



**OFFICE
OF
THE ADMINISTRATIVE LAW JUDGE**

2018 REPORT

**MASSACHUSETTS DEPARTMENT OF TRANSPORTATION
OFFICE OF THE ADMINISTRATIVE LAW JUDGE**

2018 Report

Overview of the Office

The Office of the Administrative Law Judge is established pursuant to G.L. c. 6C, §40, as amended by St. 2009, c. 25, §8. Its essential function is to make fair and impartial decisions on disputes involving the Department, including:

- construction contract disputes appealed from decisions of the Chief Engineer
- appeals from the denial of outdoor advertising permits by the Department's Division of Outdoor Advertising
- contractor appeals from decertification of disadvantaged minority business enterprises
- appeals from decisions of the Department's Right of Way Bureau pursuant to the requirements of 49 CFR Part 24 §24.10
- other matters as assigned by the Secretary of Transportation

Executive Summary

This report provides the status and disposition of appeals and other matters brought to the Office of the Administrative Law Judge in 2018.

In summary, the following matters were handled in calendar year 2018:

- Two (2) construction contract appeals were received. Both appeals will be heard in 2019, after which the office will prepare a report and recommendation to the Secretary pursuant to M.G.L. c. 6C, §40.
- Five (5) direct payment demands were ruled on in accordance with G.L. c.30, §39F.
- One (1) appeal from the denial of an application to renew outdoor advertising permits was received. An adjudicatory hearing was held and a final agency decision was issued in accordance with 700 CMR 3.19 and G.L. c. 30A. The decision is pending judicial review by the Superior Court.
- Two (2) contractor appeals from DBE decertification proceedings initiated by the MassUCP were filed with the MassUCP Adjudicatory Board. In 2018, one appeal was heard and a decision was issued by the Board in accordance with 49 CFR §26.87 and M.G.L. c. 30A. The other appeal is scheduled for hearing in early 2019.
- The Secretary of Transportation designated the Office of the ALJ to hear an appeal of certain electronic toll charges that were assessed against a customer's EZ-Pass MA

account. An adjudicatory hearing was held and a final agency decision was issued in accordance with 700 CMR 7.05(c) and G.L. c. 30A. The decision is pending judicial review by the Superior Court.

In addition, the Office accomplished the following administrative tasks:

- Completed 2017 annual report and published on MassDOT website:
<https://www.mass.gov/lists/transportation-dispute-resolution-reports>
- Completed migration of ALJ webpages to new mass.gov website, including updates and integration with trial court library's listing of agency decisions and opinions:
<https://www.mass.gov/info-details/state-agency-decisions-and-opinions>
- Created new webpage within ALJ website to provide current listing of contractors and vendors suspended or debarred by MassDOT:
<https://www.mass.gov/service-details/contractors-and-vendors-suspended-or-debarred-by-massdot>
- Began review of archived ALJ decisions for publication on MassDOT website.
- Organized archived records of the Office in accordance with applicable retention policies.
- Completed procurement for stenographer services.
- Closed files related to a proposal that the Office of the ALJ perform adjudicatory appeals governed by M.G.L. c.159, §101(c). MBTA provided confirmation that it would continue its current appeal process.
- In consultation with the Office of the General Counsel, responded to a public records request related to a hearing and adjudicatory decision held in 2018, including review of applicable public records exemptions and obligations of the Office of the ALJ pursuant to G.L. c. 6C, §40.

Construction Contract Appeals

In 2018, the following construction contract appeals were pending and/or resolved by rulings on the merits in accordance with M.G.L. c. 6C §40 and Division I §7.16 of the Standard Provisions.

Appeals Pending

Brox Industries Inc. #3-58007-003

This appeal concerns a claim in the amount of \$106,232.77 for additional payments to offset credits taken by the Department for diesel oil price adjustments. A statement of claim was filed by the contractor and a status conference is scheduled for early in 2019.

Judlau-White JV, LLC. #4-85015-001

This appeal concerns a claim in the amount of \$128,749.69 for additional payments to offset credits taken by the Department for steel price adjustments on Grade 50W steel. A statement of claim was filed by the contractor and a status conference is scheduled for early in 2019.

MIG Corporation #3-58007-003

This appeal concerns a claim in the amount of \$1,042,396.89 for additional work related to concrete repairs. The current ALJ recused himself from hearing this appeal. The matter is pending assignment to and hearing by another hearing officer.

Direct Payment Demands

In 2018, the following direct payment demands were received and resolved by rulings on the merits in accordance with G.L. c.30, §39F:

HDR Engineering, Inc. – September 28, 2018

General Contractor: Walsh Construction Company
Contract: #80859 - District 6 / Commonwealth Ave. over I-90 & MBTA
Amount: \$5,389,194.00
Decision: Denied – October 12, 2018

TDC, The Demolition Company – August 30, 2018

General Contractor: White/Skanska JV
Contract: #71680 – Fore River Bridge
Amount: \$4,569,105.20
Decision: Denied – December 13, 2018*

* A memorandum of decision was not issued

Concrete Systems, Inc. – April 11, 2018

General Contractor: Walsh-McCourt, JV1
Contract: #73274 – District 4 / I-95 over Merrimack River (Whittier Bridge)
Amount: \$443,146.54
Decision: Denied – April 19, 2018

SPS New England – February 16, 2018

General Contractor: Raytheon Company
Contract: #79148 - District 1,2,3 & 6 / All Electronic Tolling System
Amount: \$134,756.65
Decision: Allowed – April 4, 2018

SPS New England – January 16, 2018

General Contractor: Raytheon Company
Contract: #79148 - District 1,2,3 & 6 / All Electronic Tolling System
Amount: \$176,000.18
Decision: Denied – January 30, 2018

Outdoor Advertising Appeals

In 2018, the following appeal from the denial of outdoor advertising permits was heard in accordance with 700 CMR 3.19.

Clear Channel Outdoor Inc. – Denial and/or Revocation of 125 Permits

This appeal concerned actions taken by the Director of the Office of Outdoor Advertising (“OOA”) with respect to a renewal application submitted for 125 permits. Certain preliminary rulings were made and an adjudicatory hearing was held. On November 16, 2018, a final agency decision was issued upholding OOA’s determination. The decision is pending judicial review by the Superior Court (Middlesex Superior Court docket #1881CV03573).

Massachusetts UCP Board Appeals

In 2018, the Massachusetts Unified Certification Program Adjudicatory Board received the following contractor appeals from DBE decertification proceedings initiated by the Supplier Diversity Office.

Decisions

Supplies Exchange Systems MUCP #2017-0001

Supplies Exchange Systems (“SES”) requested a hearing before the Board to appeal a determination by the Office of Supplier Diversity to initiate decertification proceedings. The Board held a hearing on August 7, 2018, in accordance with the requirements of 49 CFR §26.87, M.G.L. c. 30A, and 801 C.M.R. §1.02 and §1.03. The Board determined: (1) that SES should be decertified from NAICS Code 444190; and (2) that SES should be certified in NAICS code 425120.

Appeals Pending

Aurora Engineers Inc. MUCP #2017-0002

Aurora Engineers Inc. requested a hearing before the Board to appeal a determination by the Office of Supplier Diversity to initiate decertification proceedings. The matter is scheduled for hearing in early 2019.

Administrative Issues / Vacancies on the Board

In 2018, the Secretary of Transportation appointed Mr. David Spicer, State Construction Engineer, as MassDOT’s member to the Board.

The Board has one vacancy due to the resignation of MassPort’s member in 2017. The Board has asked MassPort to nominate a replacement member. To date, MassPort’s seat remains vacant.

Appeals of Electronic Tolls

The Secretary of Transportation designated the Office of the ALJ to hear an adjudicatory appeals of electronic toll violations pursuant to 700 CMR 7.05(5)(c).

Decisions

Appeal of Electronic Tolls by EJT Management Inc.

EJT Management Inc. (“EJT”) appealed certain electronic toll charges that were assessed against its EZ-Pass MA account. Certain preliminary rulings were made and an adjudicatory hearing was held. On July 19, 2018, a final agency decision was issued denying EJT’s appeal. The decision is pending judicial review by the Superior Court (Suffolk Superior Court docket #1884CV02535).

APPENDIX OF DECISIONS/RULINGS

A. Direct Payment Demands A-1

Ruling, Direct Payment Demand of HDR Engineering, Inc., October 12, 2018

Ruling, Direct Payment Demand of Concrete Systems, Inc., April 19, 2018

Ruling, Direct Payment Demand of SPS New England, April 4, 2018

Ruling, Direct Payment Demand of SPS New England, January 30, 2018

B. Outdoor Advertising Appeals B-1

ALJ Appeal Docket – Clear Channel Outdoor, Inc., Denial and/or Revocation of Outdoor Advertising Permits

Memorandum and Order re: Preliminary Matters, Appeal of Clear Channel Outdoor, Inc., July 26, 2018

Memorandum and Order re: MBTA Motion to File Amicus Brief, Appeal of Clear Channel Outdoor, Inc., August 24, 2018

Final Agency Decision, Appeal of Clear Channel Outdoor, Inc., November 16, 2018

C. Mass. UCP Adjudicatory Board Appeals C-1

Notice of Hearing, In the Matter of Supplies Exchange Systems (MUCP #2017-0001), July 6, 2018

Final Agency Decision, In the Matter of Supplies Exchange Systems (MUCP #2017-0001), September 12, 2018

Notice of Appeal Rights, In the Matter of Supplies Exchange Systems, (MUCP #2017-0001), September 26, 2018

D. Appeal of Electronic Tolls D-1

ALJ Appeal Docket –Appeal of Electronic Toll Violations by EJT Management

Memorandum and Order re: EJT’s Motion for Interim Ruling, Appeal of Electronic Toll Violations by EJT Management, March 23, 2018

Memorandum and Order re: Department's Motion to Dismiss and EJT's Motion for Additional Discovery, Appeal of Electronic Toll Violations by EJT Management, April 2, 2018

Memorandum and Order re: Department's Motion to Quash and EJT's Motion to Compel, Appeal of Electronic Toll Violations by EJT Management, May 11, 2018

Memorandum and Order re: Post-Hearing Matters, Appeal of Electronic Toll Violations by EJT Management, July 11, 2018

Final Agency Decision, Appeal of Electronic Toll Violations by EJT Management, July 19, 2018

APPENDIX A-1

RULINGS

DIRECT PAYMENT DEMANDS



MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: October 12, 2018

RE: **Request for Direct Payment pursuant to M.G.L. c. 30, §39F**

Claimant: HDR Engineering, Inc.
Contractor: Walsh Construction Company
Contract: #80859
City/Town: District 6 / Commonwealth Ave. over I-90 & MBTA
Amount: \$5,389,194.00

This direct payment demand (Demand) by HDR Engineering, Inc. (HDR) was received by MassDOT on September 28, 2018.

FINDINGS

Based on my review of the Demand, the applicable contract, and input from MassDOT staff, I make the following findings:

1. HDR demands direct payment in the amount of \$5,389,194.00 from amounts payable or which later become payable to the Design/Builder, Walsh Construction Company (Walsh), in connection with MassDOT Contract #80859 for "Superstructure Replacement, Br. No. B-16-055, Commonwealth Ave. Over I-90 & MBTA."
2. MassDOT Contract #80859 is a design/build project procured in accordance with M.G.L. c. 149A, §14.
3. The Demand for direct payment consists of a cover letter dated September 26, 2018 from counsel for HDR and a sworn statement by means of a Declaration of Roch D. Larochelle, Senior Project Manager, including exhibits. Mr. Larochelle signed the sworn statement attesting to the accuracy of the statements therein. His signature is notarized.
4. The Demand indicates that a copy was sent certified mail to counsel for Walsh.

5. The Demand states that HDR provided professional design services to Walsh in connection with Contract #80859. The services were provided pursuant to three agreements between HDR and Walsh: the “Phase I” agreement dated March 16, 2015, the “Phase II” agreement dated March 16, 2018, and the Design-Build agreement dated June 2015.
6. The Demand includes a detailed breakdown and supporting documentation, which is summarized in paragraph 22 of the Declaration of Roch D. Larochelle:

HDR submitted requests for periodic payments to Walsh totaling \$6,340,828, which represents the amount due for Basic Services (\$4,148,363) and approved Additional Services (\$2,192,465) rendered on the Project through September 1, 2018. HDR has also submitted \$1,614,440 in Change Orders (HDR Letter No. 80 - \$801,917 and HDR Letter No. 81 - \$812,523) for Walsh requested Additional Services. Notwithstanding, Walsh has only paid HDR \$2,566,074 through December 1, 2015, leaving an accounts receivable balance due as of September 1, 2018 of \$5,389,194 ($\$6,340,828 - \$2,566,074 = \$3,774,754 + \$1,614,440$), which Walsh has failed to pay and it continues to refuse to pay.

7. Walsh submitted a Reply within the ten day period after MassDOT’s receipt of the Demand. The Reply is by a sworn statement of Charles J. Parish, Program Manager for Walsh.
8. The Reply contends that the Demand should be denied for the following reasons:
 - a) HDR is not a subcontractor approved in writing by MassDOT.
 - b) HDR’s design services are not “labor performed” or “materials furnished” as those terms are used in the direct payment statute.
 - c) HDR did not deliver or mail a copy of the Demand to Walsh.
 - d) HDR is not substantially complete with its subcontract work.
 - e) Walsh owes no funds to HDR after deducting the amount claimed due from HDR.
9. Exhibit C to Contract #80859 describes the contractual relationship between Walsh and HDR as follows:

Our DB Entity is composed of sole respondent and contracting entity, Walsh Construction Company, of Canton, Massachusetts (Walsh), who has partnered with HDR Engineering, Inc. (HDR), as Lead Designer and Engineer of Record.

10. Exhibit A to Contract #80859 defines a “subcontractor” as “any Person with whom the DB Entity has entered into any Subcontract to perform any part of the DB Work ...” The definitions further define the DB Work to include design and engineering.

RULING

G.L. c.30, §39F does not allow for direct payment to HDR. The statute authorizes direct payment only in the limited circumstances provided in the statute and only to subcontractors who are performing labor or furnishing materials. The design services provided by HDR on Contract #80859 do not constitute “labor” as that term is used in the statute. My conclusion is based on the following:

The design/build statute, G.L. c. 149A, §20(d), provides that the direct payment process shall apply “in the same manner as public works projects generally procured pursuant to G.L. c.30, §39M.” However, there is nothing in the design/build statute that expands the class of contractors who are eligible for direct payment. The plain language of G.L. c.30, §39F(3) expressly limits those who may take advantage of the statute by narrowly defining the meaning of a “subcontractor” as used therein. In pertinent part, a subcontractor is defined as “a person approved by the awarding authority in writing as a person performing labor or both performing labor and furnishing materials pursuant to a written contract with the general contractor.”

The direct payment statute does not require that the awarding authority’s written approval take any particular form. *See, e.g., P.J. Gear & Son, Inc. v. Commonwealth*, 2001 Mass. Super. LEXIS 13, 98-00242-D (Sup. Ct., Middlesex, Jan. 29, 2001). In this case, the written approval requirement was met as a result of MassDOT’s execution of Contract #80859, which expressly acknowledged and consented to HDR serving as lead designer and engineer of record pursuant to a written contract with Walsh. The issue, however, is that HDR was approved in writing to provide professional design services and not as a person performing labor or furnishing materials.

