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August 7, 2015

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., *et al.*
Docket No. C-2014-2422723

Dear Secretary Chiavetta:

On behalf of Uber Technologies, Inc., I have enclosed for electronic filing the Non-Proprietary Brief of Uber Technologies, Inc., 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., *ET AL.*	:	

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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Karen O. Moury, Esq.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

BRIEF
ON BEHALF OF
UBER TECHNOLOGIES, INC., *ET AL.*

****PUBLIC VERSION****

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Dated: August 7, 2015

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I. INTRODUCTION

In June 2014, the Bureau of Investigation and Enforcement ("I&E") filed nearly identical complaints against Lyft, Inc. ("Lyft") and Uber Technologies, Inc. and its subsidiaries (collectively referred to as "Respondents" or "Rasier-PA"). I&E settled with Lyft for $250,000 but refuses to settle with Respondents. Since the proceeding against Lyft it nearly identical to the proceeding against Respondents, it would be arbitrary and capricious to impose a civil penalty in this proceeding that is not identical to the methodology used to settle with Lyft.

This is a case that should have been settled. I&E rebuffed numerous good faith attempts by Respondents to reach a settlement. In December 2014, Respondents offered to settle this case for an amount that at that time would have far exceeded the highest civil penalty ever imposed on a motor carrier by the Commission. That offer was rejected outright. In January 2015, Respondents filed a motion seeking the assignment of a presiding officer to facilitate settlement discussions and requesting the scheduling of a structured settlement conference. I&E opposed the motion, and it was subsequently denied. Respondents then renewed their request for a structured settlement conference in February 2015, which again was opposed by I&E, so no such conference was scheduled. In June 2015, following the release of the Lyft settlement terms, Respondents made another offer which generally tracked the principles set forth in that settlement and even contained a premium to reflect the later point in the process in which settlement would be achieved. Again, this offer was rejected outright; I&E would not even schedule a meeting to discuss the settlement offer. It is telling that I&E has failed to acknowledge Respondents' good faith efforts to reach an amicable resolution of this matter.

This proceeding, as set forth in the complaint, is about trips that were arranged through Respondents' mobile application ("App") in Allegheny County between February and August 2014. I&E contends that those trips lacked proper Commission authority; Respondents disagree.

To put this dispute in context, I&E has failed to identify a single dissatisfied rider who took one of the trips at issue. In fact, the evidence previously provided to the Commission proves the exact opposite. Supporting Respondents' request for emergency temporary authority, rider after rider testified that Respondents' services addressed significant gaps in the transportation infrastructure of Allegheny County – people were able to get to work, visit relatives who were in the hospital, or get home safely after enjoying the nightlife in Pittsburgh. Likewise, no issues have been raised about safety; to the contrary, Respondents have demonstrated that practices were in place to ensure driver integrity, vehicle safety and more than adequate liability insurance. Through Respondents' services, the traveling public in Allegheny County was able to access desperately needed reliable, affordable and safe transportation that was not available from existing transportation providers.

Instead of engaging the substantive issues that impact the lives of average citizens in Allegheny County, I&E has devoted countless hours and other state resources to a discovery dispute over producing confidential trip data. Respondents have done nothing more than assert their procedural rights under the Commission's rules of practice. I&E failed to note that the Commission has had the trip data at issue since December 24, 2014 and I&E has had the trip data since May 6, 2015. In fact, I&E could have received to receive this data much earlier in this proceeding – as early as January 14, 2015 - when Respondents offered to provide it for purposes of settlement discussions, but I&E rejected those offers.

For various reasons explained in greater detail throughout this Brief, including the existing regulatory framework, the brokerage license held by Respondents and the steps taken to seek additional authority at the suggestion of Commission staff, no civil penalty is warranted. The goal of enforcement efforts is compliance with regulatory requirements. Under any interpretation of the Public Utility Code, compliance has been achieved. Since August 21, 2015,

Rasier-PA has been providing transportation network services first under emergency temporary authority granted by the Commission, and then pursuant to a two-year experimental authority certificate issued on January 29, 2015, filling the void that previously existed in the transportation infrastructure in Allegheny County. In providing these services, Rasier-PA has been a model certificate holder, complying with every requirement and condition imposed upon it by the Commission. No valid purpose would be served by the imposition of an arbitrary and capricious civil penalty on Respondents as a result of trips provided over a year ago.

II. COUNTER-STATEMENT OF THE CASE

A. Settlement Discussions

This proceeding has been and remains ripe for settlement in a manner that is consistent with the resolution of the I&E complaint against Lyft, which involves the same allegations and concerns regarding unauthorized passenger trips. Respondents remain ready and willing to engage in settlement discussions with I&E that are designed to achieve an outcome that closely tracks the Lyft settlement. Given that both proceedings involve the same issues, and I&E has all of the data that is needed to formulate a settlement position consistent with the Lyft outcome, no legitimate reason exists for this case to be litigated, requiring the parties, the Administrative Law Judges ("ALJs") and the Commission to expend valuable resources on the adjudication of a contested proceeding.

In the Lyft proceeding, a Joint Settlement Petition was filed on April 30, 2015.[1] Under the terms of that settlement, Lyft agreed to pay a civil penalty in the amount of $250,000, on a $7 million complaint, to resolve all alleged violations of orders and regulations during the period from the initiation of service in February 2014 through the date of the executed settlement agreement. By Initial Decision issued on June 5, 2015, the ALJs approved the Joint Settlement Petition, and the Commission entered a Final Order on July 15, 2015 adopting the Initial Decision and approving the Joint Settlement Petition.

By contrast, Respondents have attempted in good faith to reach an amicable resolution with I&E, but these efforts have been thwarted by I&E's refusal to participate in settlement discussions. While this refusal had been previously linked to Respondents' delay in providing

[1] *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Lyft, Inc.*, Docket No. C-2014-2422713 (Order adopted July 15, 2015)("*Lyft*").

trip data, I&E has had the trip data for over three months. Yet, I&E has continued to reject Respondents' attempts to resolve this matter by settlement.

In addition to informal efforts to engage I&E in good faith settlement discussions, Respondents have submitted formal requests to the ALJs seeking assistance. On January 14, 2015, Respondents filed a Motion for Scheduling of Settlement Conference and Assignment of Settlement Judge ("Settlement Motion"). Citing provisions in the Commission's regulations that encourage settlements and permit parties to request the scheduling of settlement conferences and the designation of presiding officers to participate in such conferences, Respondents requested that an ALJ-facilitated conference be held on or before February 6, 2015 so as not to delay the hearing that was then scheduled for February 18, 2015. In that Motion, Respondents offered to provide the trip data sought by I&E on a confidential basis to aid in settlement discussions. Respondents explained that this approach would protect the information from public disclosure, as contrasted with providing it through discovery and then later being relied upon by the Commission in reaching a determination.

In the Settlement Motion, Respondents further noted that they had provided a proposed term sheet to I&E on December 11, 2014 and that a settlement meeting was held on December 15, 2014. Explaining that no progress had been made during that settlement meeting and that no counter-proposal had been provided by I&E, Respondents suggested that the designation of an ALJ to participate in a settlement conference would substantially aid in the negotiations and offer a greater likelihood of success. Respondents also noted that a settlement would end the ongoing motions practice and alleviate the need for further litigation, thereby conserving resources of I&E, Respondents and the ALJs, as well as other Commission staff. In addition, Respondents observed that even if a settlement was not successful, a conference facilitated by an ALJ may result in a narrowing of the issues, including stipulations of fact.

The very next day, on January 15, 2015, I&E filed an Answer vehemently opposing the Settlement Motion, noting that it would only agree to a settlement conference if Respondents provided the trip data three days in advance without any conditions.[2] By Interim Order dated January 23, 2015, the ALJs denied the Settlement Motion due to I&E's strenuous opposition, noting that under the Commission's regulations, both parties must be willing to submit to the settlement or mediation process.

On February 4, 2015, Respondents filed a Motion for Reconsideration of the January 23, 2015 Interim Order ("Reconsideration Motion"), again proposing to hold a structured settlement conference and offering to provide trip data in advance of such conference. In the Reconsideration Motion, Respondents suggested that there was no downside to I&E accepting the information to aid in settlement discussions, noting that valuable resources could be saved if a settlement would be achieved. Respondents reiterated their proposal to have an ALJ designated to participate in a settlement conference due to the wide disparity in the amount of the civil penalties sought by the Complaint and the Amended Complaint filed by I&E. Two days later, on February 6, 2015, I&E filed an Answer, again strenuously opposing the Reconsideration Motion and refusing to engage in settlement discussions.

