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September 3, 2014

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Bureau of Investigation and Enforcement v. Uber Technologies, Inc.
Docket No. C-2014-2422723

Dear Secretary Chiavetta:

On behalf of Uber Technologies, Inc., I have enclosed for electronic filing the Answer of Uber Technologies, Inc. to Motion to Compel of Bureau of Investigation and Enforcement relating to Interrogatories and Requests for Production of Documents, Set I, in the above-captioned matter.

Copies have been served on all parties as indicated in the attached certificate of service.

Sincerely,

Karen O. Moury

KOM/tlg
Enclosure
cc: Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY COMMISSION, BUREAU OF INVESTIGATION AND ENFORCEMENT	:	
	:	**Docket No. C-2014-2422723**
v.	:	
UBER TECHNOLOGIES, INC.	:	

ANSWER OF UBER TECHNOLOGIES, INC. TO MOTION TO COMPEL OF BUREAU OF INVESTIGATION AND ENFORCEMENT RELATING TO INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS – SET I

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES LONG AND WATSON:

Pursuant to 52 Pa. Code § 5.342(g)(1), through its counsel, Karen O. Moury and Buchanan Ingersoll & Rooney PC, Uber Technologies, Inc. ("UTI") hereby files this Answer to the Motion to Compel filed by the Bureau of Investigation and Enforcement ("I&E") on August 28, 2014 and amended on August 29, 2014, seeking an order dismissing UTI's objections to Interrogatories and Requests for Production – Set I ("Interrogatories") propounded by I&E on August 8, 2014 and directing UTI to provide the information sought by those Interrogatories.

I. INTRODUCTION

Simply put, I&E seeks to compel UTI to produce customer and trip information that is protected from disclosure by the Commission's discovery rules and well-established case law. UTI's customer information contains confidential data about trips taken and fares paid by customers. As UTI's customers do not want such information disclosed, UTI is obligated to protect its customers' legitimate expectations of privacy. Moreover, UTI's trip information constitutes a trade secret that would lose any existing protection if it were produced to I&E. Therefore, I&E's Motion to Compel must be denied.

I&E's Interrogatories specifically request UTI to identify the number of rides provided to persons via connections made with drivers through UTI's website, mobile application or digital software ("App") during distinct time periods; to identify the entity that "provided rides to persons" via connections through the App if the entity was not UTI; and to provide invoices, receipts, e-mails, records and documents sent to individuals in relation to rides they received via connections through the App. The Commission's regulations do not permit parties to ask interrogatories that seek privileged information, and in this situation, a protective order would not be helpful since the information is so confidential and commercially-sensitive so as to justify outright prohibition of its disclosure.

The privileged material sought by the Interrogatories entails private confidential customer information, including their email addresses and payment information, the disclosure of which would be harmful to riders and violate their rights to privacy without any advance notice or opportunity to prevent such disclosure. The privileged material sought by the Interrogatories also includes highly sensitive commercial data, which qualifies as a trade secret, especially due to its narrow focus with respect to time periods and the fact that results would cover a limited geographic region. As disclosure of this information would diminish the value of this UTI asset and be competitively harmful to UTI's business by allowing competitors to mine historical data to give them a future competitive advantage, it is not discoverable under the Commission's rules.

The Interrogatories further seek the disclosure of information about past practices that is irrelevant to this proceeding. These requests represent nothing more than an attempt by I&E to seek the imposition of additional civil penalties upon an entity that has been granted emergency temporary authority to provide a service for which the Commission has found an immediate need in Allegheny County so that people can access safe, reliable and affordable transportation

options to get to school, to work and to the hospital to visit dying relatives. Finally, the Interrogatories would cause undue annoyance and burden to UTI, particularly with respect to the extensive customer information that would have to be carefully and thoroughly scrubbed to ensure protection of private data.