There is nothing in the language of the direct payment statute to suggest that persons providing design, engineering, and/or professional services have standing to make a direct payment claim. The statute was enacted in Chapter 774 of the Acts of 1972 as part of comprehensive legislation intended “to benefit laborers and materialmen who work on public construction projects, given the impossibility of obtaining a mechanic’s lien on such projects.” *Costa v. Brait Builders Corp.*, 463 Mass. 65, 71 (2012); *also see* G.L. c. 254, §6. Because no lien may attach to public property, the legislation was “for the remedial purpose of providing security to subcontractors and others who supply labor or materials for public construction projects.” *Id.* at 72. Given that the SJC consistently held for nearly a century that design services were not protected by the mechanic’s lien statute, *see Mitchell v. Packard*, 168 Mass. 467 (1897), it would be contrary to the “remedial purpose” of the legislation to conclude that design services were intended to be protected by the direct payment statute.

It is also appropriate to consider recent legislation enacted in 2011 that extended lien rights to design professionals. St. 2010, c. 424. The legislation amended G.L. c. 254 to enable designers to file a mechanic’s lien as security for services provided on private construction projects. However, it contained no provisions extending to design professionals the protections afforded by payment security statutes related to public construction projects, such the direct payment statute, the prompt payment statute G.L. c. 30, §39K, or the payment bond statute G.L. 149, §29. Also, the legislation established a clear distinction between subcontractors providing labor and/or furnishing materials, G.L. c. 254, §4, and designers and others providing

professional services, G.L. c. 254, §§2A and 2C. The same distinction applies in the context of the direct payment statute.

Because HDR is not a “subcontractor” as defined in G.L. c.30, §39F, it is not eligible for direct payment from the MassDOT.¹

For the reasons stated above, the Demand is DENIED.

cc: HDR Engineering, Inc.
695 Atlantic Avenue
Boston, MA 02111
Attn: Roch D. Larochelle, Senior Project Manager

Walsh Construction Corp.
45 Shawmut Road
Canton, MA 02021
Attn: Charles J. Parish, Program Manager

Francis A. Shannon, Esq.
Paul T. Muniz, Esq.

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
John McInerney, District 6 Highway Director

¹ Given this conclusion, I need not address the other issues raised in Walsh’s Reply concerning procedural compliance, failure to substantially complete the subcontract work, and the general contractor’s right to deduct amounts claimed due from the subcontractor.



MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: April 19, 2018

RE: **Request for Direct Payment pursuant to M.G.L. c. 30, §39F**

Claimant: Concrete Systems, Inc.
Contractor: Walsh-McCourt, JV1
Contract: #73274
City/Town: District 4 / I-95 over Merrimack River (Whittier Bridge)
Amount: \$443,146.54

This direct payment demand (Demand) by Concrete Systems, Inc. was received by the Department on April 11, 2018.

FINDINGS

Based on my review of the Demand, the applicable contract, and input from MassDOT staff, I make the following findings:

1. The Demand consists of a cover letter dated April 10, 2018 and attachments.
2. Walter J. Siryk, EVP/COO, signed the Demand by sworn statement attesting to the accuracy of the statements therein. His signature is notarized.
3. The cover letter indicates that the Demand was cc'd to: "Walsh Construction Company (Via email and Certified Mail)" and "Saugus Construction Corporation (Via email and Certified Mail)".
4. The Demand states: "... Concrete Systems, Inc. of Hudson, NH is a subcontractor/supplier for certain precast concrete related work to Walsh Construction Company and its erector, Saugus Construction Corporation." There is a detailed breakdown with supporting documentation indicating that Concrete Systems, Inc. completed its work as of October 12, 2017 and that the balance due under its subcontract is \$443,146.54.
5. Based on information provided by MassDOT construction staff, Concrete Systems, Inc. was not a subcontractor approved in writing by the Department to perform labor and/or furnish materials on Contract #73274. Also, Concrete Systems, Inc. did not contract with the general contractor Walsh-McCourt, JV1 to supply materials used or employed in the project.

6. MassDOT staff also advised that Concrete Systems, Inc. was under contract with and supplied precast deck panels to Saugus Construction Corporation, a subcontractor to Walsh-McCourt JV1.
7. All contract work related to the fabrication and installation of precast deck panels has been paid in full by the Department to the general contractor Walsh-McCourt JV1.

RULING

G.L. c.30, §39F does not allow for direct payment to Concrete Systems, Inc. The Department is authorized to make a direct payment only in the limited circumstances provided in the statute and only with respect to “subcontractors” performing labor or supplying materials.

The statute defines a subcontractor as “a person approved by the awarding authority in writing as a person performing labor or both performing labor and furnishing materials pursuant to a written contract with the general contractor”, or “a person contracting with the general contractor to supply materials used or employed in a public works project for a price in excess of five thousand dollars.”

Concrete Systems, Inc. provided materials to a subcontractor, Saugus Construction Corporation. It was not a subcontractor approved in writing by the Department and did not contract with the general contractor Walsh-McCourt, JV1 to perform labor and/or supply materials used or employed in the project. Because Concrete Systems, Inc. is not a “subcontractor” as defined in the statute, it is not eligible for direct payment from the Department.

For the reasons stated above, the Demand is DENIED.¹

cc: Concrete Systems, Inc.
9 Commercial Street
Hudson, NH 02051

Walsh-McCourt JV1
45 Shawmut Road
Canton, MA 02021

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
Paul Stedman, District 4 Highway Director

¹ I also note that Concrete Systems Inc.’s cover letter indicates that the Demand was “cc’d” to Walsh Construction Company; however, the general contractor for Contract #73274 is Walsh-McCourt, JV1. The direct payment statute expressly requires that the Demand be “delivered to or sent by certified mail to the general contractor” at the time it is mailed to the awarding authority. On its face, the procedural requirements of G.L. c.30, §39F were not met.



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: April 4, 2018

RE: **Request for Direct Payment pursuant to M.G.L. c. 30, §39F**

Claimant: SPS New England
Contractor: Raytheon Company
Contract: #79148
City/Town: District 1,2,3 & 6 / All Electronic Tolling System (AETS)
Amount: \$134,756.65

This direct payment demand (Demand) by SPS New England was received by the Department on February 16, 2018.

FINDINGS

Based on my review of the Demand, the applicable contract, and input from MassDOT staff, I make the following findings:

1. SPS New England is an approved subcontractor on MassDOT Contract #79148. Its scope includes infrastructure alterations to support the AETS system, including installation of gantries and support facilities, pavement modifications, and other civil construction work.
2. The Demand consists of a two-page letter dated February 12, 2018, which contains a detailed explanation of the balance due under the subcontract and statement of the status of completion of the subcontract work, along with supporting documentation consisting of purchase orders and the subcontract agreement between SPS and Raytheon.
3. Timothy McLaughlin, Senior Vice President, signed the Demand “under the pains and penalties of perjury.” A copy of the Demand was sent to the general contractor, Raytheon Company, by certified mail (#70171070000061073178).
4. The Department received a reply to the Demand from the general contractor dated February 26, 2018. The Reply is not by sworn statement, does not contain a breakdown of the balance due under the subcontract, and does not dispute any amount of the Demand. The Reply merely advises that the parties are attempting to resolve their payment issue.
5. Department construction staff has confirmed that all subcontract work performed by SPS New England has been completed to the Department’s satisfaction and paid of SPS’s account to Raytheon, and the Department is not retaining any amounts as a result of deficient or incomplete work performed by SPS.

Ten Park Plaza, Suite 6620, Boston, MA 02116
Tel: 857-368-9495

RULING

The Demand complies with the formal requirements of M.G.L. c.30, §39F. With respect to the Reply submitted by Raytheon Company, it is not by sworn statement, does not contain a breakdown of the balance due under the subcontract, and does not dispute any amount of the Demand as provided in the statute.

G.L. c.30, §39F(1)(c) provides that “if the awarding authority has received a demand for direct payment from a subcontractor for any amount which has already been included in a payment to the general contractor or which is to be included in a payment to the general contractor for payment to the subcontractor ... the awarding authority shall act on the demand as provided in this section.” The statute further provides: “If, within seventy days after the subcontractor has substantially completed the subcontract work, the subcontractor has not received from the general contractor the balance due under the subcontract including any amount due for extra labor and materials furnished to the general contractor, less any amount retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work, the subcontractor may demand direct payment of that balance from the awarding authority.” G.L. c.30, §39F(1)(d).

The record before me supports a finding that SPS New England substantially completed its subcontract work as of April 22, 2017. Department construction staff has confirmed that all subcontract work performed by SPS New England has been completed to the Department’s satisfaction and paid of SPS’s account to Raytheon, and the Department is not retaining any amounts as a result of deficient or incomplete work performed by SPS. More than seventy days have passed since the subcontract work was substantially completed and the work has been accepted by the Department and approved for inclusion in progress payments made or to be made to the general contractor. The balance due on the subcontract work was required to be paid by the general contractor “not later than the sixty-fifth day” after completion of the work. As Raytheon Company has failed to make such payment in accordance with G.L. c.30, §39F, the Department is obligated to make a direct payment in response to this Demand.

For the reasons stated above, the Demand is ALLOWED.

Kindly pay SPS New England \$134,756.65 from the next periodic, semi-final or final estimate and deduct that amount from payments due Raytheon Company, Inc. in accordance with Section 39F.

cc: Raytheon Company
1001 Boston Post Road
Marlboro, MA 01752

SPS New England
98 Elm Street, Route 110
Salisbury, MA 01952

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
Barry Lorion, Acting District 3 Highway Director



Charles D. Baker, Governor
 Karyn E. Polito, Lieutenant Governor
 Stephanie Pollack, MassDOT Secretary & CEO



MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: Albert Caldarelli, Administrative Law Judge
DATE: January 30, 2018
RE: Request for Direct Payment pursuant to M.G.L. c. 30, §39F

Claimant: SPS New England
 Contractor: Raytheon Company
 Contract: #79148
 City/Town: District 1,2,3 & 6 / All Electronic Tolling System (AETS)
 Amount: \$176,000.18

This direct payment demand (Demand) by SPS New England was received by the Department on January 16, 2018.

FINDINGS

Based on my review of the Demand, the applicable contract, and input from MassDOT staff, I make the following findings:

1. SPS New England is an approved subcontractor on MassDOT Contract #79148. Its scope includes infrastructure alterations to support the AETS system, including installation of gantries and support facilities, pavement modifications, and other civil construction work.
2. The Demand consists of a one-page letter dated December 27, 2017, which contains the following “detailed breakdown of the balance due under the subcontract”:

Overdue payment for contract items and EWOs 12/8/2017

Qty	amount	req. #	SPS line #	Raytheon line #	Item	Description
1	\$ 26,563.70	18	61	0170	EWO#11	MPR2
1	\$ 23,061.68	18	78	0160	EWO#49	TZ15 64 additional anchors install
1	\$ 10,418.37	18	83	0180	EWO#54	TZ 11 and 12 Millings Mulch
0.25	\$ 1,865.87	18	84	0120	EWO#55	TZ 1 RTC Rolling
0.75	5597.6	19	87	0120	EWO#55	TZ 1 RTC Rolling
0.4	108492.96	23	38	0010	Item 851.201	Traffic Control Go-Live (partial)
total \$ 176,000.18						

3. Timothy McLaughlin, Senior Vice President, signed the Demand “under the pains and penalties of perjury.” The Demand states that a copy was sent to the general contractor, Raytheon Company, by certified mail.
4. The Department has no record of receiving a reply to the Demand from the general contractor within 10 days when such reply was due in accordance with G.L. c.30, §39F(1)(d).

5. Department construction staff has confirmed that all subcontract work performed by SPS New England has been completed to the Department's satisfaction, and the Department is not retaining any amounts as a result of deficient or incomplete work performed by SPS New England.
6. Department construction staff also advises the items of work referenced in SPS New England's Demand appear to be claims that have not been submitted and approved for payment as extra work under the Contract.

RULING

M.G.L. c.30, §39F(1)(b) provides: "The demand shall be by a sworn statement delivered to or sent by certified mail to the awarding authority, and a copy shall be delivered to or sent by certified mail to the general contractor at the same time. The demand shall contain a detailed breakdown of the balance due under the subcontract and also a statement of the status of completion of the subcontract work."¹ In this case, the summary table provided by SPS New England does not contain sufficient detail to demonstrate what Department approved work was done but remains unpaid. Accordingly, the Demand must be DENIED for non-compliance with the formal requirements of G.L. c.30, §39F.

As to the merits of the Demand, SPS seeks direct payment of \$176,000.18. However, based on the limited information provided, it appears that the entirety of that amount is based on various claims for extra work under the subcontract, none of which have been submitted and approved for payment under Contract #79148. Unless and until a claim is approved for payment by the Department, it is not an amount that may form the basis of a direct payment demand. A demand for direct payment is limited to the "amount which has already been included in a payment to the general contractor or which is to be included in a payment to the general contractor for payment to the subcontractor."

For the reasons stated above, the Demand is DENIED.

cc: Raytheon Company
1001 Boston Post Road
Marlboro, MA 01752

SPS New England
98 Elm Street, Route 110
Salisbury, MA 01952

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
Barry Lorion, Acting District 3 Highway Director

¹ A Demand must contain a "detailed breakdown of the balance due under the subcontract" that clearly sets forth the original value of the subcontract, all additions to the subcontract through Department approved amendments, all pending but unapproved amendments, all payments made by the general contractor for work done, any retainage held, all credits, back charges and all other information needed to demonstrate what Department approved work was done but remains unpaid.

APPENDIX B-1

RULINGS

OUTDOOR ADVERTISING APPEALS

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

APPEAL DOCKET

APPEAL OF DENIAL AND/OR REVOCATION OF OUTDOOR ADVERTISING PERMITS

PARTIES	
<p>APPELLANT</p> <p>CLEAR CHANNEL OUTDOOR INC.</p> <p>Address: 86 Maple Street Stoneham, MA 02180</p> <p>Counsel: Gordon D. Todd, Esq. Christopher Quinn Daniel J. Hay, Esq. 41 Colgate Rd. Sidley Austin LLP Newton, MA 02462 1501 K Street, N.W. Wash., D.C. 20005</p>	<p>APPELLEE</p> <p>OFFICE OF OUTDOOR ADVERTISING MASS. DEPT. OF TRANSPORTATION</p> <p>Address: 10 Park Plaza Boston, MA 02116</p> <p>Counsel: Eileen Fenton, Senior Counsel 10 Park Plaza, Room 3510 Boston, MA 02116</p>

PROCEEDINGS AND ORDERS		
Entry #	Filing Date	Description
1	3/2/18	NOTICE OF APPEAL filed by Cove Outdoor LLC by Letter dated March 2, 2018 from Christopher Quinn. In reference to the actions taken by the Office of Outdoor Advertising, as communicated in OOA's March 1, 2018 letter, "Clear Channel demands a hearing pursuant to 700 CMR 3.05, 3.09 and 3.19."
2	3/28/18	PRELIMINARY STATUS CONFERENCE held as scheduled.
3	4/2/18	<p>SCHEDULING ORDER</p> <p>On or before April 13, 2018, Clear Channel shall file a pre-hearing brief that addresses the legal and jurisdictional issues pertinent to its appeal, the factual basis of the appeal, and the remedy being sought from this Office.</p> <p>On or before April 27, 2018, the Department shall file its reply to Clear Channel's pre-hearing brief. A sur-reply, if applicable, may be filed by Clear Channel no later than May 4, 2018.</p> <p>The Parties shall engage in voluntary discovery as provided in 801 CMR 1.02(8). The Parties shall participate in a final pre-hearing status conference to be scheduled in the month of May. The Parties shall raise any additional pre-hearing matters to be addressed by this Office by appropriate motion or filing.</p>