Despite I&E's persistent unwillingness to engage in settlement discussions, Respondents offered to discuss factual stipulations, and the parties committed on February 18, 2015 to filing a Joint Status Report with the ALJs by March 4, 2015. Upon request, the ALJs later extended the time for submitting a Joint Status Report, which was filed on March 18, 2015. At that time, the

[2] In its Answer, I&E claimed that Respondents' disclosure of settlement communications likely violated 52 Pa. Code § 5.231(d). A review of Section 5.231(d) of the Commission's regulations, however, demonstrates that that this claim was without basis since that provision merely provides that offers of settlement "will not be admissible in evidence against a counsel or party claiming the privilege." 52 Pa. Code § 5.231(d). Nothing in that provision prohibits a party from disclosing its settlement offer that was rejected.

parties reported that efforts to reach factual stipulations had not been successful and that an evidentiary hearing should be scheduled.

On May 4, 2015, the parties submitted Stipulations of Fact to the ALJs, in which Respondents stipulated to several facts that substantiated I&E's allegations including the launch of the App in Allegheny County on February 11, 2014 (one month earlier than alleged in the Complaint and the Amended Complaint) and the specific functions performed by Respondents in utilizing the digital platform for passenger trips and contracting with drivers operating their personal vehicles to provide transportation requested by passengers in Allegheny County.

Following the evidentiary hearing on May 6, 2015, and after furnishing detailed trip data to I&E, Respondents again attempted to engage in settlement discussions. Using the Lyft settlement as a guide, Respondent made a specific offer to pay a civil penalty along the same lines and even included a premium to reflect the later point in the process when settlement would be achieved. I&E also rejected this offer outright.

B. Procedural History

While Rasier-PA's application for two-year experimental authority to provide transportation network services was pending before the Commission, and prior to the grant of emergency temporary authority ("ETA") to Rasier-PA, I&E initiated this proceeding by the filing of a Complaint on June 5, 2014. In that Complaint, I&E alleged that Respondents were acting as a broker of transportation in Pennsylvania, as defined in Section 2501(b) of the Public Utility Code ("Code"), 66 Pa.C.S. § 2501(b), without proper authority from the Commission through the use of its App to connect passengers with available drivers. On the basis of these allegations, I&E claimed that Respondents had violated Code Section 1101, which requires entities to obtain certificates of public convenience before operating as public utilities.

In the original Complaint, I&E sought the imposition of a civil penalty in the amount of $95,000, which represented $1,000 for each of the eleven trips arranged by Officer Bowser and $1,000 per day for each day since the launch of the App on March 13, 2014 until June 5, 2014, the date of filing the Complaint. It further requested a civil penalty of $1,000 for each day that Respondents continued licensing the App without Commission authority after the date of filing the Complaint. Other than the eleven individual trips specified in the Complaint, which occurred on different days, no mention was made of imposing a civil penalty on the basis of the number of trips. The focus of the Complaint, beyond those eleven individual trips, was a per day civil penalty. When I&E filed its Amended Complaint on January 9, 2015, without rationale or explanation, it shifted gears and sought a per trip civil penalty, which it continues to pursue in its Brief although it is neither authorized by the Code nor consistent with past Commission precedent. In its Amended Complaint, I&E proposed a civil penalty in the amount of $19 million.

1. Discovery Disputes

Much of the discussion in I&E's Brief centers on discovery disputes, primarily relating to confidential trip data. However, for more than two months after filing its original Complaint, despite an evidentiary hearing being scheduled for October 23, 2014,[3] I&E conducted no discovery. After the issuance of the Commission's July 28, 2014 Secretarial Letter directing the parties, as part of this proceeding, to address the number of transactions/rides provided to passengers via the App during specified time periods ("trip data"), I&E served its first round of discovery on Respondents on August 8, 2014. This round of discovery essentially sought the trip data. I&E then served a second round of discovery on Respondents on October 24, 2014, which

[3] This hearing was later continued at I&E's request and rescheduled for February 18, 2015. The hearing was eventually held on May 6, 2015.

was primarily intended to identify the specific entities that performed certain functions related to transportation provided via the App.[4]

It is important to note several facts about the discovery disputes, especially since I&E so heavily relies on them in seeking a civil penalty to address the allegations in the Amended Complaint and in requesting a separate civil penalty specifically related to discovery requests. At the outset, while I&E repeatedly refers to a failure to comply with five discovery orders, it neglects to mention that each of the discovery orders related to the same two pieces of information: 1) confidential trip data; and 2) an identification of the specific entities that performed functions related to the transportation services obtained through the App.

As to trip data, I&E received it on May 6, 2015[5] and could have received it much earlier in the proceeding had it accepted Respondents' offer to receive it for purposes of aiding settlement discussions. In any case, I&E was not harmed or prejudiced in any way by not having the trip data until the evidentiary hearing since: (i) Officer Bowser testified that he did not participate in the determination of the proposed civil penalty;[6] ii) I&E needed only a 15-minute break to evaluate the trip data before offering Officer Bowser's testimony on the level of the proposed civil penalty;[7] and (iii) civil penalties are part of the relief that is requested and are argued at the briefing stage of the proceeding based on factors outlined in the Commission's policy statement at 52 Pa. Code § 69.1201.

Regarding an identification of the specific entities performing functions in connection with the passenger trips, Rasier-PA's witness provided this information during an evidentiary

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[4] Motion to Compel (filed November 13, 2014) at ¶4.
[5] It is Respondents' position that the July 28, 2014 Secretarial Letter directed the parties to address this information during the proceeding. Since it placed no deadline on Respondents for doing so, presenting this information at the evidentiary hearing complied with the Commission's directive.
[6] May 6, 2015 Transcript at 73.
[7] May 6, 2015 Transcript at 109.

hearing on August 18, 2014 on its experimental authority application. Respondents referred I&E to the transcript; all I&E had to do was review it. Moreover, Respondents provided formal responses to these discovery requests on March 5, 2015, a full two months before the evidentiary hearing and after informally providing this information to I&E on February 18, 2015.

The only two pieces of information sought by I&E through discovery that have not been provided are: 1) invoices, receipts, emails, records and documents sent to individuals who received rides during the February-August 2014 timeframe; and 2) licensing agreements between Uber Technologies, Inc. and its subsidiaries. In objecting to providing documents sent to riders, Respondents explained that it would be overly burdensome to redact private customer information. At the hearing on May 6, 2015, Respondents proffered factual testimony to further describe the amount of time that it would take to print physical copies of each single trip receipt and manually redact numerous fields of personally identifiable information from each one, but such testimony was not permitted. With respect to the licensing agreements, they are proprietary and irrelevant to this proceeding, particularly in view of the Stipulations of Fact, the testimony of Respondents' witness, the Affiliated Interest Agreement filed with the Commission on January 5, 2015, and the other discovery responses provided by Respondents.[8] I&E has not explained how its prosecution of the Amended Complaint was in any way hampered by not having responses to these discovery requests. In fact, Respondents contend that the proceeding was not affected at all by the absence of these documents.

I&E also refers to an objection that Respondents filed in response to its Application for Subpoena. It is noteworthy that the only objection raised by Respondents is that the subpoena should be served on Mr. Feldman rather than Mr. Kalanick. When I&E filed an Application for

[8] I&E Exhibit No 5.

Subpoena directed to Mr. Feldman, Respondents did not object but reserved the right to object to the admission of evidence that Mr. Feldman was directed to bring to the hearing.[9]

2. Hearing – Testimony and Exhibits

At the evidentiary hearing on May 6, 2015, Respondents presented the testimony of one witness - Mr. Jonathan J. Feldman, who is employed by Uber Technologies, Inc. ("UTI") as General Manager with responsibilities for Pennsylvania, Delaware and southern New Jersey, and holds a Master's of Business Administration from the University of Pennsylvania, Wharton School of Business. He joined UTI on April 14, 2014 as General Manager of Philadelphia. Since then, his responsibilities have grown to be the chief UTI executive of the Commonwealth of Pennsylvania, overseeing a team of twenty six employees who are focused fully on Pennsylvania. The team consists of three groups. One focuses on operations and logistics pertaining to the drivers who Rasier-PA partners with on the platform. The second group includes marketing managers who oversee rider and community outreach, community service and partnerships. The third group is responsible for support, which includes handling inbound inquiries and resolving complaints or any issues with driver-partners and riders. Most of the team is based in Philadelphia or Washington, D.C.[10]

Prior to joining UTI, Mr. Feldman worked at Viacom, Inc. where he was part of the cable networks corporate team that oversaw millions of dollars in e-commerce transactions, and built and managed digital products and mobile platforms; IAC Interactive Corp where he oversaw business development for multiple media brands; and Booz & Company, a management

[9] I&E mentions at two different places in its Brief that Mr. Feldman did not cooperate with personal service of the subpoena or accept the copy that was served by certified mail. I&E Brief at page 18, footnote 13 and page 49. The evidentiary record contains nothing to support these statements. In fact, Respondents' counsel worked out an arrangement with I&E regarding service and confirmed that Mr. Feldman would appear at the hearing on May 6, 2015. Since he then appeared at the hearing and provided the requested testimony, these statements without evidentiary support are inappropriate and irrelevant.