Consistent with the Commission's Secretarial Letter dated July 28, 2014 issued at this docket, UTI is prepared to share information about the number of rides arranged between points in Allegheny County through the UTI App during specific time periods with the Commissioners. Due to the pending complaint proceeding, UTI is working to identify a time and means through which disclosure of this information would be appropriate in a manner that does not violate the rules regarding *ex parte* communications and that would allow UTI to avoid leaving documents behind that that could later be requested and possibly retrieved through a request submitted to the Commission under Pennsylvania's Right-to-Know Law. UTI continues, however, to object to the Interrogatories, as described in more detail below.

II. ARGUMENT

A. I&E's Interrogatories Seek the Disclosure of Privileged Matter in the Form of UTI Trade Secrets and Confidential Customer Information.

Under the Commission's regulations, a party may not ask interrogatories that "relate to matter which is privileged." 52 Pa. Code § 5.361(a)(2). *See also* 52 Pa. Code § 5.321 (relating to permissible scope of discovery). I&E's Interrogatories seek the disclosure of privileged material relating to confidential customer information, including email addresses and payment information, as well as privileged matter relating rides provided through the UTI App, which qualifies as a trade secret and is protected from unlawful taking under the Fifth and Fourteenth Amendments of the United States Constitution.

The release of personal information about riders poses serious dangers for the public and liability concerns for UTI. *See Interim Guidelines for Eligible Customer Lists*, Docket No. M-2010-2183412 (Final Order on Reconsideration adopted on November 10, 2011) ("*ECL Order*"). In deciding on the scope of information that electric distribution companies should provide to electric generation suppliers about customers, the Commission found that customers should be permitted to restrict the release of all personal information about their account. The Commission observed that "[m]any customers have valid reasons for not wanting to disclose their customer information, and in terms of reasonable privacy expectations, customers should have the right and a reasonable means to maintain the confidentiality of their account information." *ECL Order* at 10. In the present proceeding, customers would not even have a say about the information regarding their accounts that might be shared or with whom it might be shared.

It is well established in Pennsylvania that a trade secret consists of a compilation of information which is used in one's business, and which gives one's business an advantage over competitors who do not know or use it. *See Sperry Rand Corp. v. Pentronix, Inc.*, 311 F. Supp. 910 (1970), 1970 U.S. Dist. LEXIS 12473; *see also* Restatement of Torts, Section 757. The crucial indicia for determining whether certain information constitutes a trade secret are "substantial secrecy and competitive value to the owner." *Den-Tal-Ez, Inc. v. Siemens Capital Corp.*, 389 Pa. Super. 219, 566 A.2d 1214, 1228 (1989). Lists containing customer names and contact information have been found to be trade secrets. *See O.D. Anderson, Inc., d/b/a Anderson Coach and Tour, and Anderson Coach and Travel v. Benjamin Cricks, Richard Koewacich and Premier Tour & Travel Inc.*, 2003 Pa. Super 13, 815 A.2d 1063 (2003) (customer lists containing names addresses and phone numbers of customers were valuable assets since they helped to target the most likely customers for future tours); *Morgan's Home*

Equip. Corp. v. Martucci, 390 Pa. 618, 624, 136 A.2d 838, 842 (1957) (lists of confidential and valuable customer data constituted trade secrets).

The trip and customer data sought by I&E's Interrogatories is information that UTI has spent considerable time and effort to collect. As such, it is a valuable asset that belongs to UTI, the disclosure of which would diminish its market value. Particularly since data provided in response to the Interrogatories would reveal the number of trips provided through the UTI App in a very limited geographic area of Allegheny County over distinct relatively short time periods, it would be possible for UTI's competitors to determine the size of the business and how lucrative it is. UTI uses this information for making decisions about growth or expansion of the business. If it ends up in the hands of competitors, it could be used as a basis for allocating their resources differently or changing their business models in a way that is injurious to UTI's business.