4	4/12/18	<p>JOINT REQUEST FOR EXTENSION OF TIME TO PREPARE AND SUBMIT PRE-HEARING BRIEFS</p> <p>Request is <u>APPROVED</u>. The SCHEDULING ORDER of April 2, 2018 is revised as follows:</p> <p>On or before April 20, 2018, Clear Channel shall file a pre-hearing brief that addresses the legal and jurisdictional issues pertinent to its appeal, the factual basis of the appeal, and the remedy being sought from this Office.</p> <p>On or before May 11, 2018, the Department shall file its reply to Clear Channel's pre-hearing brief. A sur-reply, if applicable, may be filed by Clear Channel no later than May 18, 2018.</p>
5	4/20/18	APPELLANT'S PRE-HEARING BRIEF by Clear Channel Outdoor Inc.
6	5/10/18	REQUEST TO EXTEND TIME FOR FILING REPLY BRIEF by the Department. Assented to by Clear Channel Outdoor Inc.
7	5/14/18	<p>REQUEST TO EXTEND TIME FOR FILING REPLY BRIEF is <u>ALLOWED</u>.</p> <p>The SCHEDULING ORDER of April 12, 2018 is revised as follows:</p> <p>On or before May 23, 2018, the Department shall file its reply to Clear Channel's pre-hearing brief. A sur-reply, if applicable, may be filed by Clear Channel no later than May 30, 2018.</p>
8	5/23/18	MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF by MBTA.
9	5/24/18	DEPARTMENT'S REPLY TO APPELLANT'S PRE-HEARING BRIEF.
10	5/24/18	<p>REQUEST TO EXTEND TIME FOR FILING SUR-REPLY BRIEF by Clear Channel. Assented to by the Department. REQUEST is <u>ALLOWED</u>.</p> <p>A sur-reply may be filed by Clear Channel no later than June 7, 2018.</p>
12	6/7/18	APPELLANT'S SUR-REPLY BRIEF.
13	7/12/18	<p>STATUS CONFERENCE held as scheduled.</p> <p>The Parties requested that this Office rule on the following legal questions in advance of the hearing in order to narrow the scope of the issues and factual evidence to be presented:</p> <ol style="list-style-type: none"> 1. <i>Does the Director of OOA have authority under 700 CMR 3.00 et seq. to grant a permit that expires earlier than December 31?</i> 2. <i>Does 700 CMR 7.09 require the Director of OOA to hold a hearing prior to revoking a permit?</i>
14	7/16/18	PARTIES' REQUEST FOR RULING is <u>ALLOWED</u>
15	7/26/18	<p>MEMORANDUM AND ORDER / RULING</p> <ol style="list-style-type: none"> 1. The Director of OOA has authority under 700 CMR 3.00 et seq. to grant a permit that expires earlier than December 31. 2. The Director of OOA is not required to hold a hearing prior to revoking a permit. <p>Clear Channel's request for a hearing to appeal the Director's decisions on renewal applications for 125 permits will be heard by this Office in accordance with G.L. c.30A and the procedures set forth in 700 CMR 3.19. The date and time of the hearing will be set in a separate scheduling order.</p>
16	8/16/18	<p>NOTICE OF HEARING.</p> <p>Pursuant to the requirements of M.G.L. c. 30A and 700 CMR §3.19, a hearing will be held on the denial and/or revocation of 125 outdoor advertising permits. The hearing will take place on September 19, 2018 at 10:00 a.m.</p>
17	8/24/18	<p>MBTA'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF is <u>ALLOWED</u>.</p> <p>MBTA is permitted to file an amicus brief and may argue orally at the close of the hearing.</p>

18	9/19/18	HEARING held as scheduled.
19	10/17/18	HEARING TRANSCRIPT received.
20	10/18/18	SCHEDULING ORDER If either party wishes to submit a post-hearing brief, such brief shall be submitted on or before November 2, 2018.
21	10/25/18	REQUEST TO EXTEND TIME FOR FILING POST HEARING BRIEF by the Department. Assented to by Clear Channel. REQUEST is <u>ALLOWED</u> . The Parties may submit post-hearing briefs on or before November 9, 2018.
22	11/9/18	DEPARTMENT'S POST HEARING BRIEF filed.
23	11/9/18	CLEAR CHANNEL'S POST HEARING BRIEF filed.
24	11/16/18	FINAL AGENCY DECISION In accordance with 700 CMR 3.05(6)(b), the Director's determination is final. The permits held by Clear Channel for 125 billboards located on MBTA property were further extended to March 4, 2018 and expired on that date. A copy of the decision was sent to each party and attorneys of record pursuant to M.G.L. c.30A, §11(8).



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: Gordon D. Todd, Esq.
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

Christopher A. Quinn, Esq.
41 Colgate Rd.
Newton, MA 02462

Eileen Fenton, Esq.
Office of the General Counsel
MassDOT
10 Park Plaza
Boston, MA 02116

Re: Appeal of Denial and/or Revocation of Outdoor Advertising Permits
Appellant: Clear Channel Outdoor Inc.

MEMORANDUM

Clear Channel Outdoor Inc. (“Clear Channel”) has appealed a decision of the Director of the Office of Outdoor Advertising (“OOA”) concerning renewal applications that it submitted for 125 permits. The Parties have requested that this Office rule on the proper interpretation of certain outdoor advertising regulations in advance of the hearing in order to narrow the scope of the issues and factual evidence to be presented. The questions presented are as follows:

- 1. Does the Director of OOA have authority under 700 CMR 3.00 et seq. to grant a permit that expires earlier than December 31?*
- 2. Does 700 CMR 7.09 require the Director of OOA to hold a hearing prior to revoking a permit?*

These issues have been briefed by the parties in their pre-hearing briefs submitted in accordance with my Order dated April 2, 2018. I have reviewed the Parties’ arguments and legal support, and hereby rule in accordance with 801 CMR 1.02(7)(c).

RULING

Based on my review of the applicable statutes, regulations and caselaw, I conclude that the Director of OOA has authority to grant an outdoor advertising permit that expires earlier than December 31.

MassDOT has exclusive authority under M.G.L. c. 6C and c. 93D to regulate outdoor advertising in the Commonwealth. It exercises that authority through its OOA, administered by the Director, who is empowered to enforce 700 CMR 3.00 “in any manner provided by law.” 700 CMR 3.14(1). The Director is authorized to grant or deny applications for new permits, permit renewals, temporary permits, and permit transfers. 700 CMR 3.05, 3.07(17), 3.08, 3.12. The Director also has authority to revoke permits, which may be exercised “at any time” and “without limitation.” 700 CMR 3.09.

In this context, I do not interpret 700 CMR 3.03(c) as imposing a limitation on the broad powers delegated to the Director. The regulation, in pertinent part, reads: “all permits shall expire on December 31st of each year, unless otherwise revoked or further extended by the Director.” It is a settled principle in Massachusetts that the power to grant or deny permits and the power to revoke such permits “includes according the lesser privilege” of a restricted permit. *Goodwin v. DPU*, 351 Mass. 25, 26 (1966), citing *Leach v. State Fire Marshal*, 278 Mass. 159, 165-166 (1932) and *Camp v. Rex Inc.*, 304 Mass. 484, 487 (1939). Consistent with this principle, the Director may grant an outdoor advertising permit subject to reasonable restrictions, including restrictions on the term of the permit.

On the second question, I conclude that the Director is not required to hold a hearing prior to revoking a permit. The regulations governing permit revocation are contained in 700 CMR 3.09. The Director is authorized to revoke a permit for cause “at any time.” 700 CMR 3.09(2). If the Director revokes a permit, he must provide a 30 day written notice of the revocation and “opportunity for hearing.” *Id.* The obvious intent of the regulation is to ensure compliance with G.L. c. 30A, §13, which provides: “Except as otherwise provided in this section, no agency shall revoke or refuse to renew any license unless it has first afforded the licensee an opportunity for hearing ...”

Neither the statute nor the regulations require multiple hearings with respect to permit revocations or nonrenewal decisions made by the Director. A person who has been notified of a permit revocation, including the nonrenewal of a permit, may request an administrative hearing in accordance with the procedures set forth in 700 CMR 3.19 before a hearing officer. 700 CMR 3.09(5). If the permit holder does not request a hearing, the Director’s determination becomes final. 700 CMR 3.09(4)(a). If a hearing is requested, the determination becomes final after a decision is rendered by a hearing officer. *Id.*

ORDER

Clear Channel’s request for a hearing to appeal the Director’s decisions on renewal applications for 125 permits will be heard by this Office in accordance with G.L. c.30A and the procedures set forth in 700 CMR 3.19. The date and time of the hearing will be set in a separate scheduling order.

Albert Caldarelli
Administrative Law Judge

Dated: July 26, 2018



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: Tucker DeVoe, Esq.
Goodwin Procter LLP
100 Northern Avenue
Boston, MA 02210

Gordon D. Todd, Esq.
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

Eileen Fenton, Esq.
Office of the General Counsel
MassDOT
10 Park Plaza
Boston, MA 02116

Christopher A. Quinn, Esq.
41 Colgate Rd.
Newton, MA 02462

**Re: Appeal of Denial and/or Revocation of Outdoor Advertising Permits
Appellant: Clear Channel Outdoor Inc.**

MEMORANDUM

By Motion filed May 23, 2018, the Massachusetts Bay Transportation Authority (MBTA) requested permission to file an amicus brief. The motion is unopposed by the parties.

I find that the motion sufficiently establishes that the MBTA may be affected by this proceeding. In making this ruling, I rely on 801 CMR 1.01(9)(e):

The Presiding Officer may permit any Person who may be affected by a proceeding ... to participate. Permission to participate shall be limited to the right to argue orally at the close of a hearing and to file an amicus brief ...

The MBTA's Motion is ALLOWED.

ORDER

The MBTA is permitted to file an amicus brief and may argue orally at the close of the hearing scheduled for September 19, 2018.

Albert Caldarelli
Administrative Law Judge

Dated: August 24, 2018



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: Gordon D. Todd, Esq.
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

Eileen Fenton, Esq.
Office of the General Counsel
MassDOT
10 Park Plaza
Boston, MA 02116

Daniel J. Hay, Esq.
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

Christopher A. Quinn, Esq.
41 Colgate Rd.
Newton, MA 02462

**Re: Appeal of Denial and/or Revocation of Outdoor Advertising Permits
Appellant: Clear Channel Outdoor Inc.**

NOTICE OF FINAL AGENCY DECISION

Pursuant to M.G.L. c. 30A, 700 CMR 3.19, and 801 CMR 1.02, the Office of the Administrative Law Judge hereby gives notice of a decision in the above-captioned matter.

A copy of the decision is attached. The decision is subject to judicial review in accordance with G.L. c. 30A, §14.

The parties have been notified by mail on this date.

Dated: November 16, 2018

By: _____
Lisa Harol, Secretary
Tel: (857) 368-9495

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION

FINAL AGENCY DECISION

APPEAL OF THE DENIAL AND/OR REVOCATION OF OUTDOOR ADVERTISING PERMITS BY CLEAR CHANNEL OUTDOOR INC.

INTRODUCTION

This decision addresses an appeal by Clear Channel Outdoor Inc. (“Clear Channel”) of actions taken by the Director of the Office of Outdoor Advertising (“OOA”) with respect to a renewal application submitted for 125 permits. By letter dated March 2, 2018, Clear Channel requested a hearing to contest OOA’s actions.

On September 19, 2018, I held an adjudicatory hearing in accordance with the requirements of M.G.L. c. 30A, 700 CMR 3.19, and 801 CMR 1.02. Clear Channel appeared and was represented by Gordon Todd, Esq. and Daniel Hay, Esq. The OOA was represented by Eileen Fenton, Senior Counsel. The following witnesses appeared and gave sworn testimony and evidence concerning the matters at issue in the appeal: Michael Morello, Vice President of Real Estate and Public Affairs, Clear Channel Outdoor Inc., and John Romano, Director, MassDOT Office of Outdoor Advertising.

FINDINGS OF FACT

After consideration of the testimony and evidence presented at the hearing, I make the following findings of fact:

1. Clear Channel is licensed by OOA to engage in the business of outdoor advertising in the Commonwealth. It maintains and operates over 1,600 billboards statewide.¹ Included in that total are 125 billboards located on MBTA property (the “MBTA billboards”), which are the subject of a 2003 license agreement between Clear Channel and MBTA.²
2. Clear Channel and MBTA are litigating a dispute in the Superior Court (#1884CV00268-BLS2), which arises out of the 2003 license agreement and concerns the ownership of and the right to operate and maintain the MBTA billboards.³ On January 31, 2018, the Superior Court issued a Memorandum and Order denying Clear Channel’s motion for a preliminary injunction.⁴ On February 23, 2018, the Court issued a Memorandum and Order on the parties’ cross motions and a Preliminary Injunction.⁵

¹ Maurello, Hr’g Tr. 9:3-8; Exhibit 1.

² Maurello, Hr’g Tr. 24:18-25:2; Romano, Hr’g Tr. 47:21-48:4; Exhibits 5 and 6.

³ Maurello, Hr’g Tr. 25:18-26:21; Romano, Hr’g Tr. 95:8-10; Exhibits 10 and 11.

⁴ Exhibit 10.

⁵ Exhibit 11.

3. While these matters were taking place in Superior Court, OOA was in the process of reviewing a permit renewal application from Clear Channel.⁶ The renewal application was submitted on December 14, 2017 for 1,696 permits for billboards that Clear Channel maintains and operates, including the 125 permits for the MBTA billboards.⁷ Clear Channel paid the required permit renewal fees totaling \$334,900.⁸
4. On December 21, 2017, the Director of OOA completed an initial review of Clear Channel's renewal application. Under the section of the renewal application entitled "Director's Report", he checked "RENEWAL APPROVED" and signed the form.⁹ The matter was put on the agenda for a public hearing scheduled for January 11, 2018 to give notice and opportunity for public comment, if any, prior to the Director making a final determination on the renewal application.¹⁰ The renewal application was addressed at the January 11, 2018 hearing and taken under advisement.¹¹
5. In February 2018, the Director of OOA received and reviewed a letter and other information sent to him by Evan Rowe, Director of Revenue for MBTA.¹² The letter advised OOA about the dispute between MBTA and Clear Channel. It also provided MBTA's position that ownership of the billboards would pass to MBTA as of March 4, 2018 causing Clear Channel to "have no right to be on MBTA property, operate the MBTA's static billboards, or have any further rights or claims on its property". The Director of OOA also became aware of the January 31 and February 23 Memoranda and Orders of the Superior Court, copies of which he received and reviewed.¹³
6. On February 15, 2018, the Director of OOA advised Clear Channel that a required certification page (the "2018 Permit Renewal Notice of Certification") was missing from its renewal application.¹⁴ On February 16, 2017, Clear Channel provided OOA with a scanned copy of the certification page, which had been signed by Michael Morello on December 7, 2017.¹⁵ The Director of OOA added a note in the "Director's Report" section of the renewal application stating that receipt of the certification page on February 16, 2018 completed the renewal application.¹⁶
7. On March 1, 2018, the Director of OOA advised Clear Channel that he considered the renewal application to be complete as of February 16, 2018. He also advised that he was renewing Clear Channel's permits for the MBTA billboards through

⁶ Exhibit 1.

⁷ Maurello, Hr'g Tr. 16:16-17; Exhibit 2; *also see* 700 CMR 3.02(2)(c) requiring annual renewal of permits.

⁸ Maurello, Hr'g Tr. 16:24-17:9; Exhibit 3; *see* 700 CMR 3.03(2)(a).

⁹ Exhibit 1; Romano, Hr'g Tr. 47:8-48:8; 75:25-77:4.

¹⁰ Romano, Hr'g Tr. 45:8-46:23.

¹¹ Romano, Hr'g Tr. 45:16-24.

¹² Romano, Hr'g Tr. 53:1-55:1; Exhibit 9.

¹³ Romano, Hr'g Tr. 55:2-7, 56:2-14, 56:24-57:13.

¹⁴ Maurello, Hr'g Tr. 17:17-24, 29:2-18; Romano, Hr'g Tr. 49:4-8, 77:8-78:13; Exhibit 7.