[10] May 6, 2015 Transcript at 123-124.

consulting firm. He left Booz & Company to form his own business, Open Air Publishing, Inc., which was a digital media company, where he raised over one million dollars in venture capital funding and built a team of eleven employees before the company was acquired.[11]

A Stipulation of Facts entered into by Respondents and I&E was presented at the hearing and is marked as Exhibit ALJ 1-Revised. That document explains the functions of Uber Technologies, Inc. and its various subsidiaries and how the App works for drivers and passengers. In addition, Respondents presented the Compliance Plan-Quarterly Report, which is marked as Respondent Exhibit No. 2. That exhibit shows the various compliance measures that Rasier-PA has implemented since receiving a two-year experimental authority certificate of public convenience from the Commission on January 29, 2015. Further, I&E introduced an Exhibit marked as I&E Exhibit No. 5, which contains all of Respondents' discovery responses.

C. Description of the Existing Authority and the Service

Prior to the launch of Respondents' App in Allegheny County on February 11, 2014, residents and visitors had inadequate, if any, access to reliable, affordable and safe transportation. Respondents filled the void that had existed in Allegheny County's transportation infrastructure, while carrying liability insurance in the amount of $1,000,000 to more than adequately protect the public. In granting ETA to Rasier-PA a few months later on July 24, 2014, the Commission recognized this immediate need for transportation network services in Allegheny County due to the inadequacy of the existing transportation infrastructure and found that there was a substantial benefit to be derived from the initiation of a competitive service. The Commission described Rasier-PA as facilitating "wider ranging, faster and more user-friendly

[11] May 6, 2015 Transcript at 124-125.

scheduling of transportation services."[12] The Commission reaffirmed these findings in granting Rasier-PA two-year experimental authority certificates to provide transportation network services in Allegheny County and throughout the Commonwealth.[13] Pursuant to the *December 5, 2014 Orders*, the Commission approved Rasier-PA's Compliance Plans and issued the certificates on January 29, 2015.[14]

Transportation network services are provided through an App that connects passenger and drivers. A passenger who has downloaded the App, established an account and provided payment information may use the App to locate the nearest available driver who is logged onto the platform. Prior to submitting a request for transportation through the App, a passenger may view the applicable rates and may also enter a desired destination and view an estimated fare. When a passenger submits a request for transportation through the App, drivers are alerted of the trip request through the App. When a driver accepts the passenger's request for transportation through the App, the passenger receives through the App the driver's estimated time of arrival, along with a photo of the driver and a description of the driver's vehicle. Upon arrival to the passenger's desired destination, the request for transportation through the App is deemed completed and the fare is charged to the credit card or other form of payment provided by the

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[12] *Application of Rasier-PA LLC For Emergency Temporary Authority To Operate An Experimental Ride-Sharing Network Service Between Points in Allegheny County, Pennsylvania*, Docket No. A-2014-2429993 (Order adopted July 24, 2014 at p. 12) ("*ETA Order*").

[13] *Application of Rasier-PA LLC for Experimental Authority to Operate Ride-Sharing Network Service Between Points in Allegheny County, Pennsylvania*, Docket No. A-2014-2416127; and *Application of Rasier-PA LLC for Experimental Authority to Operate Ride-Sharing Network Service Between Points in Pennsylvania Excluding Designated Counties,* Docket No. A-2014-2424608 (Orders entered December 5, 2014) ("*December 5, 2014 Orders*").

[14] *Application of Rasier-PA LLC for Experimental Authority to Operate Ride-Sharing Network Service Between Points in Allegheny County, Pennsylvania*, Docket No. A-2014-2416127; and *Application of Rasier-PA LLC for Experimental Authority to Operate Ride-Sharing Network Service Between Points in Pennsylvania Excluding Designated Counties,* Docket No. A-2014-2424608 (Order entered January 29, 2015) ("*January 29, 2015 Order*").

passenger upon establishing an account to use the App. Once the payment has been processed, the passenger receives an electronic receipt from documenting the details of the completed trip.[15]

D. Issues

This case is about trips that were arranged through Respondents' App in Allegheny County between February and August 2014, for which I&E claims that Respondents did not have proper Commission authority.[16] The legal questions are whether Respondents needed additional Commission authority for these trips, and if so, whether a civil penalty is warranted and in what amount.

In its Brief, however, I&E suggests that this case is "about a company's defiant refusal to either furnish information to or cooperate with the governmental agency that regulates it."[17] Besides mischaracterizing the Amended Complaint and the nature of the proceeding, this statement is completely contradicted by the evidence of record which demonstrates that Rasier-PA actually filed an application for experimental authority to provide transportation network services in Allegheny County two months before the Complaint proceeding was initiated.[18] A company that voluntarily files an application for authority before any enforcement proceedings are initiated can hardly be described as defiant or uncooperative.

Further, when Respondents realized that the permanent application was going to languish due to the filing of protests by taxicab and limousine companies, Rasier-PA filed its ETA

[15] Exhibit ALJ 1-Revised.
[16] The only authority held by Respondents at the time of the filing of the Complaint was a brokerage license issued to Gegen LLC ("Gegen") on March 1, 2013 at Docket No. A-2012-2317300 and limousine certificate issued to Gegen on October 29, 2013 at Docket No. A-2012-2339043. ALJ Exhibit 1-Revised, Paragraphs 3 and 4.
[17] I&E Brief at 1.
[18] Exhibit ALJ 1-Revised.

application. Other evidence in the record similarly shows a track record of regulatory compliance in that Rasier-PA:[19]

- Operated in Allegheny County under the *ETA Order* from August 21, 2014 through January 29, 2015 without receiving any citations for violations of the Commission's regulations or orders
- Timely submitted Compliance Plans pursuant to the *December 5, 2014 Orders* on December 24, 2014, and provided the trip data on a confidential basis
- Filed an application on February 27, 2015 requesting authority to operate transportation network services in the counties previously excluded from its applications[20]
- Timely complied with all conditions of the *December 5, 2014 Orders*, as reaffirmed in the *January 29, 2015 Order,* by March 1, 2015
- Filed its Assessment Report on March 31, 2015
- Filed an application on March 31, 2015 requesting statewide authority to transport property, which was approved on April 14, 2015 and used in May for a Goodwill clothing drive[21]
- Submitted its first Quarterly Report on the Compliance Plans on April 30, 2015
- Filed its Self-Certification Form on April 30, 2015

Moreover, Rasier-PA has fully cooperated with I&E and the Commission's Bureau of Technical Utility Services by providing access to documents that demonstrate continued compliance with the Commission's conditions and regulatory requirements and in responding to requests for information to address consumer concerns. When I&E filed a complaint against Rasier-PA due to the lack of a U placard on a single vehicle's windshield, Rasier-PA promptly paid the civil penalty, fully satisfying the complaint.[22] Even when Rasier-PA filed an answer to an I&E complaint justifying the ban of a rider who made racist remarks to a driver and disputing

[19] May 6, 2015 Transcript at 139-142.
[20] Docket No. A-2015-2469287.
[21] Docket No. A-2015-2474715.
[22] Docket No. C-2015-2474801.

any violations of the Code or Commission regulations, Rasier-PA promptly paid the civil penalty, fully satisfying the complaint.[23] Most recently, Rasier-PA timely filed its second Quarterly Report on the Compliance Plans on July 23, 2015. All of these measures demonstrate that Rasier-PA has operated as a model certificate holder in Pennsylvania in providing transportation network services that have been demanded by the public.