The Fifth and Fourteenth Amendments prohibit the government from depriving anyone of "property, without due process of law," or taking property "for public use, without just compensation." U.S. Const. Amend V; U.S. Const. Amend. XIV. The United States Supreme Court has long recognized that the Fifth Amendment protects intangible property. *See The West River Bridge Company v. Dix et al.*, 77 U.S. 507, 533 (1848) (no meaningful distinction between real property and "incorporeal property" for the purposes of the takings clause.) Specifically, trade secrets have been recognized as property under the Fifth Amendment. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984). The regulatory taking of a trade secret causes the value of the asset to diminish, which results in awards of damages in the form of compensation. *See Gully v. Sw. Bell Tel. Co.*, 774 F.2d 1287, 1293 (5th Cir. 1985).

Particularly given the broad scope of Pennsylvania's Right-to-Know Law, 65 P.S. §§ 67.101-67.3104, UTI submits that written disclosure of the information requested by the Interrogatories, even subject to a protective order, may eventually lead to public disclosure of this highly proprietary information in a way that is harmful to both UTI and its customers. The sweeping amendments to the Right-to-Know Law that went into effect on January 1, 2009 were designed to promote access to official government information in order to prohibit secrets and establish a rebuttable presumption that documents in the possession of a Commonwealth agency are public records. *See Commonwealth of Pennsylvania, Pennsylvania Gaming Control Board v. Office of Open Records*, 48 A.3d 503, 2012 Pa. Commw. LEXIS 174 (2012); 65 P.S. §67.305. The burden of proving that a record is exempt from public access is on the Commonwealth agency. 65 P.S. § 67.708(a)(1).

A "record" is broadly defined by the Right-to-Know Law to include "information" that is created in "connection with a transaction, business or activity of the agency." 65 P.S. §67.102. Although the Right-to-Know Law also contains several exemptions to the definition of "record," including two that could be applicable here – namely a record that constitutes or reveals a trade secret or confidential proprietary information (65 P.S. § 67.708(b)(11)) and a record relating to a noncriminal investigation (65 P.S. § 67.708(b)(17)), those exemptions would protect UTI and its customers only if the Commission agrees that they are applicable and the Pennsylvania Office of Open Records or appellate courts ultimately agree.

The language of the Right-to-Know Law and its recent application by the Office of Open Records demonstrate that even providing information on a confidential basis subject to a protective order is not sufficient to guard against disclosure of that information. To have any hope of ultimately protecting information marked as proprietary from disclosure by the

Commission, UTI would have five business days after receiving notice of the Right-to-Know law request to "provide input on the release of the record." 65 P.S. § 67.707(b). The Commission would not be bound by that input, and even if the Commission would decline to produce the information on the basis of its confidentiality, the Office of Open Records may require its disclosure. *See In the Matter of Scott Kraus and the Morning Call v. Pennsylvania Public Utility Commission,* Docket No. AP 2013-1986 (documents submitted confidentially as part of a Commission staff investigation were ordered to be publicly released).[1]

The Commission has previously found that a party is not required to provide commercially sensitive data as part of discovery. In the *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Their Default Service Programs*, Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669 and P-2011-2273670, ALJ Barnes issued an Order Denying the Retail Energy Supply Association's Motion to Compel on that very basis (Order dated March 16, 2012). Refusing to require the companies to disclose confidential information, ALJ Barnes prevented the mining of historical data by competitors to in an effort to obtain a competitive advantage in the future. Order at 6. The ALJ emphasized that even the existence of a protective order did not provide a basis for the companies to disclose confidential information. Order at 8.

I&E claims that the information sought by its Interrogatories is similar to the daily log sheets that call and demand carriers are required to complete and make available to the Commission upon request under the Commission's regulations at 52 Pa. Code § 29.313(c) and

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[1] Decision is available on Office of Open Records website. http://dced.state.pa.us/open-records/final-determinations/FileHandler.ashx?FileID=12318. Decision is currently on appeal in *Pennsylvania Public Utility Commission v. Scott Kraus/The Morning Call*, 2254 C.D. 2013.

that limousine carriers must maintain under the Commission's regulations at 52 Pa. Code § 29.335. However, these regulations have nothing to do with whether UTI should be directed to provide aggregate trip data in a narrow geographic region over distinct relatively short-time periods. Neither UTI nor its subsidiary has sought or received authority to operate as a call and demand carrier or a limousine provider. Further, the Commission made no mention of any duty to complete daily log sheets as part of its grant of emergency temporary authority to operate an experimental ride-sharing network service between points in Allegheny County to UTI's subsidiary, Rasier-PA LLC ("Rasier-PA"). *See Application of Rasier-PA LLC for Emergency Temporary Authority to Operate an Experimental Ride-Sharing Network Service Between Points in Allegheny County, PA*, Docket No. A-2014-2429993 (Order adopted July 24, 2014).