¹⁵ Maurello, Hr'g Tr. 18:5-19, 29:2-18; Exhibit 7.

¹⁶ Exhibit 7.

March 4, 2018.¹⁷ Each of the 125 permits for the MBTA billboards contains the following term: “This permit expires on 3/4/2018 unless sooner revoked by the Office.”¹⁸

8. On March 2, 2018, the Director of OOA again advised Clear Channel that he considered the renewal application to be complete as of February 16, 2018. He also advised that he was renewing permits for the balance of the Clear Channel’s inventory.¹⁹ All of these permits were renewed to December 31, 2018.²⁰

PRELIMINARY RULINGS

The Director is Authorized to Further Extend Permits

Clear Channel argues that the Director exceeded his authority in renewing the MBTA billboard permits but setting them to expire on March 4, 2018. Clear Channel relies on 700 CMR 3.03(c) which reads in pertinent part: “all permits shall expire on December 31st of each year, unless otherwise revoked or further extended by the Director.” I have ruled previously, and reaffirm now, that I do not interpret 700 CMR 3.03(c) as imposing a limitation on the broad powers delegated to the Director. In this case, extending the expiration date of the permits held by Clear Channel from December 31, 2017 to March 4, 2018 is expressly authorized by 700 CMR 3.03(c). Also, the Director has broad authority to enforce 700 CMR 3.00 “in any manner provided by law.”²¹ He is authorized to grant or deny applications for new permits, permit renewals, temporary permits, and permit transfers.²² The Director also has authority to revoke permits, which may be exercised “at any time” and “without limitation.”²³ It is a settled principle in Massachusetts that the power to grant or deny permits and the power to revoke such permits “includes according the lesser privilege.”²⁴ Consistent with this principle, the broad range of powers granted to the Director includes the authority to grant permits with an expiration date earlier than December 31.

The Director’s Determination Was a Denial, In Part

The parties also disputed the procedural posture of this case. Clear Channel considered the Director’s determination to be a denial and/or a revocation of its permits, and exercised its right to a hearing pursuant to 700 CMR 3.05(4) and 3.19. The OOA, on the other hand, continued to argue that there was no denial or revocation because the Director approved Clear Channel’s renewal application and extended the permits, and the permits simply expired by their own terms. OOA maintains that there is nothing for this Office to decide and no hearing should have taken place.

¹⁷ Exhibit 5.

¹⁸ *Id.*

¹⁹ Exhibit 4.

²⁰ *Id.*

²¹ 700 CMR 3.14(1).

²² 700 CMR 3.05, 3.07(17), 3.08, 3.12.

²³ 700 CMR 3.09.

²⁴ *Goodwin v. DPU*, 351 Mass. 25, 26 (1966), citing *Leach v. State Fire Marshal*, 278 Mass. 159, 165-166 (1932) and *Camp v. Rex Inc.*, 304 Mass. 484, 487 (1939).

I conclude that the Director's determination is a denial, in part, of Clear Channel's renewal application. The permits that Clear Channel sought to renew were, by regulation, to expire on December 31 of each year unless otherwise revoked or further extended by the Director.²⁵ Clear Channel properly applied for renewal of those permits. In exercising his authority pursuant to 700 CMR 3.05, the Director approved the application and further extended the permits to March 4, 2018. This is not a revocation for purposes of 700 CMR 3.09 because no permits held by Clear Channel were revoked. However, the determination constitutes a denial, in part, because the Director did not renew the permits to December 31 in accordance with their original terms.

The Director Did Not Abuse His Discretion

Clear Channel accuses the Director of abusing his discretion and engaging in improper *ex parte* communications with MBTA concerning the permits for the MBTA billboards. Given the ongoing litigation, it suggests that the Director should have refrained from any action that would affect the status quo as it related to the permits. It also contends that OOA's relationship to MBTA, a sister agency to MassDOT, presented a conflict of interest such that the Director had motivation to make decisions to benefit MBTA's interests in the litigation at the expense of Clear Channel. It points out that the Superior Court's rulings were preliminary in nature and did not compel OOA to take any specific action, or any action at all, with respect to the permits for the MBTA billboards. Finally, Clear Channel contends that the Director's actions were improper because they have, in effect, decided the dispute that is being litigated in the Superior Court.

Based on the record before me, the Director's actions on Clear Channel's renewal application and his ultimate determination concerning the MBTA permits do not lie "outside the bounds of reasonable alternatives."²⁶ The legislature has vested OOA, through its Director, with the exclusive authority to regulate outdoor advertising in the Commonwealth. The Director, therefore, has an affirmative duty to administer the laws, regulations, and public policy as they apply to all billboards, including those at issue in this appeal. Although the Court did not order the Director to do anything, it is equally the case that the Court did not enjoin him from carrying out his administrative duties. The permits for the MBTA billboards were expiring. A renewal application had been submitted and was pending before him. The Director was required to make a determination "within a reasonable time."²⁷

Also, it was known to Clear Channel that its renewal application would be subject to public review and comment. The Director put it on the agenda of OOA's January 11, 2018 public hearing for the purpose of soliciting public comment, if any, prior to making a final determination. When he received MBTA's February 2018 correspondence, it was within his discretion to consider that information or not, to give weight to MBTA's position or not, to follow up with MBTA if he wanted clarification or additional information, and to determine whether he required a response and/or further information from Clear Channel before making his determination on the renewal application. Nothing in the regulations governing permit renewals limits the scope of the Director's review or requires him, prior to making a determination, to engage in ongoing dialogue with permit applicants concerning comments, information, and communications received from third parties.

²⁵ 700 CMR 3.03(c).

²⁶ *L.L. v. Commonwealth*, 470 Mass. 169, 184-185 & n.27 (2014) (discussing the abuse of discretion standard).

²⁷ 700 CMR 3.05(2).

The regulations required the Director, upon making his determination to deny, in part, Clear Channel's renewal application, to "set forth a brief summary of the reasons for the denial, including citations to applicable law and the provisions of 700 CMR 3.00 relied upon."²⁸ His March 1, 2018 transmittal to Clear Channel satisfied that requirement.²⁹ If Clear Channel disagreed with the Director's determination, which it did, it was guaranteed the opportunity to challenge it at a hearing pursuant to 700 CMR 3.05(4) and 3.19, and M.G.L. c. 30A, §13. Pending a hearing and decision, the Director's determination does not become final. Clear Channel was not denied any procedural due process rights guaranteed to permit applicants.

Clear Channel requested a hearing and was entitled to a *de novo* review of the Director's denial, in part, of its renewal application. At the hearing, OOA had the burden to demonstrate by a preponderance of the evidence that the Director had sufficient reason to refuse to renew Clear Channel's permits beyond March 4, 2018. OOA met its burden. My decision is provided below.

DISCUSSION

The ultimate purpose of an outdoor advertising permit is to grant permission to erect and maintain sign structures.³⁰ The permit authorizes the location and physical characteristics of the billboard, i.e., its construction, site, spacing requirements, dimensions, height, etc.³¹ It also specifies the conditions under which the billboard is maintained, i.e., changing the message on the sign, painting fixtures, routine repairs, safety improvements, insurance, etc.³² Finally, the permit carries with it obligations to the general public. The permit holder must ensure that no unauthorized modifications are made,³³ that there are no unauthorized cut-outs, projections, extensions,³⁴ that there are no moving or movable parts, or flashing, animated, intermittent or other illumination,³⁵ that the sign is properly maintained including removal of debris from the ground about it,³⁶ that the sign is insured,³⁷ and that public is notified on the billboard itself of the identity of the permittee responsible for the billboard.³⁸

It is necessary to any determination to grant or renew an outdoor advertising permit to confirm that the applicant can meet the permit obligations for the particular billboard. In Clear Channel's case, its ability to do so with respect to the MBTA billboards was brought into question because of the Superior Court's injunction. The Court ordered Clear Channel "not to dismantle, remove, dispose of, or interfere with any use of any billboard or sign structures located on property owned, leased, or otherwise controlled by the Massachusetts Bay Transportation Authority." It enjoined Clear Channel based on its finding that "MBTA is likely to succeed on its claim that Clear Channel is obligated to transfer the billboard structures to MBTA as of March 4, 2018."³⁹

²⁸ *Id.*

²⁹ See Exhibit 5.

³⁰ 700 CMR 3.02(2)(a); also see M.G.L. c. 93D, §3.

³¹ 700 CMR 3.07.

³² See "Ordinary/Customary Maintenance" at 700 CMR 3.01.

³³ 700 CMR 3.13(1).

³⁴ 700 CMR 3.13(2).

³⁵ 700 CMR 3.13(3).

³⁶ 700 CMR 3.13(4).

³⁷ 700 CMR 3.04.

³⁸ 700 CMR 3.13(5).

³⁹ Exhibit 11.

I acknowledge that the Court's findings are preliminary. With respect to the license agreement between MBTA and Clear Channel, there has been no final resolution of either party's rights to own, operate and maintain the MBTA billboards. Similarly, the February 2018 information provided by MBTA to the Director is merely a statement of MBTA's position on a dispute that has yet to be finally adjudicated. Therefore, I make no assumptions nor do I draw any conclusions concerning the issues that Clear Channel and MBTA are litigating in Superior Court. It is not appropriate, nor is it the role of OOA or this Office, to interpret the contract and property rights of permit applicants, or to grant property rights to a party through the issuance of a permit.⁴⁰

It is appropriate, however, to consider *the effect* of a Court order on a permit holder's ability to carry out its permit obligations. Clear Channel was ordered to not "interfere with any use of" the MBTA billboards. Unless and until the Court modifies its injunction, Clear Channel cannot change the message on the signs; it cannot perform painting or routine repairs; it cannot make safety improvements; it has no ability to protect against unauthorized modifications or features; it cannot remove debris from the billboard sites; it cannot hold itself out to the public as being responsible for the billboard. On February 23, 2018, when the Court issued its injunction, it became impossible for Clear Channel to perform the maintenance and public safety obligations required of a permittee with respect to the MBTA billboards. There is no sound reason to grant permission to maintain billboards to an applicant that is legally incapable of doing so.

The Director's decision to further extend Clear Channel's permits to March 4, 2018 was within his authority and reasonable based on the Superior Court's findings. He had sufficient reason to set them to expire as early as February 23, 2018, the date of the Court's injunction. Accordingly, he was justified in not renewing the permits beyond March 4, 2018.

DECISION

In accordance with 700 CMR 3.05(6)(b), the Director's determination is final. The permits held by Clear Channel for 125 billboards located on MBTA property were further extended to March 4, 2018 and expired on that date.

Albert Caldarelli
Administrative Law Judge

Dated: November 16, 2018

⁴⁰ See 700 CMR 3.03(2)(h) and 3.07(1).

APPENDIX C-1

RULINGS

MASS UCP ADJUDICATORY BOARD APPEALS



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



**MASSACHUSETTS UNIFIED CERTIFICATION PROGRAM
ADJUDICATORY BOARD**

To: Harold Rogers
Supplies Exchange Systems
18 Abbotsford Street
Dorchester, MA 02121

Ingrid Freire, Esq.
UCP Counsel
Mass. Department of Transportation
10 Park Plaza, Room 3510
Boston, MA 02116

In the Matter of Supplies Exchange Systems (MUCP #2017-0001)

NOTICE OF FINAL AGENCY DECISION

Pursuant to 49 CPR §26.87, M.G.L. c. 30A, and 801 C.M.R. §1.02 and §1.03, the Massachusetts Unified Certification Project Adjudicatory Board hereby gives notice of a decision in the above-captioned matter. The parties have been notified by mail on this date.

Dated: September 12, 2018

By: Lisa Harol, Secretary
Tel: (857) 368-9495

FINAL AGENCY DECISION

MASSACHUSETTS UNIFIED CERTIFICATION PROGRAM ADJUDICATORY BOARD

IN THE MATTER OF SUPPLIES EXCHANGE SYSTEMS

INTRODUCTION

The Adjudicatory Board of the Massachusetts Unified Certification Program is authorized to hear and decide appeals from determinations to decertify or remove a Disadvantaged Business Enterprise's eligibility pursuant to 49 CFR §26.87.

By letter dated March 30, 2017, the Massachusetts Unified Certification Program (MassUCP) notified Supplies Exchange Systems (SES) that it was initiating ineligibility proceedings. On April 2, 2017, SES requested a hearing before this Board. The Board held a hearing on August 7, 2018, in accordance with the requirements of 49 CFR §26.87, M.G.L. c. 30A, and 801 C.M.R. §1.02 and §1.03.

FINDINGS

After review of the testimony and evidence presented at the hearing, the Board makes the following findings:

1. SES is owned and operated by Mr. Harold Rogers. SES was established in 1976 and is in the business of selling building and construction materials to contractors and individuals, including lumber, electrical supplies, masonry equipment and supplies, doors, cabinets, windows.¹
2. SES is currently certified by the MassUCP as a Disadvantaged Business Enterprise (DBE) as a "Supplier of Construction Materials" and assigned NAISC code 444190 titled "Other Building Material Dealers."
3. Until recently, SES was located at 204 Washington Street, Dorchester, MA.² On or about January 2017, SES had to vacate this location and move its business operations to Mr. Rogers' home office at 18 Abbotsford Street in Boston. SES also utilizes a storage facility at 800 River Street in Hyde Park.³
4. With respect to its sales of building and construction materials, SES essentially follows these business practices:⁴

¹ Rogers, Hr'g Tr. 8:4-8, 19:24-25, 45:7-14.

² Rogers, Hr'g Tr. 49:21-22.

³ Rogers, Hr'g Tr. 49:21-22; Drake, Hr'g Tr. 26:16-20, 28:11-12

⁴ Rogers, Hr'g Tr. 50:19-51:12 and SES post-hearing statement. (The Board notes that SES on occasion may deviate from its normal operations to address special situations, *e.g.*, *see* Rogers, Hr'g Tr. 60:4-15, 62:10-12, 73:7-16).

- a. SES solicits contractors and other users of building and construction materials;
 - b. SES develops a take-off based on its review of the plans and specifications for a specific project;
 - c. SES provides its take-off to manufacturers/distributors to get quotes;
 - d. If the quote is acceptable, SES adds a mark-up, and provides its quote to the contractor;
 - e. If accepted, the contractor sends a purchase order for the materials to SES;
 - f. SES purchases the materials from the manufacturer/distributor;
 - g. SES arranges for delivery of the materials directly to the jobsite;
 - h. Upon receipt of payment from the contractor, SES pays the manufacturer/distributor.
5. SES does not keep an inventory of building and construction materials for sale to contractors on public projects.⁵ When it was operating at the Washington Street location, SES maintained a limited amount of inventory on site, which enabled it to sell building and construction materials to walk-in customers.⁶ At its current office location and storage facility, SES does not keep inventory for sales to walk-in customers.⁷
6. In January 2017, Ms. Ayoka Drake, Certification Investigator, performed an administrative review, including a site visit, of SES's certification status. During the review, Mr Rogers and other representatives of SES answered questions, provided information, accompanied her to the home office and storage facility, responded to requests both by email and letter, and hand-delivered additional documentation.⁸
7. During her site visit, Ms. Drake observed no building and construction materials in the storage facility. Also, the records provided by SES do not include an inventory report or other documentation evidencing that SES maintains an inventory of building and construction materials for retail sale to contractors or others.⁹
8. Ms. Drake proposed changing SES's certification from NAISC code 444190 to NAISC code 425120 titled "wholesale trade agents and brokers". SES disagreed with the proposed change.¹⁰

DISCUSSION

The MassUCP has initiated decertification proceedings against SES based on its findings that (1) SES does not meet the criteria required to remain certified under NAISC code 444190

⁵ Rogers, Hr'g Tr. 50:15-51:12, 62:10-12.

