a rotation-type towing program. They are not “regulating” towing rates. Because they, not the vehicle owners, are the towing companies’ customers, they have always had the ability to set towing rates by the “offer and acceptance,” free enterprise system.

What the new law might do, however, is motivate law enforcement agencies that do not currently include a rate schedule in their rotation list rules to now take some action. Some may mistakenly view the “regulation” language in the FAST Act as giving them *new* rate-making power over nonconsensual tows. Those agencies that have previously been unsure of their legal footing regarding the establishment of rates might now feel compelled to take steps towards developing a uniform schedule of towing fees among their rotation towing companies.

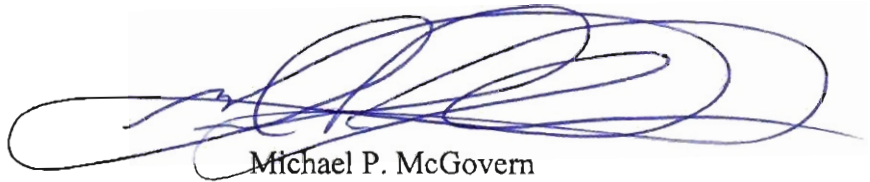
If law enforcement proposed new rotation tow rate schedule, what should a tow operator do?

In the event a police agency proposes a new rate schedule for rotation tows, the prudent rotation tow operator will have a good grasp on his cost of operations and be prepared to

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evaluate the profitability of any proposed rotation towing rates. He should also be ready to explain to the governing law enforcement agency the costs of operating a 24-hour emergency response towing company and, if necessary, negotiate for more reasonable rates. (Note: There is an exception to the federal antitrust laws — called the Noerr-Pennington doctrine — that allows towing company owners to work together to lobby governments or police agencies for reasonable rotation towing rates.)

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Michael P. McGovern", is written over a light blue rectangular background.

Michael P. McGovern

MPM:rld