Clearly, the purpose of the requirement for call and demand and limousine carriers to maintain log sheets, which contain information about origin and destination, the number of passengers and the fares collected, is to ensure that they are following their tariffs and other Commission rules applicable to such carriers. Recognizing the benefits of bringing needed transportation alternatives to riders in Allegheny County, the Commission has granted authority, on an experimental basis, for Rasier-PA to operate a ride-sharing network service and has accepted a tariff that explains the rate calculation methods without specifying actual rates.[2]

Additionally, the log sheets maintained by existing carriers are far different than the information that I&E is seeking through the Interrogatories. Most notably, the regulations cited by I&E require carriers to maintain individual trip data but does not require the carriers to compile or provide information showing total number of trips over distinct time periods or to

[2] Rasier-PA's proposed tariff is available on the Commission's website: http://www.puc.pa.gov/pcdocs/1302328.pdf, along with the Secretarial Letter noting its acceptance: http://www.puc.pa.gov/pcdocs/1306394.doc.

provide private customer data. In any case, by the very nature of the service being new and innovative, thereby qualifying for classification as experimental service that is separate and apart from call and demand service and limousine service, data about rides arranged through the UTI App is commercially sensitive, and its disclosure would be harmful to UTI and its customers.

B. I&E's Interrogatories Seek Information That Is Not Admissible at Hearing Nor Would Be Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

Under the Commission's regulations, a party may only seek discovery that is relevant to the subject matter involved in the pending action and which appears reasonably calculated to lead to the discovery of admissible evidence. 52 Pa. Code §5.321(c). By seeking information about other transactions beyond those referenced in the complaint, including the number of rides arranged through the UTI App and the name of an entity that provided these services if UTI did not, I&E has requested information that is irrelevant to this proceeding and which does not appear reasonably calculated to lead to the discovery of admissible evidence.

The complaint filed by I&E in this proceeding contains allegations about a launch of Uber X on March 13, 2014 and eleven occasions on which Officer Bowser was allegedly transported by drivers that he requested using the UTI App. Information about any other transactions is irrelevant to those specific allegations, and the interrogatory is an impermissible fishing expedition. The Commission has previously concluded that the standard for discovery is relevance, not curiosity. *See Pennsylvania Public Utility Commission, et al. v. Pennsylvania American Water Company*, Docket No. R-2011-2232243 (Order on Motion to Compel dated July 21, 2011 at 21-22).

I&E claims that the information requested by the Interrogatories is relevant to its request for relief in the complaint – namely that a civil penalty of $1,000 be imposed on UTI for each

day it has allegedly illegally operated since March 13, 2014. However, the complaint does not contain any allegations about continued operations. Moreover, I&E has not cited any authority under which it may seek production of documents from a respondent that are intended to be used against the respondent for purposes of requesting a civil penalty in excess of what is sought to address the specific allegations outlined in the complaint. Likewise, I&E has not offered any authority to support its request for UTI to implicate another entity that may have been involved in arranging rides through the UTI App. In short, I&E has not explained why it expects UTI to provide information to support and supplement allegations in the complaint that it has the burden to prove.

In addition, I&E has failed to explain the relevance of any information about trips arranged through the UTI App prior to the issuance of a Cease and Desist Order by the ALJs on July 1, 2014 in response to the Petition for Interim Emergency Relief, Docket No. P-2014-2426846, which was adopted by the Commission on July 24, 2014. Upon receipt of I&E's complaint on June 6, 2014 containing allegations about unauthorized service, UTI was under no obligation to stop licensing its software to riders and entities contracting with drivers. Absent an adjudication as to whether the Commission has jurisdiction over an entity licensing a software product or that any activities were in violation of the Public Utility Code, I&E had no right to expect any change in UTI's operations merely upon the filing of a complaint. Similarly, UTI had no obligation to alter its operations upon the receipt of a letter from the Commission's advisory staff in July 2012.