⁶ Rogers, Hr'g 50:16-19.

⁷ Rogers, Hr'g Tr. 53:9-21.

⁸ Drake, Hr'g Tr. 26:16-31:22; Exhibits 6, 8, 10 and 14.

⁹ Drake, Hr'g Tr. 28:2-10, 35:14-21; Exhibits 6, 10 and 14.

¹⁰ Drake, Hr'g Tr. 33:24-34:16.

entitled “Other Building Material Dealers,” and (2) the inability of SES to provide certain documentation during the recent administrative review constitutes a failure to cooperate pursuant to 49 C.F.R. Section 26.87(f). Pursuant to 49 CFR §26.87(d)(1), MassUCP has the burden of proving by a preponderance of the evidence that SES does not meet the certification standards of 49 CFR Part 26.

The Evidence Supports Decertification regarding NAISC Code 444190

In accordance with 49 C.F.R. 26.71(n), a DBE may be certified only in the NAICS code or codes that “describes, as specifically as possible, the principal goods or services that a firm would provide DOT recipients.” Here, SES is currently certified under NAICS Code 444190, titled “other building material dealers.” This NAICS code describes firms that are “primarily engaged in retailing specialized lines of new building materials such as lumber, fencing, glass, doors, plumbing fixtures and supplies, electrical supplies, prefabricated buildings and kits, and kitchen and bath cabinets and countertops to be installed.” The code is intended to describe retailers who buy goods for resale, serve the general public, have a warehouse or office intended to solicit high volume of walk-in customers, and display merchandise. *See Exhibit 2.*

The Board concludes that MassUCP has established by a preponderance of the evidence that NAICS Code 444190 does not accurately describe the principal goods or services that SES would provide DOT recipients. Accordingly, SES should be decertified from NAICS Code 444190.

The Evidence Does Not Support a Finding that SES Failed to Cooperate

The evidence presented by MassUCP does not demonstrate that SES failed to cooperate such that it should be decertified pursuant to 49 C.F.R. Section 26.87(f). During the review, Mr Rogers and other representatives of SES answered questions, provided information, accompanied her to its home office and storage facility, responded to requests both by email and letter, and hand-delivered additional documentation in response to requests. The documentation requested of SES was for the purpose of confirming the proper NAISC Code for certification. Documentation was provided by SES, and based on that documentation, MassUCP concluded that SES is not eligible to remain certified as a DBE under NAICS Code 444190, but is eligible to be certified as a DBE in NAICS Code 425120. The Board concludes that these circumstances do not meet the “failure to cooperate” standard described in 49 C.F.R. Section 26.87(f).

Certification regarding NAISC Code 425120

MassUCP concluded, and the Board agrees, that NAICS Code 425120, titled “wholesale trade agents and brokers,” most accurately describes the principal goods or services that SES would provide DOT recipients. At this time, however, MassUCP has not certified SES in that NAISC Code because SES objected to the certification change and SES exercised its right to a hearing before this Board concerning MassUCP’s action to decertify SES from its current NAISC code designation.

The Board believes that 49 C.F.R. 26.71(n) creates an affirmative obligation on MassUCP to certify a DBE firm in the “most specific available NAICS code.” Although firms are required to make sure that the NAICS codes are kept up-to-date, the certification itself is

based on “work *which the UCP has determined* the firm’s owners can control.” It is up to the certifying agency “to make an appropriate NAICS code designation.”

ORDER

Based on the above findings, the Board orders the following:

1. MassUCP shall decertify SES from NAICS Code 444190.
2. MassUCP shall certify SES in NAICS code 425120.

Dated: September 12, 2018

The Adjudicatory Board:

On behalf of its members:

Albert Caldarelli
David Spicer
Kenrick Clifton (did not participate)



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



**MASSACHUSETTS UNIFIED CERTIFICATION PROGRAM
ADJUDICATORY BOARD**

To: Harold Rogers
Supplies Exchange Systems
18 Abbotsford Street
Dorchester, MA 02121

Ingrid Freire, Esq.
UCP Counsel
Mass. Department of Transportation
10 Park Plaza, Room 3510
Boston, MA 02116

In the Matter of Supplies Exchange Systems (MUCP #2017-0001)

NOTICE

On September 12, 2018, you received written notice of the decision of the MassUCP Adjudicatory Board (Board) and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision, which ordered the following:

1. MassUCP shall decertify SES from NAICS Code 444190.
2. MassUCP shall certify SES in NAICS Code 425120.

Pursuant to 49 CFR §§26.87(g) and 26.89, you have the right to appeal this decision to the U.S. Department of Transportation (USDOT) at the following address:

U.S. Department of Transportation
Departmental Office of Civil Rights
1200 New Jersey Avenue SE
Washington, DC 20590-0001

If you want to file an appeal, you must send a letter to the USDOT within 90 days, including information and setting forth a full and specific statement as to why the decision is erroneous, what significant fact that the Board failed to consider, or what provisions of the applicable regulations the Board did not properly apply.

Please note that pending any appeal to the USDOT, the decision Board remains in effect.

Dated: September 26, 2018

By: _____
Lisa Harol, Secretary
Tel: (857) 368-9495

APPENDIX D-1

RULINGS

ELECTRONIC TOLL APPEALS

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

APPEAL DOCKET

APPEAL OF ELECTRONIC TOLLS BY EJT MANAGEMENT, INC.

PARTIES

<p>APPELLANT</p> <p>EJT MANAGEMENT, INC.</p> <p>Address:</p> <p>Counsel: Andrew Good, Esq. Philip Cormier, Esq. Good Schneider Cormier & Fried 83 Atlantic Avenue Boston, MA 02110</p>	<p>APPELLEE</p> <p>MASS. DEPT. OF TRANSPORTATION</p> <p>Address: 10 Park Plaza Boston, MA 02116</p> <p>Counsel: Eileen Fenton, Senior Counsel 10 Park Plaza, Room 3510 Boston, MA 02116</p>
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PROCEEDINGS AND ORDERS

Entry #	Filing Date	Description
1	12/1/17	DESIGNATION AND ASSIGNMENT by SECRETARY OF TRANSPORTATION. <i>see 700 CMR 7.05(5)(c)</i> By Memorandum dated November 9, 2017 (including attachments), MassDOT recommended to the Secretary that the Administrative Law Judge hear "a request for an adjudicatory appeal by EJT Management of toll charges that were issued to them as the registered owner of certain taxi cabs that operate on MassDOT's toll roads." Recommendation APPROVED by Secretary on December 1, 2017.
2	12/4/17	NOTICE OF APPEAL received. Receipt of Memorandum dated November 9, 2017 and Secretary's Approval, and attachments consisting of: March 17, 2017 correspondence to MassDOT from Counsel for EJT Management; June 8, 2017 correspondence to MassDOT from Counsel for EJT Management; June 28, 2017 correspondence from MassDOT to Counsel for EJT Management; and August 29, 2017 correspondence to MassDOT from Counsel for EJT Management.
3	12/18/17	STATUS CONFERENCE held as scheduled. Teleconference held to discuss preliminary matters concerning the Appeal. Eileen Fenton, Senior Counsel, representing MassDOT; Andrew Good, Esq. and Philip Cormier, Esq. representing EJT Management; Lisa Harol, Office of the ALJ, present to address administrative matters.
4	12/18/17	REQUEST TO SUBMIT PRE-HEARING MEMORANDUM by EJT Management during Status Conference. Request is APPROVED. The Parties to engage in further discussion with the goal of preparing and submitting a joint pre-hearing memorandum outlining factual and legal issues to be decided at the hearing, any agreed stipulations of facts, and other recommendations concerning the scope of the hearing; and to provide update at next status conference.

5	2/21/18	STATUS CONFERENCE held as scheduled.
6	2/23/18	NOTICE OF HEARING. Pursuant to the requirements of M.G.L. c. 30A, G.L. c. 6C §13, and 700 CMR §7.05, an adjudicatory hearing will be held concerning electronic tolls charged to EJT Management Inc. The Parties shall appear on April 10, 2018 at 9:00 a.m.
7	2/23/18	SCHEDULING ORDER. By March 20, 2018, the Parties shall complete all discovery in this matter, including witness lists, disclosure of any expert witnesses, and the opportunity to review any reports or exhibits to be presented at the Hearing. On March 22, 2018, the Parties shall participate by telephone conference call in a final pre-hearing status conference. The Parties shall raise any outstanding pre-hearing matters to be addressed by this Office by appropriate motion or filing with this Office on or before March 22, 2018.
8	3/19/18	MOTION FOR INTERIM RULING by EJT Management. "EJT requests an interim ruling well in advance of the ... hearing that: 1. At all times material to this dispute, the leased vehicle regulation applied to taxis. 2. EJT is not liable to DOT for tolls incurred by its taxis that were operated as leased vehicles during January and February 2018."
9	3/20/18	COMPLETION OF DISCOVERY Per #7: The Parties shall complete all discovery in this matter, including witness lists, disclosure of any expert witness, and the opportunity to review any reports or exhibits to be presented at the Hearing.
10	3/22/18	FINAL PRE-HEARING STATUS CONFERENCE held as scheduled.
11	3/22/18	MOTION TO RESCHEDULE HEARING by Department. The Department requested that the hearing scheduled for April 10, 2018 be rescheduled to April 12, 2018 to ensure the availability of a witness at the hearing, which request was assented to by EJT.
12	3/23/18	RULING: DEPARTMENT'S MOTION TO RESCHEDULE HEARING is <u>ALLOWED</u> .
13	3/23/18	NOTICE OF HEARING – SCHEDULING CHANGE Pursuant to the requirements of M.G.L. c. 30A, G.L. c. 6C §13, and 700 CMR §7.05, the date and time for the adjudicatory hearing on this matter is rescheduled to April 12, 2018, 9:00 a.m.
14	3/23/18	RULING: EJT's MOTION FOR INTERIM RULING is <u>DENIED</u> . "it is not practicable for this Office to make an interim ruling on these matters in advance of the hearing, as findings of facts necessary to rule on the above issues must be determined at the hearing. Also, EJT's rights are adequately protected with regard to any tolls or charges during these proceedings."
15	3/23/18	MEMORANDUM AND ORDER On March 22, 2018, the Parties participated in a final pre-hearing status conference to discuss issues to be presented at a hearing and other pre-hearing matters. The Parties confirmed that they are prepared to proceed to a hearing on the appeal. If any pre-hearing matters to be addressed by this Office arise prior to the hearing, the parties shall raise them by appropriate motion or filing with this Office.
16	3/28/18	MOTION TO DISMISS by Department.
17	3/30/18	PRELIMINARY RESPONSE TO DEPARTMENT'S MOTION TO DISMISS AND MOTION FOR DISCOVERY by EJT Management.

18	4/2/18	<p>RULING: DEPARTMENT MOTION TO DISMISS is <u>DENIED</u>.</p> <p>By requesting an Adjudicatory Hearing pursuant to 700 CMR 7.05(c), EJT has properly stated a claim upon which relief can be granted. There is no dispute that EJT is "a person issued a notice regarding the assessment of a toll, fine, fee or other penalty." By letters dated March 17, 2017 and June 8, 2017, EJT made "a written request for an appeal hearing." EJT's request for a hearing is acknowledged by the Department and the Secretary of Transportation in a November 9, 2017 memorandum designating and assigning the matter to the Office of the Administrative Law Judge. Therefore, EJT is "entitled to a hearing" on its appeal of the assessment of such tolls, fines, fees or other penalties. 700 CMR 7.05(c).</p>
19	4/2/18	<p>RULING: EJT'S MOTION FOR DISCOVERY is <u>DENIED</u>.</p> <p>The reason articulated by EJT for its motion for additional discovery has been rendered moot as a result of the denial of the Department's motion to dismiss.</p>
20	4/2/18	<p>REQUEST FOR TELECONFERENCE by EJT Management is <u>ALLOWED</u>.</p>
21	4/2/18	<p>TELECONFERENCE held as scheduled.</p> <p>Any pre-hearing matters to be addressed by this Office must be raised prior to the hearing by appropriate motion or filing with this Office.</p>
22	4/10/18	<p>HEARING not held. Rescheduled to 4/12/18 per #13.</p>
23	4/10/18	<p>JOINT MOTION TO CONTINUE HEARING by EJT Management and Department</p> <p>The Parties jointly move for a continuance of the presently scheduled hearing date of April 12, 2018 ...</p>
24	4/11/18	<p>RULING: JOINT MOTION TO CONTINUE HEARING is <u>ALLOWED</u>.</p>
25	4/11/18	<p>NOTICE OF HEARING – SCHEDULING CHANGE</p> <p>Pursuant to the requirements of M.G.L. c. 30A, G.L. c. 6C §13, and 700 CMR §7.05, the date and time for the adjudicatory hearing on this matter is rescheduled to May 16, 2018, 11:00 a.m.</p>
26	4/12/18	<p>HEARING not held. Rescheduled to 5/16/18 per #25.</p>
27	4/25/18	<p>MOTION TO COMPEL COMPLIANCE WITH SUBPOENA by EJT Management</p>
28	4/25/18	<p>REQUEST FOR CONFERENCE CALL by EJT Management</p> <p>The Request is <u>ALLOWED</u>. Conference call to be held on 4/26/18.</p>
29	4/25/18	<p>MOTION TO QUASH SUBPOENA by Department</p>
30	4/26/18	<p>TELECONFERENCE held as scheduled.</p>
31	4/26/18	<p>SCHEDULING ORDER</p> <p>EJT Management shall file its Opposition to Department's Motion to Quash by 4/30/18</p> <p>The Department shall file its Opposition to EJT Management's Motion to Compel by 4/30/18</p> <p>The Parties shall engage in discussions concerning a stipulation of fact to resolve their dispute concerning the production of certain records requested in EJT Management's Subpoena. If the Parties cannot agree on such stipulation by 5/4/18, a ruling(s) will be issued on the Parties' motions.</p>
32	4/30/18	<p>OPPOSITION TO MOTION TO QUASH by EJT Management</p>
33	4/30/18	<p>OPPOSITION TO MOTION TO COMPEL by Department</p>

34	5/4/18	STATUS REPORT Parties to report on status of discussions concerning a stipulation of fact to resolve their dispute concerning the production of certain records requested in EJT Management's Subpoena.
35	5/9/18	HEARING ON DEPARTMENT'S MOTION TO QUASH SUBPOENA and EJT MANAGEMENT'S MOTION TO COMPEL COMPLIANCE WITH SUBPOENA held as scheduled
36	5/11/18	DEPARTMENT'S MOTION TO QUASH SUBPOENA is <u>ALLOWED in part and DENIED in part.</u> EJT MANAGEMENT'S MOTION TO COMPEL is <u>ALLOWED in part and DENIED in part.</u> Pursuant to M.G.L. c.30A, §12 and 801 CMR 1.02(10)(i), the April 5, 2018 Subpoena is modified as follows: 1. No later than May 14, 2018, the Department shall provide to EJT all non-privileged documents that are responsive to the April 5, 2018 Subpoena, subject to the following: a. The Department is not required to provide any information relative to other account holders who participate in the electronic toll collection system; b. If the Department asserts a legal privilege with respect to any otherwise responsive documents, it shall provide a privilege log for EJT's review.
37	5/16/18	HEARING held as scheduled.
38	5/16/18	SCHEDULING ORDER The Parties may submit post-hearing briefs no later than two weeks after receipt of the hearing transcript.
39	5/21/18	PAGES 1 AND 2 TO HEARING EXHIBIT EJT-16 filed by EJT. Entered into the record as pages 1 and 2 of Hearing Exhibit EJT-16.
40	6/1/18	HEARING TRANSCRIPT received.
41	6/1/18	COPY OF HEARING TRANSCRIPT filed by EJT.
42	6/11/18	MOTION FOR ENLARGEMENT OF TIME TO SUBMIT POST-HEARING BRIEF by EJT.
43	6/22/18	EJT'S POST-HEARING BRIEF filed.
44	6/22/18	MOTION TO CORRECT TRANSCRIPTION ERRORS by EJT.
45	7/2/18	REQUEST FOR EXTENSION OF TIME TO SUBMIT POST-HEARING BRIEF by Department.
46	7/3/18	REQUEST TO SUBMIT REPLY TO DEPARTMENT'S POST-HEARING BRIEF by EJT
47	7/3/18	LETTER FROM EJT TRANSMITTING EZ-DRIVE MA ACCOUNT DATA received.
48	7/9/18	DEPARTMENT'S POST-HEARING BRIEF filed.
49	7/11/18	EJT TO MOTION FOR ENLARGEMENT OF TIME TO SUBMIT POST-HEARING BRIEF is <u>ALLOWED.</u> DEPARTMENT'S REQUEST FOR EXTENSION OF TIME TO SUBMIT POST-HEARING BRIEF is <u>ALLOWED.</u> EJT REQUEST TO SUBMIT REPLY TO DEPARTMENT'S POST-HEARING BRIEF is <u>ALLOWED.</u> SCHEDULING ORDER The schedule for filing post-hearing briefs is revised as follows: 1. EJT's post-hearing brief is due on or before June 22, 2018. 2. The Department's post-hearing brief is due on or before July 9, 2018. 3. EJT's reply brief is due on or before July 16, 2018.