Although I&E has tried to make this case about discovery disputes and Respondents' litigation strategy,[24] I&E filed its Complaint on June 5, 2014 and conducted no discovery for over two months. As the complainant, I&E had the burden of proof to move forward on the allegations in the Complaint. Likewise, Respondents had a right to raise any and all procedural and substantive issues during the course of litigation in an effort to protect its own interests. At the heart of I&E's discontent with Respondents is the decision to provide trip data at the evidentiary hearing, rather than through discovery, in this proceeding. However, I&E was not harmed by the lack of trip data in preparing for the hearing since that is information that is relevant, if at all, only to the arguments in connection with the relief requested. Moreover, Officer Bowser testified that he was not involved in the determination of a proposed civil penalty, and I&E needed only a 15-minute break to evaluate the trip data before offering Officer Bowser's testimony on the level of the proposed civil penalty.[25]

Another common theme throughout I&E's brief is "public safety." Yet, safety is not an issue in this proceeding. Not a single shred of evidence was presented by I&E to suggest that

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[23] Docket No. C-2015-2457172.
[24] I&E characterizes Respondents' Motion for Judgment on the Pleadings as "advancing frivolous arguments." I&E Brief at page 53, footnote 26. However, a review of that Motion shows that I&E mistakenly alleged "brokering" activities, which require a Commission license issued under Code Section 2505(a) while seeking violation of Code Section 1101, which requires public utilities to obtain certificates. In addition, I&E only named Uber Technologies, Inc. as a respondent in the original Complaint. Both of these deficiencies were corrected when the Amended Complaint was filed, suggesting that the Motion was far from frivolous.
[25] May 6, 2015 Transcript at 73 and 109.

public safety was in any way jeopardized by Respondent's operations. To the contrary, Officer Bowser testified that he had observed no safety concerns when taking trips arranged through the App.[26] Moreover, Respondent provided significant testimony of the various measures that were employed to ensure public safety during the period in question. For example, drivers were required to undergo comprehensive criminal background checks and driver history record and vehicles were required to successfully complete Pennsylvania state inspections. Additionally, feedback was solicited from riders regarding driver integrity and vehicle safety, and a zero tolerance policy was in place regarding the use of alcohol or controlled substances.[27]

As noted above, the issues in this proceeding are straightforward. The legal questions are whether Respondents needed additional Commission authority to provide transportation network services, and if so, whether a civil penalty is warranted. In the event that the Commission determines that Respondents' conduct was unlawful, it is necessary to determine the appropriate civil penalty consistent with the factors set forth in the Commission's policy statement at 52 Pa. Code § 69.1201. The Commission should not be persuaded by I&E's efforts to steer its focus toward extraneous matters that are not at issue and toward a multi-million penalty that is not supported by the record.

[26] June 26, 2014 Transcript at 35, 38-39.
[27] Respondent Exhibit No. 1; May 6, 2015 Transcript at 130-134.

III. COUNTERSTATEMENT OF QUESTIONS

1. Is it a violation of either Section 1101 or 2505 of the Public Utility Code for an entity to use a mobile application that connects passengers with independent drivers who provide transportation services in their personal vehicles?

   Suggested Answer: No

2. If Respondents are found to have violated Section 1101 or 2505 of the Public Utility Code, is a civil penalty warranted?

   Suggested Answer: No

3. Is a civil penalty an appropriate remedy to address a party's failure to furnish discovery responses?

   Suggested Answer: No

IV. SUMMARY OF ARGUMENT

Through the introduction of transportation network services in Allegheny County in February 2014, the traveling public has had access to reliable, affordable and safe transportation alternatives that were previously available from existing providers. Recognizing that the use of an App to pair passengers with drivers using their own personal vehicles does not fall neatly within any existing classification of transportation provider, the Commission has created a new experimental authority scheme to accommodate this new and innovative service demanded by the public. Moreover, several bills are pending in Pennsylvania's General Assembly that would establish a set of requirements applicable to transportation network services.

Despite the compelling public demand for these services and the grey area in which they fall in Pennsylvania's existing regulatory framework, I&E has taken the position that Respondents knew or should have known that Commission authority was needed before it launched transportation network services in Allegheny County. However, since transportation network services do not fall under the statutory definitions of "common carrier by motor vehicle" or "broker," Respondents contend that the activities that are the subject of the Amended Complaint do not require a license or certificate issued by the Commission.

Even if the Commission determines that unauthorized trips arranged through the App during a brief period in 2014 required the issuance of authority, compliance has been achieved and no further action is warranted. In particular, while this proceeding was pending, Rasier-PA, received emergency temporary authority and a two-year experimental authority certificate to provide transportation network services in Allegheny County. Since receiving Commission authorization on August 21, 2014, Rasier-PA has been a model certificate holder, fully and timely complying with each and every condition and regulatory requirement imposed upon it by the Commission.

To the extent that the Commission concludes that a civil penalty is necessary for trips that occurred over a year ago, it should avoid I&E's efforts to steer it toward an arbitrary and capricious civil penalty that is based on discovery disputes and Respondents' litigation strategy. Rather, the Commission's focus should be on a determination of an appropriate civil penalty, considering the various relevant factors that are set forth in the Commission's policy statement governing civil penalties in litigated and settled proceedings.

Each of the factors that is relevant to the determination of a civil penalty either weighs in favor of no civil penalty or a lower civil penalty. For instance, prior to the launch of the App in Allegheny County, Gegen had obtained a brokerage license, which was believed to cover those operations. When Respondents were advised by Commission staff of its view that this license may be insufficient to cover its operations, Rasier-PA filed an application for experimental authority. Importantly, no adverse consequences occurred as a result of the launch of the App in Allegheny County. To the contrary, extensive driver integrity and vehicle safety practices, as well as $1 million in liability insurance, were in place to protect the public. Moreover, Respondents have no compliance history, in that there have been no prior Commission adjudications finding any violations of the Code, regulations or orders. Finally, the record is replete with examples of Rasier-PA's compliance with all conditions and requirements imposed by the Commission.

An evaluation of this case that fairly considers those factors will lead the Commission to a reasonable outcome, which rejects I&E's proposed $19 million civil penalty and is more in line with the Lyft settlement approved on July 15, 2015, involving the same factual and legal allegations concerning unauthorized passenger trips.

V. ARGUMENT

A. Respondents did not engage in any activity requiring authority from the Commission during the period covered by the Amended Complaint.

1. The activities engaged in by Respondents do not fall within the statutory definitions of common carrier or broker.

Through Code Sections 1101 and 2505, the General Assembly has conferred jurisdiction on the Commission to regulate the operations of common carriers by motor vehicle and brokers, and requires such entities to obtain a certificate of public convenience or license from the Commission prior to engaging in these activities. 66 Pa.C.S. § 1101 and 2505. However, the statutory definitions of common carrier by motor vehicle and broker do not describe the transportation network services offered by Respondents. Therefore, the activities engaged in by Respondents did not require Commission authority.

Common carriers by motor vehicle are defined by Code Section 102, in pertinent part, as "[a]ny common carrier who or which holds out or undertakes the transportation of passengers or property, or both, or any class of passengers or property, between points within the Commonwealth of Pennsylvania by motor vehicle for compensation." 66 Pa.C.S. § 102 (definitions). Under the facts presented in the record of this proceeding, Respondents did not employ persons, own vehicles or transport passengers between points in Pennsylvania. Respondents' activities were limited to partnering with drivers using their own personal vehicles to transport persons who requested transportation through the App.[28]

Moreover, it is well-settled in Pennsylvania that an entity is not a common carrier if its services are available only to a segment of the public. In a landmark decision in *Aronimink Transportation Co. v. Public Service Commission*, 111 Pa. Superior Ct. 414, 170 A. 375 (1934)

[28] Exhibit ALJ 1-Revised.

("*Aronimink*"), the Superior Court provided guidance upon which the Commission has relied for eighty years to determine whether certain transportation services require the issuance of a certificate of public convenience. Finding that the corporation was exempt from Commission regulation, the Superior Court explained that a "common carrier" is one who undertakes for hire to transport all persons who request such service. The Superior Court emphasized that the public or private character of the enterprise does not depend upon the number of persons by whom it is used, but upon whether or not it is open to the use and service of all of the public. *Brink's Express Company v. Public Service Commission*, 117 Pa. Superior Ct. 268; 178 A. 346 (1935)

In another landmark decision, *Drexelbrook Associates v. Pennsylvania Public Utility Commission*, 418 Pa. 430, 212 A.2d 337 (1965), the Pennsylvania Supreme Court examined what is necessary for a service to be considered of a public rather than private nature, and therefore subject to the PUC's jurisdiction. In *Drexelbrook*, the Supreme Court held that where the class of persons to be serviced is not open to the indefinite public, the proposed service is private in nature.

Here, the only way in which a member of the public can use the transportation network services is to download the App to a compatible mobile device or computer with an Internet browser, agree to Respondents' terms and conditions and provide payment information. Therefore, the services provided through the App are not open to the indefinite public or to the public at large.