Moreover, UTI is protected by the Fifth Amendment of the United States Constitution from disclosing this information, and therefore the Interrogatories seek information that would neither be admissible at hearing nor reasonably calculated to lead to the discovery of admissible

evidence. Specifically, since UTI could not be compelled to offer testimony about the number of rides that were provided or disclose any affiliated or wholly-owned entities to whom it licensed its App, it is inappropriate to seek this information through discovery.

The United State Supreme Court has found that the Fifth Amendment privilege may be asserted in an administrative proceeding and protects against disclosures that the party reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. *See Kastigar et al. v. United States*, 406 U.S. 441 (1972). Section 3310 of the Public Utility Code ("Code") provides that any person or corporation operating as a broker, without a license issued by the Commission "shall be guilty of a summary offense, and any subsequent offense by such person or corporation shall constitute a misdemeanor of the third degree." 66 Pa.C.S. § 3310. Given the allegations in the complaint about unlawful brokering, which have not been proven and the Commission has not yet adjudicated, disclosure of information about rides that were arranged through the UTI App could result in prosecution under Code Section 3310 and therefore is protected by the Fifth Amendment.

I&E claims that the Fifth Amendment protections are not available to corporations. However, I&E fails to recognize, however, that corporations can only act through their agents. Therefore, officers and agents of a corporation can claim the benefits afforded by the Fifth Amendment in responding to a complaint or answering interrogatories, even when acting on behalf of the corporation. *Kohn v. State*, 336 N.W. 2d 292, 298-99 (Minn. 1983). Moreover, if a corporation can be charged with criminal offenses for violations of Code Section 3310, it makes sense that they or their agents can assert the Fifth Amendment privilege. This analysis is bolstered by the 2010 Supreme Court decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010),

in which the Court held for the first time that a corporation enjoys First Amendment rights of association and free speech.

C. I&E's Interrogatories Would Cause Unreasonable Annoyance and Burden to UTI.

The Commission's regulations do not permit discovery which "[w]ould cause unreasonable annoyance, embarrassment, oppression, burden or expense." 52 Pa. Code § 5.361(a)(2). I&E's Interrogatories seeking transaction data and customer information would cause unreasonable annoyance and burden to UTI. This is particularly true when UTI's subsidiary, Rasier-PA, has complied with the Commission's ETA Order and is lawfully providing ride-sharing network services in response to an immediate public need in Allegheny County. Assuming that compliance with the Commission's regulatory and statutory requirements was the primary goal of the complaint, that has been achieved, and efforts to gather additional information through discovery in this proceeding about past practices cause unreasonable annoyance and burden to UTI.

In addition, disclosure of the extensive private customer information sought by I&E's Interrogatories would impose unreasonable burden on UTI. The documentation requested by I&E would be voluminous and would require UTI to commit significant resources to compile every single communication to passengers regarding rides offered in Pennsylvania. In order to ensure protection of customer information, UTI would be required to proactively review any document to be produced in order to remove or redact such privileged information. This would be an unduly burdensome exercise, especially in view of the limited, if any, probative value this information would produce.

WHREFORE, for the reasons set forth above, Uber Technologies, Inc. respectfully requests that its objections to the Bureau of Investigation and Enforcement's Interrogatories and Request for Production of Documents – Set I be sustained and that I&E's Motion to Compel be denied.

Respectfully submitted,

September 3, 2014

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Attorneys for Uber Technologies, Inc.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY COMMISSION, BUREAU OF INVESTIGATION AND ENFORCEMENT	:	
	:	**Docket No. C-2014-2422723**
v.	:	
UBER TECHNOLOGIES, INC.	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

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Dated this 3rd day of September, 2014.

Karen O. Moury, Esq.