50	7/11/18	EJT TO MOTION TO CORRECT TRANSCRIPTION ERRORS is <u>ALLOWED</u> . The errata sheet attached to EJT's Motion shall be incorporated into the record of this proceeding.
51	7/13/18	LETTER FROM STEPHEN COLLINS received.
52	7/16/18	EJT'S POST HEARING REPLY BRIEF filed.
53	7/19/18	FINAL AGENCY DECISION For the reasons stated herein, EJT's appeal is denied. A copy of the decision sent to each party and attorneys of record pursuant to M.G.L. c.30A, §11(8).



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: Andrew Good, Esq.
Philip Cormier, Esq.
Good Schneider Cormier & Fried
83 Atlantic Avenue
Boston, MA 02110

Eileen Fenton, Esq.
Office of the General Counsel
MassDOT
10 Park Plaza
Boston, MA 02116

Re: Appeal of Electronic Tolls
Appellant: EJT Management Inc.

NOTICE OF HEARING – SCHEDULING CHANGE

On March 22, 2018, the Department requested that the hearing scheduled for April 10, 2018 on the above-referenced matter be rescheduled to April 12, 2018 to ensure the availability of a witness at the hearing, which request was assented to by EJT. The Department's request is ALLOWED.

In accordance with the above, and pursuant to the requirements of M.G.L. c. 30A, G.L. c. 6C §13, and 700 CMR §7.05, the date and time for the adjudicatory hearing on this matter is rescheduled as follows:

Date: **April 12, 2018**
Time: **9:00 a.m.**
Location: **Room 6620, 6th Floor**
10 Park Plaza, Boston, MA 02116

MEMORANDUM AND ORDER

By letter dated March 19, 2018, EJT requested that this Office make an interim ruling in advance of the hearing. The request is as follows:

EJT requests an interim ruling well in advance of the ... hearing that:

1. At all times material to this dispute, the leased vehicle regulation applied to taxis.
2. EJT is not liable to DOT for tolls incurred by its taxis that were operated as leased vehicles during January and February 2018.

In accordance with 801 CMR 1.02(7)(c), I have reviewed the request and have determined that it is not practicable for this Office to make an interim ruling on these matters in advance of the hearing, as findings of facts necessary to rule on the above issues must be determined at the hearing. Also, EJT's rights are adequately protected with regard to any tolls or charges during these proceedings. If, after the hearing and decision, EJT's appeal is successful, available remedies may include "where appropriate, retroactive as well as prospective relief." 801 CMR 1.02(10)(n)(4). For these reasons, the request is DENIED.

MEMORANDUM AND ORDER

On March 22, 2018, the Parties participated in a final pre-hearing status conference to discuss issues to be presented at a hearing and other pre-hearing matters. The Parties confirmed that they are prepared to proceed to a hearing on the appeal.

If any pre-hearing matters to be addressed by this Office arise prior to the hearing, the parties shall raise them by appropriate motion or filing with this Office.

Albert Caldarelli
Administrative Law Judge

Dated: March 23, 2018



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: Andrew Good, Esq.
Philip Cormier, Esq.
Good Schneider Cormier & Fried
83 Atlantic Avenue
Boston, MA 02110

Eileen Fenton, Esq.
Office of the General Counsel
MassDOT
10 Park Plaza
Boston, MA 02116

Re: Appeal of Electronic Tolls
Appellant: EJT Management Inc.

MEMORANDUM

By Motion filed March 28, 2018, the Department requests that this Office dismiss EJT Management Inc.'s (EJT) appeal "for failure to state a claim upon which relief can be granted." Also, I have EJT's Preliminary Response and Motion for Discovery. EJT requests additional discovery "to enable an informed decision to be made concerning [the Department's] motion to dismiss ..."

For the reasons discussed below and pursuant to 801 CMR 1.02(7)(c):

1. The Department's Motion to Dismiss is DENIED.
2. EJT's Motion for additional discovery is DENIED.

DISCUSSION

By requesting an Adjudicatory Hearing pursuant to 700 CMR 7.05(c), EJT has properly stated a claim upon which relief can be granted. There is no dispute that EJT is "a person issued a notice regarding the assessment of a toll, fine, fee or other penalty." By letters dated March 17, 2017 and June 8, 2017, EJT made "a written request for an appeal hearing." EJT's request for a hearing is acknowledged by the Department and the Secretary of Transportation in a November 9, 2017 memorandum designating and assigning the matter to the Office of the Administrative Law Judge. Therefore, EJT is "entitled to a hearing" on its appeal of the assessment of such tolls, fines, fees or other penalties. 700 CMR 7.05(c).

The Department relies on EJT's request dated March 19, 2018 as the factual basis of its motion. However, EJT's request was not intended, and was not treated by this Office, as an admission of facts by either party. EJT's request was denied expressly on the basis that "it is not practicable for this Office to make an interim ruling on these matters in advance of the hearing, *as findings of facts necessary to rule on the above issues must be determined at the hearing* [emphasis added]." All facts necessary to a decision on the appeal must be made "*following the hearing.*" 700 CMR 7.05(c)

The Parties were given the opportunity to agree on stipulated facts in advance of the Hearing, but were unable to do so. Therefore, an Adjudicatory Hearing on this matter will be

held on April 12, 2018 in accordance with 700 CMR 7.05(c), Chapter 30A, and 801 CMR §1.02. All findings of facts pertinent to this matter will be made based upon the issues and evidence presented at the hearing. Each party has the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence. G.L. c.30A, §11(3). The parties may present and establish all relevant facts and circumstances by oral testimony and documentary evidence; advance any pertinent arguments; question or refute any testimony including an opportunity to cross-examine adverse witnesses; introduce evidence; and introduce any other pertinent documents. 801 CMR 1.02(10)(g). After consideration of all relevant and reliable evidence, this Office will reach a fair, independent and impartial decision. 801 CMR §1.02(10)(f).

Finally, the parties were ordered to complete discovery by March 20, 2018. The reason articulated by EJT for its motion for additional discovery has been rendered moot as a result of my denial of the Department's motion.

Albert Caldarelli
Administrative Law Judge

Dated: April 2, 2018



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: Andrew Good, Esq.
Philip Cormier, Esq.
Good Schneider Cormier & Fried
83 Atlantic Avenue
Boston, MA 02110

Eileen Fenton, Esq.
Office of the General Counsel
MassDOT
10 Park Plaza
Boston, MA 02116

Re: Appeal of Electronic Tolls
Appellant: EJT Management Inc.

MEMORANDUM

This Memorandum and Order addresses a dispute between the parties concerning EJT Management Inc's (EJT) Subpoena dated April 5, 2018.

The Subpoena commands the Department to designate a keeper of records witness to appear at the May 16, 2018 hearing to give testimony and produce certain documents. On April 25, 2018, the Department moved to quash, and EJT moved to compel compliance. Each party submitted an opposition to the other's motion. On May 9, 2018 the parties appeared before me and were heard on their respective motions and oppositions.

For the reasons discussed below and pursuant to M.G.L. c.30A, §12 and 801 CMR 1.02(10)(i):

1. The Department's Motion to Quash is ALLOWED in part and DENIED in part.
2. EJT's Motion to Compel is ALLOWED in part and DENIED in part.
3. The April 5, 2018 Subpoena is modified as provided herein.

DISCUSSION

By Memorandum and Order dated April 2, 2018, this Office ruled that EJT has properly appealed the assessment of certain electronic tolls. A principal issue in EJT's appeal is whether and to what extent EJT may avail itself of the payment reassignment process provided in 700 CMR 7.04(8) for entities in the business of leasing or renting motor vehicles. In presenting its appeal, EJT has the right to examine and introduce any pertinent documents. 801 CMR 1.02(10)(g). The Subpoena generally seeks documents concerning the Department's practices and policies to implement the payment reassignment process provided in 700 CMR 7.04(8). In that regard, the requested documents are pertinent to the matters at issue in EJT's appeal.

Notwithstanding the above, the Department has demonstrated that the Subpoena, in part, calls for numerous records that are subject to the requirements set forth in G.L c.6C, §13 regarding electronic toll accounts. The Department is mandated by statute to "maintain the confidentiality of all information [without limit] relative to account holders who participate in its

electronic toll collection system.” Also, the statute provides that an account holder such as EJT has the right to access only information about its own account. *See* G.L. c.6C, §15(b) (“an account holder may, upon written request to the department, have access to all information pertaining solely to the account holder”). Further, as a holder of personal data, the Department is required to identify and give reasonable notice to each account holder prior to disclosing the information, even in response to compulsory legal process. G.L. c.66A, §2(k). There were 64,055 instances identified where the payment reassignment process provided in 700 CMR 7.04(8) was implicated. As a result, the Department has raised a persuasive argument that the Subpoena is unduly burdensome.

In consideration of the above, I ordered the Department to provide for *in camera* review representative samples of account holder information and related documentation that is responsive to item #3 of the Subpoena.¹ The Department provided a copy of the Rental/Lease Company Transaction Form used to initiate the process provided in 700 CMR 7.04(8), which EJT is aware of and which is publicly available, and which on its face is self-explanatory as to the steps a lessor must take to request payment reassignment. The form requires the registered owner to identify the toll transaction, lessee, and vehicle information, and to certify that the vehicle was leased or rented on the date of the toll transaction. It also requires the lessor to provide “all lessee or renter information.” All of the samples reviewed *in camera* consisted of a properly completed Rental/Lease Company Transaction Form and a copy of the related lease agreement. As a result, I see no reason to compel the Department to disclose confidential information pertaining to other account holders, whether in redacted form or pursuant to a protective order, to demonstrate the practices and policies related to the payment reassignment process provided in 700 CMR 7.04(8). The process is obvious from the face of the Rental/Lease Company Transaction Form and can be corroborated at the hearing through witness testimony and documentation that does not affect the privacy interests of other account holders.

ORDER

Pursuant to M.G.L. c.30A, §12 and 801 CMR 1.02(10)(i), I exercise my authority to modify the April 5, 2018 Subpoena as follows:

1. No later than May 14, 2018, the Department shall provide to EJT all non-privileged documents that are responsive to the April 5, 2018 Subpoena, subject to the following:
 - a. The Department is not required to provide any information relative to other account holders who participate in the electronic toll collection system;
 - b. If the Department asserts a legal privilege with respect to any otherwise responsive documents, it shall provide a privilege log for EJT’s review.

Albert Caldarelli
Administrative Law Judge

Dated: May 11, 2018

¹ Item #3 of the Subpoena requests documents that concern “instances in which the Department has granted to the lessor of a rented vehicle (including the lessor of a taxicab) the lessor’s request to reassign toll charges incurred by such rented vehicle to the lessee of such vehicle ...”



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: Andrew Good, Esq.
Philip Cormier, Esq.
Good Schneider Cormier & Fried
83 Atlantic Avenue
Boston, MA 02110

Eileen Fenton, Esq.
Office of the General Counsel
MassDOT
10 Park Plaza
Boston, MA 02116

Re: Appeal of Electronic Tolls
Appellant: EJT Management Inc.

SCHEDULING ORDER – POST HEARING BRIEFS

EJT filed an assented to motion for enlargement of time to file its post-hearing brief, dated June 11, 2018. The motion is ALLOWED.

By letter dated July 2, 2018, the Department requested for an extension of time to file its post-hearing brief. The request is ALLOWED.

By letter dated July 3, 2018, EJT requested leave to file a reply to the Department's post-hearing brief. The request is ALLOWED.

The schedule for filing post-hearing briefs is revised as follows:

1. EJT's post-hearing brief is due on or before June 22, 2018.
2. The Department's post-hearing brief is due on or before July 9, 2018.
3. EJT's reply brief is due on or before July 16, 2018.

CORRECTION OF TRANSCRIPT ERRORS

EJT filed a motion to correct transcript errors. The motion is dated June 22, 2018 and is unopposed. I have reviewed the proposed errata sheet included with EJT's motion, and I agree that the corrections should be made.

EJT's motion is ALLOWED. The errata sheet shall be incorporated into the record of this proceeding.

Albert Caldarelli
Administrative Law Judge

Dated: July 11, 2018



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: Andrew Good, Esq.
Philip Cormier, Esq.
Good Schneider Cormier & Fried
83 Atlantic Avenue
Boston, MA 02110

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MassDOT
10 Park Plaza
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**Re: Appeal of Electronic Tolls
Appellant: EJT Management Inc.**

NOTICE OF FINAL AGENCY DECISION

Pursuant to 700 CMR 7.05(c) and M.G.L. c. 30A, § 11(8), the Office of the Administrative Law Judge hereby gives notice of a decision in the above-captioned matter. The parties have been notified by mail on this date.

EJT' s appeal was denied. The reasons for this decision are set forth in the attached.

Dated: July 19, 2018

By: _____
Lisa Harol, Secretary
Tel: (857) 368-9495

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION

FINAL AGENCY DECISION

**APPEAL OF THE ASSESSMENT OF TOLLS
BY EJT MANAGEMENT, INC.**

INTRODUCTION

This decision addresses an appeal by EJT Management, Inc. (“EJT”) of certain electronic toll charges that were assessed against its EZ-Pass MA account in the months of November 2016 through April 2018 for transit over MassDOT’s toll roads, bridges and tunnels.¹

By letters dated March 17, 2017 and June 8, 2017 to the Secretary of Transportation, EJT made a written request for an appeal hearing concerning the toll charges at issue.² On December 1, 2017, the Secretary assigned the matter to the Office of the Administrative Law Judge and designated me to hear the appeal.

On May 16, 2018, I held an adjudicatory hearing in accordance with the requirements of 700 CMR 7.05(c), Chapter 30A, and 801 CMR §1.02. EJT appeared and was represented by Philip Cormier, Esq. and Andrew Good, Esq. MassDOT was represented by Eileen Fenton, Senior Counsel. The following witnesses appeared and gave sworn testimony concerning the matters at issue in the appeal:

Mary Tarpy, President of EJT Management, Inc.
Stephen Collins, Director of Statewide Tolling for MassDOT
Grace Garcia, Customer Service Manager, Transcore

FINDINGS OF FACT

After consideration of the testimony and evidence presented at the hearing, I make the following findings of fact:

EJT and the City of Boston Taxicab Industry

1. EJT is a company that manages the leasing of 362 taxicabs and taxi medallions for 34 corporations that own the taxicabs and medallions.³
2. EJT’s business operations are highly regulated by the City of Boston Hackney Carriage Unit and are subject to a comprehensive set of regulations for the Boston taxicab industry, which are set forth in Boston Police Department Rule 403.⁴

¹ MassDOT’s toll roads, bridges and tunnels refers to the turnpike, Ted Williams Tunnel, Sumner/Callahan Tunnels, and Tobin Memorial Bridge. *See* M.G.L.c. 6C, §13.