Similarly, Respondents are not a broker. A broker is defined, in pertinent part, by Code Section 2505(a) as an entity who "sells or offers for sale any transportation by a motor carrier" or "who sells, provides, furnishes, contracts, or arranges for such transportation." 66 Pa.C.S. § 2505(a). Respondents were not engaged in selling, providing, furnishing, contracting or arranging transportation by a motor carrier. Rather, Respondents' activities were limited to

partnering with drivers to operate on the platform and receive leads from potential riders via the App. Respondents were not contracting for or arranging specific transportation for passengers. Rather, the riders themselves used the App, after agreeing to terms and conditions established by Respondents, to obtain the transportation. Moreover, no "arranging" of transportation services occurred; riders were simply matched with drivers who were available and happened to be closest to their pick-up location.[29] Therefore, Respondents were not acting in the role of a broker. Also, again, the transportation services provided through the App are not available to the indefinite public but rather only to those individuals who voluntarily choose to use the App to arrange their transportation services.

The fact that several bills are currently pending in the General Assembly is an indication that the services being provided by Respondents either do not currently fall under the Commission's jurisdiction or that they at least fall in a grey area. Therefore, for I&E to suggest that Respondents knew or should have known, prior to the launch, that their activities required additional Commission authority (beyond Gegen's license) is without basis. Moreover, its suggestion that Respondents should have known that such activities were regulated by the Commission when it received a letter from the Bureau of Technical Utility Services in June 2012 is absurd. No evidence was introduced in the record of this proceeding of the specific activities, if any, that Respondents were engaged in at that time. The receipt of a staff letter about unknown activities in no way provided Respondents with any information about what is required in Pennsylvania for activities that are now known as "transportation network services."

I&E also suggests that upon receipt of the Complaint it filed on June 5, 2014, Respondents should have ceased any operations in Pennsylvania. The filing of a complaint by an

[29] Exhibit ALJ 1-Revised.

independent prosecutory bureau of the Commission, prior to any determination by the Commission as to whether new and innovative services require Commission authority, placed Respondents under no obligation to cease operations. Moreover, shortly after the filing of the Complaint, Rasier-PA obtained ETA to provide transportation network services in Allegheny County.

I&E further argues that the filing of an application by Rasier-PA on April 14, 2014 for authority to provide transportation network services demonstrates that Respondents knew that Commission authority was necessary.[30] As Mr. Feldman testified, however, the Rasier-PA application was filed based on advice of Commission staff who suggested that the brokerage license held by Gegen may not cover the operations launched in February 2014.[31] It is reasonable for an entity to file an application for Commission authority even if it does not believe that Commission authority is required, especially if it is concerned about enforcement actions being initiated before legislative solutions can be implemented. Therefore, no credence should be given to I&E's argument that somehow Respondents conceded that Commission authority was required by the filing of the Rasier-PA application on April 14, 2014.

2. Undocumented "public safety concerns" have no bearing on whether a certificate of public convenience of brokerage license is required.

The section of I&E's Brief addressing the need for Commission authority contains an extensive discussion that has no bearing on whether Respondents were engaged in unlawful activities. Specifically, I&E argues that "Officer Bowser testified at length about public safety concerns."[32] Whether Respondents' activities caused public safety concerns, which they did not, is irrelevant to whether the issuance of a certificate or license by the Commission was required.

[30] I&E Brief at 29.
[31] May 6, 2015 Transcript at 135.
[32] I&E Brief at 25.

Moreover, despite Officer Bowser's description of the situation as a "recipe for disaster," I&E presented no evidence of any safety issues. To the contrary, Officer Bowser testified that he observed no safety concerns during his trips. In addition, Officer Bowser acknowledged that companies often have their own inherent business reasons to employ practices designed to avoid the occurrence of accidents and incidents and that regulatory oversight does not guarantee that accidents and incidents will not occur.[33]

B. No civil penalty should be imposed Respondents; moreover, any civil penalty that is imposed should be based on relevant factors, calculated on a per day basis and limited to transportation network services provided by Respondents after July 24, 2014.

1. In view of the lack of clarity in the Code regarding jurisdiction over transportation network services, no civil penalty is warranted.

Given the lack of clarity in the Code about whether the use of a digital platform to facilitate the transportation of passengers by non-certificated drivers utilizing their personal vehicles falls under the Commission's jurisdiction, as described above, and the critical need for the transportation services that were facilitated by Respondents through the digital platform, no civil penalty is warranted. This is particularly true for the time period during which the Commission had not declared that these services required its authority.

I&E refers to a "cease and desist" letter issued to Respondents in 2012 by the Commission's Bureau of Technical Utility Services. As that letter was sent by advisory staff and not representative of the Commission's views or binding on the Commission, and moreover was not specific about the activities that were supposedly unlawful, it did not preclude the launch of the App in February 2014. Additionally, the issuance of I&E's Complaint on June 5, 2014 did

[33] June 26, 2014 Transcript at 38-40.

not require Respondents to cease operations or otherwise provide any official Commission decision about the applicability of the Code to Respondents' activities.

As to Respondents' operations after the issuance of cease and desist orders by the ALJs and the Commission, on July 1, 2014 and July 24, 2014,[34] respectively, I&E argues that they were based on "nothing more than an internal company decision."[35] Again, I&E ignored testimony of Respondents' witness that explained the basis for that decision. As Mr. Feldman testified, Respondents continued operating for various reasons. In part, this decision was based on the fact that the Commission had the very same day found that a critical and urgent transportation need existed in Allegheny County and had authorized Rasier-PA to provide transportation network services pursuant to an ETA certificate. Additionally, Respondents had already been in business for over five months, offering thousands of trips, and there was a tremendous need for the service. If Respondents had stopped operating, riders who previously had been unable to access transportation would have been back to square one, unable to get to their doctors' appointments or get home safely from a bar at night. Moreover, shutting down would have adversely impacted the drivers who were operating their own small businesses and relying on the income from this service. As Mr. Feldman testified, "To pull the rug out when there is such tremendous need, when the Commission has said that this is needed, that there is an emergency and that it's conditionally approved would be detrimental to the community."[36]

2. The civil penalty proposed by I&E is excessive, and was developed in an arbitrary and capricious manner.

Even if the Commission determines that a civil penalty is necessary, the arbitrary and capricious $19 million civil penalty proposed by I&E is ridiculously excessive. To put it in some

[34] Exhibits ALJ 2 and 3.
[35] I&E Brief at 29.
[36] May 6, 2015 Transcript at 137-138.

perspective in the context of administrative proceedings, the Commission has recently imposed the following civil penalties on public utilities amidst allegations of unsafe or inadequate business practices jeopardizing public safety or resulting in fatalities, serious bodily injury and/or significant property damage:

- UGI Utilities, Inc. – Gas Division - allegations relating to a natural gas ignition incident that required the company to revise its operating procedures - $96,000[37]

- Columbia Gas of Pennsylvania, Inc. - allegations relating to excessive pipeline pressures, excavation damage and lack of pressure regulation devices - $200,000[38]

- UGI Utilities, Inc. – natural gas explosion that caused $455,000 in damages to a home and business amidst allegations of a failure to properly mark underground facilities and have appropriate measures in place to address damage prevention - $200,000[39]

- Pennsylvania Electric Company – termination of service that preceded a fire resulting in serious injury to an occupant of the residence - $200,000[40]

- PPL Electric Utilities – termination of electric service that preceded a fire, resulting in the death of two children - $300,000[41]

- UGI Utilities, Inc. – natural gas explosion that resulted in five fatalities amidst allegations of inadequate leak detection measures and insufficient pipeline replacement - $500,000[42]

- Philadelphia Gas Works – natural gas explosion that resulted in one fatality and five instances of bodily injury amidst allegations of damaged pipeline, inadequate corrosion control measures and failure to minimize the danger of natural gas ignition or comply with emergency procedures that require protection of people

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[37] *Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. UGI Utilities, Inc- Gas Division,* Docket No. M-2013-2313375 (Order adopted April 23, 2014).
[38] *Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. Columbia Gas of Pennsylvania, Inc.,* Docket No. M-2014-2306076 (Order adopted September 11, 2014).
[39] *Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. UGI Utilities, Inc- Gas Division,* Docket No. C-2012-2295974 (Order adopted May 9, 2013).
[40] *Pa. Public Utility Commission, Law Bureau Prosecutory Staff v. Pennsylvania Electric Company,* Docket No. M-2008-2027681 (Order adopted March 12, 2009).
[41] *Pa. Public Utility Commission, Law Bureau Prosecutory Staff v. PPL Electric Utilities Corp.*, Docket No. M-2008-2057562 (Order adopted March 26, 2009).
[42] *Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. UGI Utilities, Inc- Gas Division,* Docket No. C-2012-230-2308997 (Order adopted January 24, 2013).

first, and failure to take steps to reasonably protect the public from danger - $500,000[43]

- UGI Penn Natural Gas – allegations of natural gas leaks, inadequate repairs, and insufficient monitoring of a hazardous condition - $1,000,000[44]

The civil penalties for the three incidents above involving eight fatalities total $1.3 million. In fact, the largest single penalty for a case involving a fatality was $500,000, where a natural gas explosion resulted in five fatalities. Given that the record in this case contains no evidence of any unsafe or inadequate business practices jeopardizing public safety or any harm resulting to the public, a multi-million penalty is clearly excessive when compared to the above-referenced civil penalties.

Moreover, the highest civil penalty ever imposed by the Commission, of which Respondents are aware, is $1.3 million as a result of a settlement between I&E and West Penn Power Company relating to an alleged violation of Act 129 electric consumption reduction requirements.[45] 66 Pa.C.S. § 2806.1. That civil penalty, however, must be placed in further perspective due to the mandate in Act 129 of 2008 for a minimum penalty of $1 million for any electric distribution company failing to meet its usage reduction targets established by the Commission. 66 Pa.C.S. § 2806.1(f)(2)(i).

In the transportation industry, the highest civil penalty ever approved by the Commission is $250,000, which was recently imposed as a result of the I&E settlement with Lyft, Inc. for the

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[43] *Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. Philadelphia Gas Works*, Docket No. C-2011-2278312 (Order adopted July 16, 2013).
[44] *Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. UGI Penn Natural Gas, Inc.*, Docket No. M-2013-2338981 (Order adopted August 29, 2013).
[45] *Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. West Penn Power Company*, Docket No. C-2014-2417325 (Order adopted August 22, 2014).

same activities that are the subject of the Complaint filed against Respondents.[46] Before that, the highest civil penalties in the transportation industry were approximately $20,000.[47]

Besides being excessive to the point of being absurd, the $19 million civil penalty was developed in an arbitrary and capricious manner by I&E. Officer Bowser testified that he did not participate in the determination of the amount of civil penalty to propose in the Amended Complaint,[48] which relied on "proxy trip data" and was nothing more than a wild guess. Moreover, after reviewing the actual trip data, which I&E has contended was so critical to its case, he testified that I&E was not even changing the amount of the requested civil penalty. Indicating that the civil penalty per trip increased after the actual trip data was considered, Officer Bowser testified that I&E arrived at the per trip penalty by simply dividing the arbitrary $19 million by the number of actual trips.[49] He further noted that I&E took no other factors into account.[50]

Therefore, it is obvious that I&E did not develop the proposed civil penalty in accordance with the Commission's policy statement at 52 Pa. Code § 69.1201, which sets forth the factors and standards that are to be considered when evaluating cases involving violations of the Code, regulations or Commission orders. Rather, I&E decided on an arbitrary and capricious civil penalty and then essentially backed into it. The fact that the proposed civil penalty is exactly [redacted] per trip is further evidence of the arbitrary and capricious manner in which I&E

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[46] *Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. Lyft, Inc.*, Docket No. C-2014-2422713 (Initial Decision entered June 5, 2015) (Final Order entered July 15, 2015).
[47] *See, e.g. Pa. Public Utility Commission, Bureau of Transportation and Safety v. Alpha Moving and Storage, Inc.*, Docket No. C-2010-2187846 (Order adopted January 27, 2011); *Pa. Public Utility Commission, Bureau of Transportation and Safety v. Pegasus Transportation Holdings, Inc., t/d/b/a Pegasus Chauffered Motor Cars*, Docket No. A-00116364C0502 (Order adopted September 25, 2006); *Pa. Public Utility Commission, Bureau of Transportation and Safety v. Aspire Limousine Service, Inc.*, Docket No. C-2010-2160834 (Order adopted October 21, 2010) ("*Aspire*").
[48] May 6, 2015 Transcript at 109.
[49] May 6, 2015 Transcript at 113 (Proprietary).
[50] May 6, 2015 Transcript at 113 (Proprietary).

determined its recommended civil penalty. A review of the receipts for individual trips that were entered into evidence in this record, which show fares ranging from $8.00 to $12.00 further demonstrates the absurdity of I&E's proposed civil penalty.[51]

Even I&E's complaint and settlement involving Lyft show an arbitrary and capricious approach to proposing a civil penalty. Whereas I&E sought a $7 million civil penalty in the Lyft complaint proceeding, it settled with Lyft for the significantly lower, and more reasonable, amount of $250,000.

I&E's legal arguments also demonstrate that the proposed civil penalty of $19 million is arbitrary and capricious. For instance, I&E argues in its Brief that "no matter how the civil penalty...is ultimately calculated, a total civil penalty of $19,000,000 remains the appropriate total...."[52] This argument, coupled with the lack of any discussion or consideration by the I&E witness of the standards set forth in the Commission's policy statement, demonstrates that I&E plucked the $19 million proposed civil penalty out of thin air, linked more to a desire for media coverage than to any factors outlined by the Commission for determining a civil penalty.

3. Assessing a civil penalty on a per trip basis is unlawful and unwarranted.

Moreover, I&E's argument for a per trip civil penalty is without basis. When I&E originally filed its Complaint on June 5, 2014, it sought a civil penalty for each trip that had been arranged by Officer Bowser. Notably, those trips occurred on different days, so it is immaterial whether the penalty was sought on a per day or per trip basis. For continued unauthorized service following the filing of the Complaint, I&E followed its normal approach of requesting a civil penalty per day. When it filed its Amended Complaint on January 9, 2015, more than four months after Rasier-PA had received ETA and was operating in Allegheny County pursuant to a

[51] I&E Exhibit No. 4.
[52] I&E Brief at 35.

Commission-issued certificate of public convenience, I&E changed its request - without any explanation, rationale or lawful basis - to a per trip civil penalty.

Code Section 3301(a) authorizes the Commission to impose a civil penalty not exceeding $1,000 for a violation of the Code, Commission regulation or Commission order. 66 Pa.C.S. § 3301(a). Code Section 3301(b) provides that for each and every day's continuance in such violation shall be a separate and distinct offense. 66 Pa.C.S. § 3301(b).

I&E cites the Commonwealth Court's decision in *Newcomer Trucking, Inc. v. Pa. Public Utility Commission*, 531 A.2d 85 (Pa. Cmwlth. 1987), as authorizing the Commission to impose a civil penalty for each trip arranged through the App. That case is distinguishable, however, from the present case. In that case, a property carrier was prohibited by the express terms of its certificate from transporting goods for more than one shipper on one truck at any time. The carrier was found to have violated this restriction on 184 times on 128 separate days. Affirming the Commission's decision to impose a civil penalty on the basis of 184 separate violations, the Commonwealth Court noted that the shipments could be feasibly segregated into discrete violations.

Two factors distinguish *Newcomer* from the present case. First, the property carrier's certificate in *Newcomer* clearly prohibited the use of a single truck for multiple shipments. In this case, prior to the issuance of the cease and desist order by the Commission, it was unknown whether the Commission viewed Respondents' activities as requiring a certificate or license. Moreover, the focus in this proceeding is on individual passenger trips but rather on the use of a digital platform to facilitate the transportation of passengers utilizing non-certificated drivers in their personal vehicles.[53] Therefore, the question in this proceeding is whether using the digital

[53] Exhibit ALJ 3 at Ordering Paragraph 3.

platform without authority violates the Code. If utilizing a digital platform to facilitate the transportation of passengers is determined to require Commission authority, the continued operation after that determination would be considered a continuing offense.

Second, *Newcomer* involved the use of single truck by for multiple shipments by a property carrier rather than unauthorized service, which has typically been treated as an ongoing offense and addressed by per day civil penalties. Indeed, I&E's original Complaint sought per day civil penalties for ongoing alleged violations of the Code. Changing the structure of the penalty request seven months after filing its Complaint, without any explanation or rationale, especially over four months after Rasier-PA received a certificate to provide transportation network services, is inappropriate and should not be endorsed by this Commission.

Other than the *Newcomer* decision, Respondents are unaware of any other Commission or appellate case in which the "continuing offense" language of Code Section 3301(b) has been invoked. While the Commission's interpretation and application of this language survived appellate review in *Newcomer*, sufficient differences exist between these two cases, as explained above, to warrant a fresh consideration of this language. This case is not about the number of trips arranged through the App; it is about whether Commission authority is required to utilize a digital platform to facilitate the transportation of passengers. Therefore, any penalty that is imposed should be assessed on a per day basis.