² 700 CMR 7.05(5)(c): “Consistent with the provisions of M.G.L. c. 30A, a person issued a notice regarding the assessment of a toll, fine, fee or other penalty may make a written request for an appeal before a clerk designated by MassDOT.”

³ Tarpey, Hr’g Tr. 10:6-12, 70:8-18; *also see*, *Serbago v. Boston Cab Dispatch*, 471 Mass. 321, 325, n. 5 (2015).

⁴ Tarpey, Hr’g Tr. 10:13-17; Exhibit DOT-1; *also see*, *Serbago at 322* (“Rule 403 is a comprehensive set of regulations for the Boston taxicab industry, promulgated by the city’s police commissioner pursuant to an express delegation of authority by the Legislature. St. 1930, c. 392, as amended by St. 1931, c. 408 §7, and St. 1934, c. 280.”) and *Id. at 324* (“In sum, businesses operating under the regime of Rule 403 may be described aptly as members of a highly regulated industry.”).

3. When EJT leases taxicabs to lessee taxicab drivers, it is required to use a lease agreement issued by the Hackney Carriage Unit.⁵ EJT may not alter the terms and conditions of the lease agreement, and may not charge lessee taxicab drivers more than the maximum lease/shift rates and additional charges expressly authorized by the Hackney Carriage Unit.⁶
4. There is no provision in the lease agreement or in Rule 403 authorizing a taxicab lessor such as EJT to charge lessee drivers for past unpaid tolls or to require drivers to place a deposit to secure the future payment of tolls.⁷
5. On or about September 2006, the Hackney Carriage Unit mandated that all taxicabs in the City of Boston use FASTLANE, the electronic tolling system established by MassDOT's predecessor agency the Massachusetts Transportation Authority ("MTA").⁸ Under the City's program, taxicabs had to be equipped with transponders, taxicab drivers were required to open electronic tolling accounts and obtain transponders for their use while operating a taxicab, and taxicab owners were required to open pre-paid electronic tolling accounts and register their taxicabs to such accounts.⁹

EJT's Taxi Owner Account

6. To comply with the requirements of the Hackney Carriage Unit, EJT submitted an "Application for Taxi Owner Account" dated September 11, 2006 to open an electronic tolling account with MassDOT for payment of tolls incurred by the taxicabs under its management responsibility. EJT's account was created and given Account Number 737604.¹⁰ The account has been in use since that time and remains active to the present day.¹¹
7. EJT initially elected the pre-paid toll payment option of automatic account replenishment by credit card, and then later switched to the option of direct payment from its checking account. EJT authorized MassDOT to charge its credit card for an initial deposit of \$25,650, which was equal to the required minimum opening balance of \$75 for each of the 342 taxicabs under EJT's management at the time and that EJT registered to its account.¹² Currently, EJT manages 362 taxis and the license plates of all of those taxis are registered to its account.¹³

⁵ Tarpey, Hr'g Tr. 12:6 – 13:12; Exhibit EJT-1; Exhibit DOT-1 at Rule 403 §6(I) ("The Inspector of Carriages or the Police Commission may from time to time issue documents that shall be used by Medallion Owners, Lessees and Hackney Carriage Drivers as lease agreement or shift rental agreements for Hackney Carriages. No lease or shift agreement may be altered without express permission of the Inspector of Carriages.")

⁶ Tarpey, Hr'g Tr. 13:15–14:4; Exhibit DOT-1 at Rule 403 §10(II)(a) and Appendix III.

⁷ Tarpey, Hr'g Tr. 64:24-65:4, 103:2-104:15; Exhibit EJT-1; Exhibit DOT-1 at Rule 403 §10(II)(a) and App. III.

⁸ Ch. 25 of the Acts of 2009 abolished the Massachusetts Turnpike Authority and merged its essential functions into MassDOT; since that time, electronic toll collection by use of a transponder has been renamed "EZ-Pass MA."

⁹ Tarpey, Hr'g Tr. 20:16-21:3, 23:2-5, 67:23-68:10; *also see* Exhibit EJT-3 "FASTLANE Transponder Order Worksheet – City of Boston Taxi Program"; and Exhibit DOT-1 at Rule 403 §3(III)(c)(xxvi) ("In order to help manage the flow of traffic in and around the City of Boston, any vehicle licensed for use as a Hackney Carriage will be equipped with a FASTLANE transponder ...").

¹⁰ Tarpey, Hr'g Tr. 20:16-24:18, 70:8-71:1; Exhibit EJT-3.

¹¹ Exhibits EJT-3-6, EJT-10, EJT-10A, EJT-18.

¹² Tarpey, Hr'g Tr. 20:16-24:18, 51:19-24, 70:8-71:1; Exhibit EJT-3.

¹³ Tarpey, Hr'g Tr. 68:24:25.

8. The “Application for Taxi Owner Account” was signed by EJT’s President at the time. It includes the following certification above the signature line: “I have read the information on this application, including the terms and conditions. I authorize payment as selected, and certify that all information contained in the application is true and accurate.”¹⁴

EZ-Pass Terms and Conditions

9. The terms and conditions attached to EJT’s application include the following: “In cases where your FASTLANE transponder is not read, but an image of the vehicle’s license plate is captured in the lane and the license plate information for the vehicle is listed in your account, the appropriate toll amount shall be deducted from your account by use of the video image, referred to herein as a ‘video toll’ or ‘v-toll.’ A Video Toll (‘V-Toll’) Administrative Fee shall also be applied to your account.”¹⁵
10. The terms and conditions attached to EJT’s application state that they may be changed by giving customers notice of such changes.¹⁶ In October 2016, MassDOT made changes to the terms and conditions for Taxi Owner Accounts, effective October 28, 2016, as part of MassDOT’s implementation of an “all-electronic-tolling system” called EZ-Pass MA.¹⁷ Notice of the changes was posted on MassDOT’s website and EJT was advised through frequent communications with staff at EZ-Pass MA about how implementation of the all-electronic tolling system might affect EJT’s account.¹⁸
11. The October 2016 version of the application for Taxi Owner Accounts requires applicants to confirm the following: “I acknowledge that my EZ-Pass MA account will be used to guarantee any toll payments incurred by the driver, and that my account will be charged for any video tolls (“v-tolls”) and fees incurred by a taxi for which the license plate number is included within my EZ-Pass MA account.”¹⁹
12. The October 28, 2016 terms and conditions state: “You acknowledge that in cases where your valid E-ZPass MA transponder is not read, an image of the vehicle’s license plate is captured and the appropriate toll will be charged to your account based on the license plate information listed in your account. This may result in an Administrative Fee being charged to your E-ZPass account.”²⁰
13. The October 28, 2016 terms and conditions also state: “The registered owner of record of the motor vehicle is responsible for the payment of the tolls, fees, fines

¹⁴ Exhibit EJT-3.

¹⁵ *Id.* at Fast Lane Program Agreement §5(a)

¹⁶ *Id.* at Fast Lane Program Agreement §12(a) (“The MTA may change the ‘FASTLANE Program Terms and Conditions’ at any time by giving customers notice thereof. The terms and conditions shall become effective seven (7) days after such notice has been given.”)

¹⁷ Collins, Hr’g Tr. 157:16-158:15, 116:12-14; Exhibit EJT-19.

¹⁸ Collins, Hr’g Tr. 187:15-188:1; Tarpey, Hr’g Tr. 40:14-42:16, 108:10-109:7.

¹⁹ Collins, Hr’g Tr. 157:16-158:15, 116:12-14; Exhibit EJT-19.

²⁰ Exhibit EJT-19.

and/or penalties that MassDOT assesses with respect to the nonpayment of the toll. If, however, the registered owner of record is in the business of leasing or renting motor vehicles and provides to MassDOT by the Payment Due Date on the Pay By Plate invoice, a copy of a lease, rental or similar contract document indicating that the vehicle was leased or rented at the time of the toll transaction and the identity, address and driver's license information of the person entitled to possession is discernible from the document, in which case that person may be responsible for the payment of the fines or penalties that MassDOT assesses.”²¹

Electronic Tolling Prior to October 28, 2016

14. Prior to October 28, 2016, tolls for transit over MassDOT’s toll roads, bridges and tunnels could be paid either by setting up an EZ-Pass account or by cash payment manually collected at a designated toll booth.²² When a customer set up an EZ-Pass account, the customer’s vehicle information and license plate numbers were listed on the account and the customer was provided transponders for use in each vehicle.²³
15. To use an electronic toll lane, the vehicle had to be equipped with a transponder, which would transmit information to enable the electronic tolling system to charge the toll to the customer’s account. It was a violation of the applicable regulations related to electronic toll collection to use an electronic toll lane without a transponder or with a transponder registered to an account with insufficient funds to pay the toll.²⁴
16. When the electronic tolling system was unable to collect the toll because the transponder was not in the vehicle, or the transponder was not read properly, or the transponder was registered to an account with insufficient funds, the system would capture a video image of the vehicle’s license plate and try to determine if the plate was listed on an EZ-Pass account. If the plate was found on an EZ-Pass account with sufficient funds to pay the toll, the appropriate toll amount plus a \$5 administrative fee was charged to that account based on the video image. This manner of electronic toll collection is referred to as a “video toll” or “v-toll.”²⁵ Otherwise, a Toll Violation Notice would be sent to the registered owner of the vehicle.²⁶
17. A Toll Violation Notice assessed a \$50 fine to the registered owner of the vehicle for the unauthorized use of the electronic toll collection system.²⁷
18. A registered owner who was an EZ-Pass customer could appeal the violation by completing the first page of a Toll Violation Appeal Form by the due date shown on the notice. For these appeals, MassDOT would waive the \$50 violation fine

²¹ *Id.*

²² Collins, Hr’g Tr. 110:22-111:3.

²³ Tarpey, Hr’g Tr. 23:12-15; Exhibit 3 at Fast Lane Transponder Order Worksheet.

²⁴ Collins, Hr’g Tr. 111:4-9; Exhibits 7 and 8; *also see* Exhibit EJT-3 at Fast Lane Program Agreement.

²⁵ Collins, Hr’g Tr. 113:8-18; ; *also see* Exhibit EJT-3 at Fast Lane Program Agreement §5(a);

²⁶ Exhibit 6.

²⁷ *Id.*

and instead charge a “v-toll”, i.e., the missed toll plus a \$5 violation administrative fee, to the registered owner’s EZ-Pass account.²⁸

19. A registered owner who was not an EZ-Pass account holder could appeal the violation by completing the second page of the Toll Violation Appeal Form. Leasing and Rental Agencies could appeal the violation by providing information about the lessee and certifying that the vehicle was leased to such person on the date of the violation.²⁹
20. Prior to October 2016, EJT received thousands of Toll Violation Notices, at a rate of approximately 100 or more per month, for unauthorized use of the electronic toll collection system.³⁰ The violations were the result of taxi drivers who, while operating taxis leased from EJT, used the electronic toll lanes without a transponder or at times when the taxi driver’s own account had insufficient funds to pay the toll.³¹
21. EJT would appeal each Toll Violation Notice by filling out and sending the Toll Violation Appeal Form to MassDOT’s Violation Processing Center in Auburn. EJT would also fill out and sign the section certifying that the vehicle was leased on the date of the violation.³² In almost all cases, the appeals were accepted by MassDOT. For each such accepted appeal, EJT was sent a notice confirming that MassDOT had waived the \$50 toll violation fine.³³
22. For violation appeals submitted by EJT, the Violation Processing Center would check the accounts of taxi drivers and if there was a sufficient balance, the missed toll and administrative fee would be posted to the account of the driver responsible for incurring the toll. Otherwise, the toll and administrative fee would be posted to EJT’s account.³⁴ The tolls and fees incurred by lessee drivers and paid by EJT through its EZ-Pass account averaged about \$1000 per month.³⁵

MassDOT’s All-Electronic Tolling System

23. On October 28, 2016, MassDOT implemented an all-electronic tolling system called EZDriveMA, which eliminated the option of paying tolls by cash and enabled toll collection without requiring vehicles to stop at a tollbooth.³⁶

²⁸ Collins, Hr’g Tr. 111:10-22; Exhibits 7, 8 and 9.

²⁹ Exhibit 6; *also see* M.G.L. c. 90, §20G.

³⁰ Tarpey, Hr’g Tr. 29:23-30:11, 32:16-19.

³¹ Tarpey, Hr’g Tr. 52:25-56:15.

³² Tarpey, Hr’g Tr. 33:25-36:5.

³³ *Id.*

³⁴ Tarpey, Hr’g Tr. 35:13-24; Exhibits 7, 8 and 9.

³⁵ Tarpey, Hr’g Tr. 42:21-22, 94:2-95:2; Exhibits 4, 5 and 6.

³⁶ Collins, Hr’g Tr. 116:12-14; *also see* 700 CMR 7.02 (“EZDriveMA is the cashless, automated system installed on or operating with respect to the Massachusetts Turnpike, MHS, a way, or at other MassDOT owned or MassDOT approved facilities for the purpose of collecting tolls, fares, fees, fines or other transactions as determined by MassDOT. The EZDriveMA system consists of E-ZPass MA and Pay By Plate.”)

24. In the all-electronic tolling system, customers still have the option of paying tolls by use of a transponder registered to an EZ-Pass account. However, it is no longer an unauthorized use of the electronic tolling system to operate a vehicle on MassDOT's tolled roads without a transponder and EZ-Pass account, and the regulations have eliminated violations and toll violation fines.³⁷
25. Those who elect to drive on MassDOT's toll roads without a transponder/EZ-Pass account are now covered by a new program call Pay By Plate.³⁸ Under this program, a customer has the option of setting up a Pay By Plate Registered Account, in which his/her vehicle(s) and corresponding license plate(s) are listed on the account and tolls incurred by those vehicle(s) are posted to the account based on video images.³⁹ Otherwise, the vehicle and license plate images are used to identify the registered owner of the vehicle in order to collect the toll by means of a Pay By Plate Invoice.
26. When a vehicle operates on a tolled facility without a transponder or when the transponder's account does not have sufficient funds to pay the toll, the all-electronic tolling system captures a video image of the vehicle's license plate and determines if the plate is listed on an EZ-Pass MA or Pay By Plate Registered account. If the plate is listed on an account with sufficient funds to pay the toll, a "video toll" or "v-toll" is charged to that account based on the video image.⁴⁰ Otherwise, a Pay By Plate Invoice is sent to the vehicle's registered owner of record.⁴¹
27. The Pay By Plate Invoice is an itemized statement that provides a summary of toll usage, tolls due, balance, late and other fees, fines, penalties, and other amounts due associated with toll or other transactions, as well as payments made, and/or credits.⁴²

Increase in V-Tolls Charged to EJT's Account

28. After the implementation of the all-electronic tolling system, v-tolls charged to EJT's EZ-Pass account increased significantly, on a scale of ten times or more the

³⁷ Collins, Hr'g Tr. 116:14-21; *also compare* 700 CMR 7.02, 7.04 (promulgated 3/29/13) *with* 700 CMR 7.02, 7.04 (amended 10/21/16, which eliminates the Violation Enforcement System for electronic toll collection).

³⁸ 700 CMR 7.02: ("Pay By Plate (PBP) refers to the EZDriveMA payment option where photographic or video images of vehicles and license plates are used to either post toll transactions to a Registered Pay By Plate account or for obtaining the name and address of the registered owner of the vehicle from the Registry of Motor Vehicles/Department of Motor Vehicles (RMV/DMV) or other means, for purposes of collecting tolls, fees, fines, and other debts owed.")

³⁹ 700 CMR 7.02: ("Pay By Plate Registered Account refers to a payment option whereby a vehicle and its corresponding license plate is provided by the customer to be listed on an account for collecting tolls, fees, fines or other transactions as determined by MassDOT.")

⁴⁰ Collins, Hr'g Tr. 139:23-140:17; Exhibit 15.

⁴¹ *Id.*; *also see* 700 CMR 7.04(4): ("Pay By Plate Program. Driving on a MassDOT toll roadway without an E-ZPass MA account, Pay By Plate Registered account, or a toll account of another agency that has toll reciprocity with MassDOT, will result in an invoice issued to the registered owner or responsible party, where applicable, based on an image taken of the vehicle license plate or other identifying information; *also see* 700 CMR 7.04(5) ("A person who operates a motor vehicle which is not an authorized E-ZPass MA equipped Motor Vehicle, listed on a Pay By Plate Registered account, or using an electronic toll collection device of another agency or entity that has toll collection reciprocity with MassDOT, shall be considered a Pay By Plate customer and shall be subject to the provisions of 700 CMR 7.04.")

⁴² Exhibit 11; *also see* 700 CMR 7.02.

monthly amount paid in tolls previously.⁴³ The toll charges were the result of taxi drivers who, while leasing taxis from EJT, operated on MassDOT’s tolled facilities without a transponder in the taxi, or with a transponder that was not read due to improper installation, or at times when the taxi driver’s account had insufficient funds to pay the toll.⁴⁴

29. In October 2016, the period immediately preceding implementation of all-electronic tolling, EJT’s EZ-Pass account was charged \$996.20 for tolls incurred by taxi drivers leasing taxis from EJT.⁴⁵ In the first month after all-electronic tolling, November 2016, EJT’s account was charged \$9,013.25 for such tolls.⁴⁶

30. From December 2016 through April 2018, EJT’s EZ-Pass account was charged the following amounts for tolls incurred by taxi drivers leasing taxis from EJT:⁴⁷

12/2016:	\$16,242.35	9/2017:	\$11,739.80
1/2017:	\$7,859.70	10/2017:	\$12,422.10
2/2017:	\$16,351.65	11/2017:	\$10,996.20
3/2017:	\$20,835.15	12/2017:	\$9,167.55
4/2017:	\$9,903.35	1/2018:	\$7,321.20
5/2017:	\$13,488.70	2/2018:	\$6,871.20
6/2017:	\$13,219.45	3/2018:	\$10,519.90
7/2017:	\$8,597.60	4/2018:	\$11,004.60
8/2017:	\$12,298.25		

31. The significant increase in tolls incurred by taxi drivers and charged to EJT’s account is likely the result of driver behavior, specifically with respect to the following features of the all-electronic tolling system: “image review/trip building”, and “two-way tolling”.⁴⁸

32. Toll amounts are not posted to accounts in real time. Although the system images all license plates of vehicles using the tolled facilities, 20% of those images require manual review for accuracy. Therefore, the all-electronic tolling system has a built-in, two-to-five day Image Review/Trip Building period prior to posting the transaction to the appropriate account. When a taxi driver with a manual replenishment cash account does not appropriately track his account to ensure a positive balance, the built-in delay of the Image Review/Trip building period increases the likelihood of the driver’s account having insufficient funds when the system tries to charge the toll.⁴⁹

33. Prior to all-electronic tolling, taxicabs using the Ted Williams Tunnel and Sumner/Callahan Tunnels were assessed a toll in the amount of \$5.25 in one direction, which was leaving Logan Airport. The taxi driver was permitted to

⁴³ Tarpey, Hr’g Tr. 42:22-24, 43:23-49:7; Exhibits 10 and 10A.

⁴⁴ Tarpey, Hr’g Tr. 54:11-56:15; Collins, Hr’g Tr. 118:12-120:19.

⁴⁵ Exhibit 6 (Account #737604 - “Tolls & Other Usage”, Statement Period 10/01/2016 to 11/31/2016).

⁴⁶ Exhibits 10 and 10A (Account #737604 - “Tolls & Other Usage”, Statement Period 11/01/2016 to 11/30/2016).

⁴⁷ Exhibits 10 and 10A (Account #737604 - “Tolls & Other Usage”, Statement Periods 12/01/2016 to 4/30/2018).

⁴⁸ Collins, Hr’g Tr. 118:12-120:19.

⁴⁹ Collins, Hr’g Tr. 118:12-120:19, 137:4-139:8.

charge the passenger for the toll. Now, a \$2.65 toll is assessed in each direction, to and from the airport. The Hackney Carriage Unit has mandated that passengers may be charged only the toll incurred during their trip. This has created an incentive for taxi drivers to evade tolls for return trips to and from the airport when there is no passenger in the taxi.⁵⁰

Reassignment of Tolls Incurred by Leased or Rented Vehicles

34. MassDOT promulgated 700 CMR 7.04(8) as part of the regulations for all-electronic tolling. This section of the regulations establishes a “Rental/Lease Company Transaction Reassignment” process as part of the Pay By Plate Program. This process allows the registered owner of record of a vehicle, if in the business of leasing or renting motor vehicles, to request that MassDOT reassign responsibility for nonpayment of a toll transaction to the lessee in possession of the vehicle when the toll was incurred.⁵¹
35. The Rental/Lease Company Transaction Reassignment process is available only when there is nonpayment of the toll, i.e. when a Pay By Plate Invoice is sent to the registered owner because the vehicle incurring the toll is not listed on a valid EZ-Pass or Pay By Plate Registered account. For leased vehicles registered to pre-paid EZ-Pass accounts, pre-paid Pay By Plate Registered accounts, and other pre-paid commercial accounts, tolls are posted to and paid from the account.⁵²
36. Large rental car companies, such as Avis, Budget, Enterprise, and Alamo, establish pre-paid commercial accounts referred to as “violation avoidance accounts.” The account is a type of Pay By Plate Registered account in which the license plates of the rental vehicles are listed on the accounts, and the account is used to pay tolls incurred by lessees. Any requirement on the lessee to repay the rental car company for the toll would be addressed in the terms of the lessor/lessee rental agreement.⁵³
37. The types of entities who primarily utilize the toll transaction reassignment process are auto dealers, such as Toyota, Nissan, Infiniti and GMAC. The dealers do not register their leased vehicles to pre-paid accounts, presumably because their lessees take exclusive use and possession of the vehicles for multiple years under long-term leases.⁵⁴
38. To request reassignment of a toll transaction to a lessee, the registered owner is required to complete and submit information on a Rental/Lease Company Transaction Reassignment form that identifies the toll transaction, lessee, and vehicle, and certifies that the vehicle was leased or rented on the date of the toll transaction.⁵⁵

⁵⁰ Collins, Hr’g Tr. 118:24-119:6, 120:6-14.

⁵¹ Exhibit DOT-2; *also see* 700 CMR 7.04(8).

⁵² Collins, Hr’g Tr. 160:23- 165:11; Garcia, Hr’g Tr. 194:21-195:12.

⁵³ Collins, Hr’g Tr. 127:17- 165:11; Garcia, Hr’g Tr. 170:2-24, 195:7-12.

⁵⁴ Collins, Hr’g Tr. 127:1-8; Garcia, Hr’g Tr. 169:3-12

⁵⁵ *Id.*

39. All toll transactions charged to and paid from EJT's EZ Pass account during the period November 2016 through April 2018 were incurred by taxi drivers leasing taxicabs listed on EJT's pre-paid account. The toll charges and payments appeared on EJT's monthly account statements for that period. EJT did not receive a Pay By Plate Invoice for any of the toll charges.⁵⁶

DECISION

I find that all toll transactions charged to EJT's EZ-Pass account for the period November 2016 through April 2018 were properly charged in accordance with the applicable electronic tolling regulations and the EZ-Pass terms and conditions. Further, I find no merit to EJT's argument that MassDOT is arbitrarily applying its transaction reassignment process for rental/leasing companies to exclude EJT, or that the reassignment process itself constitutes an *ultra vires* exercise of MassDOT's authority to charge and collect tolls. My decision is based on the conclusions below.

EJT is required by the City of Boston's Hackney Carriage Unit to maintain a pre-paid electronic tolling account with MassDOT and to register its taxicabs to the account. The sole purpose of EJT's account is "to guarantee any toll payments incurred by the driver." The account is to "be charged for any video tolls ('v-tolls') and fees incurred by a taxi for which the license plate number is included within [its] EZ-Pass MA account."⁵⁷ Therefore, it is both intended and expected that EJT's account will be charged the toll when a taxi driver leasing an EJT taxi operates on a tolled facility without a transponder or when the driver's account does not have sufficient funds to pay the toll. Such tolls were properly charged to EJT's EZ-Pass account in accordance with 700 CMR 7.04(6).⁵⁸ By establishing its EZ-Pass account and registering its taxis to the account, EJT expressly agreed to pay tolls incurred by taxis listed on the account.

Notwithstanding the above, EJT contends that it is a "registered owner of record in the business of leasing or renting vehicles," and therefore, is entitled to receive a refund of tolls incurred by lessee taxi drivers and to have MassDOT reassign such tolls to the drivers' accounts.⁵⁹ Although I agree that EJT is in the business of leasing or renting vehicles,⁶⁰ EJT is not eligible for the Rental/Lease Company Transaction Reassignment process in the circumstances presented in this appeal. The reassignment process governed by 700 CMR 7.04(8) is used in connection with the Pay By Plate Program, i.e., when the toll cannot be collected from an EZ-Pass or Pay By Plate Registered account and must be collected by means of an invoice to the registered owner. This is evident in the regulation's references to "the nonpayment of the toll" and the Pay By Plate invoice, which is used to collect tolls when a vehicle is not listed on a valid account.⁶¹ The process is intended to collect a toll from the responsible party in situations where (1) there is nonpayment of a toll, and (2) the vehicle was leased or rented at the time of the

⁵⁶ Exhibits 10 and 10A; Tarpey, Hr'g Tr. 99:23-100:1; Collins, Hr'g Tr. 161:6-13, 163:8-10.

⁵⁷ Exhibit EJT-19.

⁵⁸ 700 CMR 7.04(6): ("The Department assesses the appropriate toll charge against the corresponding EZ-Pass MA Account Holder ...")

⁵⁹ See 700 CMR 7.04(8).

⁶⁰ See 700 CMR 7.02 (defining a taxi as a "motor vehicle").

⁶¹ 700 CMR 7.04(4): ("Pay By Plate Program. Driving on a MassDOT toll roadway without an E-ZPass MA account, Pay By Plate Registered account, or a toll account of another agency that has toll reciprocity with MassDOT, will result in an invoice issued to the registered owner or responsible party, where applicable, based on an image taken of the vehicle license plate or other identifying information.")

toll transaction. There is nothing in the regulation providing for a retroactive credit and reassignment of tolls properly collected from pre-paid accounts.

I find no evidence to support EJT's allegation that MassDOT is arbitrarily applying the reassignment process described in 700 CMR 7.04(8). MassDOT assesses tolls against EJT's account in the same manner as it does the pre-paid accounts of other entities in the business of renting and leasing vehicles. Rental car companies with pre-paid commercial accounts such as Avis, Budget, Enterprise, and Alamo, register their rental vehicles to the accounts. When a lessee drives on a toll road in a vehicle listed on the leasing company's pre-paid account, the toll is charged to the account and is not eligible for a refund or reassignment to the lessee. With respect to instances prior to all-electronic tolling where MassDOT reassigned tolls and fees from EJT to lessee taxi driver accounts, those transactions were made in the context of violation appeals and toll violation fines, which no longer exist, and pursuant to regulations that no longer apply. They have no bearing on the process described in 700 CMR 7.04(8).

I am not persuaded by EJT's argument that the transaction reassignment process constitutes an *ultra vires* exercise of MassDOT's authority. MassDOT has broad authority under G.L. c. 6C, §13 to charge and collect tolls for transit over its facilities, and to determine "the manner of collection as [it] determines desirable." Pursuant to that authority, it adopted regulations for the implementation of all-electronic tolling, which are promulgated at 700 CMR 7.00 *et seq.* The transaction reassignment program is a part of all-electronic tolling and is expressly established under the regulations in 700 CMR 7.04(8). I have no reason to believe that these regulations were adopted in violation of G.L. c. 30A and EJT presented no factual evidence at the hearing to indicate otherwise. As a result, there is nothing before me to support a finding that the reassignment program, including the use of a Rental/Lease Company Transaction Reassignment Form for submission of information, is a violation of G.L. c. 30A or an *ultra vires* exercise of MassDOT's authority.

EJT also contends that MassDOT has no authority under 700 CMR 7.04(8) to reassign responsibility for nonpayment of tolls from a lessor to a lessee. By doing so, EJT argues, MassDOT is engaging in "arbitrary and capricious decision-making" and *ultra vires* activity. I disagree. EJT apparently relies on its parsing of the phrase "in which case that person [the lessee] is *prima facie* responsible for the payment of the fines or penalties that the Department assesses ..." as evidence that only fines and penalties can be reassigned to lessees under the regulation, but not tolls. This interpretation would mean the lessee would be responsible to pay fines and penalties, but responsibility for nonpayment of the toll would remain with the lessor. In this scenario, the lessor would have no incentive to ever pay the toll since all fines and penalties for nonpayment would be the responsibility of the lessee. EJT's interpretation leads to an irrational result that is contrary to the essential purpose of the all-electronic tolling system, which is to collect the toll. Read in its entirety and in the context of the all-electronic tolling system, the regulation is intended to provide a process for collecting an unpaid toll by directing a Pay By Plate Invoice, and all transactions typically included therein,⁶² to the responsible party when the vehicle was leased or rented at the time of the toll transaction.

⁶² 700 CMR 7.02: ("A Pay By Plate Invoice refers to an itemized statement issued to a vehicle's registered owner of record or responsible party, where applicable, which provides a summary of toll usage, tolls due, balance, late and other fees, fines, penalties, and other amounts due associated with toll or other transactions, as well as payments made, and/or credits.")

Finally, EJT questions the fairness of MassDOT's tolling system that collects tolls from its EZ-Pass account instead of pursuing the individual taxi drivers who are incurring the tolls. EJT points out that the drivers who lease EJT's taxis have exclusive possession of the taxi when the tolls are incurred and also are required to have their own EZ-Pass accounts. By operating on a tolled facility without a transponder or with insufficient funds in the account, the driver is violating the regulations and EZ-Pass terms and conditions, yet avoids responsibility for paying the toll and any associated fines and penalties. EJT has provided data and information from its taxi tracking system that it claims can assist MassDOT to confirm the identity of the driver in possession of the taxi when a toll is incurred. With the driver's transponder and account information, EJT reasons that MassDOT has all it needs to identify and pursue the driver for the missed toll.

Although I understand EJT's equitable argument, there is no requirement for MassDOT to revise its manner of toll collection to accommodate EJT's situation. Unlike other leasing companies, EJT is subject to the City's Hackney Carriage rules, which require EJT to establish a pre-paid account to guarantee payment of tolls for its leased taxis but does not permit EJT to obtain security from the drivers to cover that risk. EJT's account, however, is charged for tolls in the same manner as other leasing companies that maintain pre-paid accounts. To the extent that all-electronic tolling affects EJT differently, it is a consequence of its membership in the Boston taxi industry, and not the result of an inconsistent or arbitrary application of MassDOT's tolling regulations.

For the reasons stated herein, EJT's appeal is denied.

Albert Caldarelli
Administrative Law Judge

Dated: July 19, 2018