Additionally, a per day penalty is consistent with prior Commission practice. Not only is that the format originally used by I&E for this proceeding, it is also the approach that has been followed on many prior occasions.[54] Indeed, the per day format is also what was originally used

[54] *See, e.g., Aspire*; *Pa. Public Utility Commission, Bureau of Transportation & Safety v. Steve R. Brungard and Rosemarie Metz-Brungard, t/d/b/a Protean Potentials*, Docket No. A-00113098C0101, 202 Pa. PUC LEXIS 23 (Order entered June 3, 2002). *See also Lyft* (Complaint filed on June 5, 2014). When I&E has sought or the Commission has imposed civil penalties on a per trip basis, the civil penalties have been lower than if they had been

in the Lyft complaint proceeding. Even in the Amended Complaint against Lyft, I&E limited the per trip penalty request to those trips that occurred after issuance of the cease and desist order by the ALJs.

Even if the Commission views Section 3301 as permitting the imposition of a civil penalty on a per trip rather than per day basis, it should still reject I&E's proposal to assess any civil penalty as on per trip basis. In arguing that each trip is a discrete violation and subject to a separate monetary civil penalty, I&E contends that "driver habits and vehicle differences support a fine per trip."[55] Yet, at no time in this proceeding did I&E present any evidence to suggest that any safety concerns existed with respect any driver or vehicle operating or being operated on Respondents' platform. Also, while differences between drivers and vehicles most certainly may exist, they are all subjected to the same criminal background checks, driver history record checks, state inspections, and Pennsylvania's Vehicle Code, and covered by the same liability insurance policy,[56] rendering any differences moot.

4. Any civil penalty imposed on Respondent should be for services provided after July 24, 2014.

Prior to July 24, 2014, the Commission had made no pronouncements about whether the transportation network services being provided by Respondents required a certificate or license issued by the Commission. Since these services do not fall under the traditionally regulated transportation services, to the point that the Commission had to rely on a new category for experimental service to grant authority Rasier-PA to engage in them, it would be unreasonable for the Commission to assess a civil penalty for activities engaged in prior to July 24, 2014. As of July 24, 2014, Respondents were aware that the Commission viewed the use of a digital

assessed on a per day basis. *See, e.g., Pa. Public Utility Commission, Bureau of Transportation & Safety v. A-Apollo Transfer, Inc.*, Docket No. A-00098529C0501 (Order adopted October 6, 2005).

[55] I&E Brief at 33.

[56] Respondent Exhibit No. 2; May 6, 2015 Transcript at 130-134.

platform to facilitate transportation to passengers using non-certificated drivers as requiring Commission authority. Yet, even that decision was made without the benefit of a full evidentiary record that clearly identified the functions being performed by Respondents. Additionally, on the same date, the Commission found that an immediate and urgent need existed for transportation services in Allegheny warranting a grant of ETA to Rasier-PA.

As to the period of time between July 1, 2014, the date of the ALJ's cease and desist order, and July 24, 2014, Respondents recognize that the Commission's regulations provide that no stay of an interim emergency order will be permitted while the matter is being reviewed by the Commission. However, it is not clear that a cease and desist order, which is very different in scope and magnitude than a typical interim emergency order, is enforceable against an entity prior to Commission review and approval. This is not a case where parties' rights were affected in such a way that the ALJ's action on an interim emergency petition must be adhered to pending Commission review. To the contrary, this is a case that raised a novel issue about whether new and innovative transportation network services are subject to the Commission's jurisdiction, where the ALJs were in unchartered territory and reaching conclusions on cases of first impression. Therefore, any civil penalties should address only service provided after July 24, 2014, the same date on which the Commission declared that the proposed transportation network services of Rasier-PA would fulfill an urgent and immediate need in Allegheny County, justifying the grant of emergency temporary authority.

C. Application of the Commission's standards does not support the civil penalty proposed by I&E.

The Commission's policy statement at 52 Pa. Code § 69.1201 sets forth specific standards and factors that are to be considered when evaluating whether and to what extent a civil penalty for violations of the Code, Commission regulations or Commission orders is

warranted. These factors were initially developed in the *Rosi v. Bell-Atlantic – Pennslvania, Inc., and Sprint Communications, L.P.*, Docket No. C-00992409 (Order entered March 16, 2006) and in *Pa. Public Utility Commission v. NCIC Operator Serv.*, Docket No. M-00001440 (Order entered December 21, 2000), where the Commission held that violations would be subject to the same standards. The Commission's policy statement is essentially a codification of those guidelines.

1. As the launch of the App was responsive to public demand and was based on a belief that the license held by a subsidiary covered the operations, it did not constitute conduct of a serious nature.

The first factor for consideration is whether the conduct was of a serious nature. 52 Pa. Code § 69.1201(c)(1). Under the Commission's policy statement, it is explained that when conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When conduct is less egregious, it may warrant a lower penalty.

Providing desperately needed alternatives for reliable, affordable and safe transportation to the public in Allegheny County and filling voids in the existing transportation infrastructure can hardly be viewed as conduct of a serious nature. This is particularly true when Respondents believed that the Gegen brokerage license covered its operations at the time of the launch in February 2014. Upon learning from Commission advisory staff that additional authority may be required, Rasier-PA filed an application for a two-year experimental certificate to provide transportation network services in Allegheny County. By the time the Commission reviewed these operations and determined, on an interim basis, that they required Commission authority, the operations were well underway, with both the public and drivers relying on them. Moreover, at the same time as the Commission reached this determination, it also conditionally granted emergency temporary authority to Rasier-PA.

I&E argues that providing unauthorized services is serious "due to its impact on public safety."[57] It goes on to argue that "with each and every trip conducted by an uncertificated driver, Uber subjected the public to potential injury or even death" because the Commission was "unable to prevent injury to people or damage to property through an inspection of vehicles and a review of records pertaining to drivers."[58] Continuing to speculate about potential harm to the public, I&E suggests that "it is not clear that there would have been sufficient, adequate or even any insurance coverage for injury and damage to persons or property caused by drivers operating in Uber's network."[59]

Engaging in unsubstantiated speculation and hyperbole, I&E completely ignores the fact that there is no evidence in the record about public safety ever being in jeopardy. I&E has had the opportunity since August 21, 2014 to inspect vehicles operating on Rasier-PA's platform and to the extent that any inspections have occurred, it presented no evidence about any deficiencies. Importantly, the reasons that public safety was not in jeopardy are: 1) Respondents have compelling business reasons to ensure driver integrity and vehicle safety; 2) Respondents follow standard business practices that include criminal background checks, driver history checks, and vehicle inspections; and 3) Respondents hold $1 million in liability insurance that ensures that the public is protected from financial loss when accidents do occur.[60] The scare tactics that I&E used in support of its request for interim emergency relief are not relevant now.

In addressing this factor, I&E cites two assessment cases in support of the proposition that the Commission has found that a significant penalty is necessary to deter additional violations in the future. However, in neither of the cited cases did the Commission even discuss

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[57] I&E Brief at 37.
[58] I&E Brief at 37.
[59] I&E Brief at 38.
[60] Respondent Exhibit No. 2; May 6, 2015 Transcript at 130-134.

the size of the civil penalty. Rather, as a result of the respondents not filing answers to the I&E complaints, I&E filed motions for default judgments. The Commission orders simply granted those motions and contained no discussion of a need to deter future violations. *See Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. C&J Services, Inc.*, Docket No. C-2012-2335066 (Order entered May 6, 2013); *Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. Hathaway Specialized Hauling, Inc. t/a Fantasia Machinery Transport*, Docket No. C-2012-2325066 (Order entered March 14, 2013).

Also in the context of the first factor, I&E suggests that Respondents' delays in responding to discovery is serious conduct warranting a higher civil penalty. I&E cites no Commission precedent to support the consideration of a party's conduct during a proceeding in the determination of the appropriate civil penalty. Further, I&E's due process rights were not affected by these delays. As Respondents have explained, I&E's ability to prosecute the Amended Complaint was not hampered by receipt of the trip data at the hearing or by not having discovery responses prior to March 5, 2015 that explained the functions performed by Respondent.

2. No adverse consequences occurred as a result of Respondents' launch of the App; to the contrary, the public benefitted by having access to safe, affordable and reliable transportation alternatives.

The second factor is whether the resulting consequences of such conduct were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty. As discussed above, no adverse consequences occurred as a result of Respondents' conduct. Therefore, this factor weighs in favor of no penalty or a lower penalty.

Notably, I&E glosses over any discussion of this factor, merely continuing to speculate about what could have happened from a safety perspective without acknowledging that

Commission oversight would not have necessarily precluded any accidents from occurring. Again, while the potential for harm may have been relevant in the content of the interim emergency relief proceeding, speculation about safety issues has no place in this discussion when no evidence has been introduced to show that the public safety was ever in jeopardy or that any harm ever occurred. In fact, Mr. Feldman testified that there were no instances of incidents that resulted in fatalities, serious bodily injury or significant property damage, and that less than one incident per ten thousand trips occurred that could even lead to the filing of an insurance claim.[61]

In discussing the second factor, I&E suggests that even one incident per ten thousand trips is serious especially since Respondents did not follow the Commission's regulations related to driver integrity, vehicle safety and insurance during that time.[62] This sentence must be completely disregarded in determining any civil penalty since there is no support for it in the evidentiary record, and in fact, there is evidence directly contravening this statement. Through Mr. Feldman, it was demonstrated that Respondents not only followed the Commission's regulations during that time, but exceeded them, even prior to a grant of emergency temporary authority to Rasier-PA. For instance, Respondents carried $1 million of liability insurance, which is 28 times the amount required of taxicab companies.[63] Additionally, Respondents followed the driver integrity and vehicle safety requirements that were later imposed upon Rasier-PA by the Commission, and again went further than the Commission's regulations by not only performing criminal background checks but also automatically disqualifying any individuals who had committed serious crimes, as contrasted with Commission's regulations applicable to taxicabs and limousines that have no automatic disqualifiers. Moreover, whereas the Commission's regulations only require taxicabs and limousines to perform criminal

[61] May 6, 2015 Transcript at 138-139.
[62] I&E Brief at 42.
[63] May 6, 2015 Transcript at 128; 52 Pa. Code § 32.11(b) (requires $35,000 in liability insurance).

background checks that cover the prior twelve months, Respondents' checks went back seven years.[64]

Rather than causing any adverse consequences to the public, Respondents' launch of the App in Allegheny County filled a void in the transportation infrastructure that existed at that time. Due to the services provided by Respondents, the traveling public had access to safe, affordable and reliable transportation alternatives. Also, drivers had an opportunity to start and grown their own small businesses. This factor weighs in favor of no penalty or a lower penalty.

3. Respondents believed they had sufficient Commission authority when they launched operations.

The third factor is whether the conduct at issue was deemed intentional or negligent. When conduct has been deemed intentional, the conduct may result in a higher penalty. As noted above, even if the Commission finds that Respondents violated the Code, the launch of the operations was not an intentional violation of the Code. Rather, Respondents believed that, to the extent the Code requires Commission authority, the brokerage license issued to Gegen covered the operations. Clearly, prior to issuance of the cease and desist order, Respondents were not aware of the Commission's view on its jurisdiction over transportation network services.

Although Respondents continued providing services after issuance of the cease and desist order, the Commission had on the very same day found that an immediate and urgent transportation need existed in Allegheny County and granted Rasier-PA emergency temporary authority to provide transportation network services. Additionally, Respondent shad already been in business for over five months, offering thousands of trips. If Respondents had stopped

[64] *See December 5, 2014 Orders* at 39 (Allegheny County) and 31 (Statewide); Respondent Exhibit No. 2; May 6, 2015 Transcript at 130-134; 52 Pa. Code § 29.505.

operating, riders who had been previously unable to access transportation would have been back to square one, unable to get to their doctors' appointments, work, school or get home safely from a bar at night. Moreover, shutting down operations would have adversely impacted the drivers who were operating their own small businesses and relying on the income from this service. As Mr. Feldman testified, "To pull the rug out when there is such tremendous need, when the Commission has said that this is needed, that there is an emergency and that it's conditionally approved would be detrimental to the community."[65] Importantly, Respondents were in substantial compliance with the Commission's requirements as of that date and its unauthorized operations continued for a couple of weeks until Rasier-PA fully complied with the Commission's conditions and received its certificate on August 21, 2014.

4. Rasier-PA has taken numerous measures to ensure full compliance with the Commission's regulations, requirements and conditions.

The fourth factor is whether a regulated entity has modified its internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. Through Mr. Feldman's testimony, it was demonstrated that Rasier-PA has taken numerous measures to ensure full compliance with the Commission's regulations, requirements and conditions, by:

- Operating in Allegheny County under the *ETA Order* from August 21, 2014 through January 29, 2015 without receiving any citations for violations of the Commission's regulations or orders
- Timely submitting Compliance Plans pursuant to the *December 5, 2014 Orders* on December 24, 2014, and provided the trip data on a confidential basis
- Filing an Application on February 27, 2015 requesting authority to operate transportation network services in the counties previously excluded from its Applications
- Timely complying with all conditions of the *December 5, 2014 Orders*, as reaffirmed in the *January 29, 2015 Order,* by March 1, 2015

[65] May 6, 2015 Transcript at 137-138.

- Filing its Assessment Report on March 31, 2015
- Filing an Application on March 31, 2015 requesting statewide authority to transport property, which was granted on April 16, 2015 and used in May for a Goodwill clothing drive
- Submitting its first Quarterly Report on the Compliance Plans on April 30, 2015
- Filing its Self-Certification Form on April 30, 2015

In addition to these steps taken by Rasier-PA, it has also cooperated with I&E and the Bureau of Technical Utility Services in providing extensive information, as part of audits, to document compliance with the vehicle safety and driver integrity requirements which the Commission imposed and to which it agreed. Notably, I&E has pointed to no situations in which Rasier-PA has failed to fully comply with data requests since becoming certificated to provide transportation services. In fact, Rasier-PA has gone to great lengths to cooperate with I&E on routine compliance matters and investigations involving individual consumers.

Again, I&E's Brief addressing this factor is completely focused on two sets of discovery responses that were not provided by Respondents – discovery responses that I&E deemed critical to its case and were requested nearly three and five months, respectively, after initiation of this proceeding.[66] Discovery responses are completely irrelevant to this factor, and it is Rasier-PA's status as a model citizen as a certificate holder over the past year that demonstrates the modification of internal practices and procedures, warranting the imposition of no penalty or a lower civil penalty.

[66] I&E Brief at 46-47.

5. The launch of the App gave thousands of riders access to reliable, affordable and safe transportation that was otherwise unavailable.

The fifth factor involves the number of customers affected and the duration of the violation. This factor should be viewed from the opposite angle: how many customers would have gone without transportation if Respondents had not been facilitating transportation services through the App? Notably, as a result of Respondents' operations, the traveling public in Allegheny County had access to reliable, affordable and safe transportation that was otherwise unavailable. No customers complained about the services they received through the App. To the contrary, customers used the services and overwhelmingly supported Rasier-PA's application for emergency temporary authority, urging the Commission to ensure that these services continued to be made available.[67] Therefore, this factor supports no penalty or a lower penalty.

Again, I&E's Brief focuses on the potential for Respondents' services to have "a detrimental impact on public safety."[68] Even the testimony of Officer Bowser cited in the Brief discussed how the public "could" have been affected. Since this factor reviews how the conduct adversely affected customers, speculation about potential impact, particularly when I&E has pointed to no examples of actual public safety concerns, should be disregarded.

6. Respondents have no record of non-compliance.

The sixth factor is compliance history, with recurrent violations by a utility resulting in a higher penalty. Simply stated, Respondents have no record of non-compliance.[69] This factor warrants the imposition of no penalty or a lower civil penalty.

In its discussion of this factor, I&E repeats earlier arguments about launching the App without authority and a failure to comply with discovery orders.[70] As these issues have been

[67] *See* Application filed on July 2, 2014 at Docket No. A-2014-242993, which resulted in the issuance of the *ETA Order*.
[68] I&E Brief at 47-48.
[69] May 6, 2015 Transcript at 142.

previously addressed, Respondents note simply that there have been no prior Commission adjudications finding any violations of the Code, regulations or Commission orders. I&E's reference again to service of the subpoena on Mr. Feldman is inappropriate since there is no record evidence to support its claims, and no violation of the regulations is alleged. Importantly, he appeared at the hearing and provided testimony on the issues for which he was subpoenaed, including the confidential trip data.

7. A respondent to a complaint is entitled to defend itself and is not required to cooperate with I&E.

The seventh factor is whether an entity has cooperated with I&E's investigation. Respondents were not being investigated by I&E; they were being prosecuted by I&E. Upon the filing of its Complaint on June 5, 2014, I&E initiated a litigated proceeding. A respondent in a litigated proceeding is entitled to defend itself. No Commission precedent has been cited for the proposition that a respondent in a litigated complaint proceeding must cooperate with I&E. In fact, the Commission has said that this factor is irrelevant when no investigation was conducted. *See Jack Bleiman v. PECO Energy Company, Docket No. F-2012-2284038* (Initial Decision issued November 20, 2012)(Order entered June 13, 2013).

Nonetheless, Respondents did cooperate with I&E in several significant ways, most notably by seeking to resolve this litigation through settlement on several occasions. Also, Respondents entered into numerous factual stipulations that allowed I&E to forego the presentation of evidence on many of the key points of its Amended Complaint.[71] Importantly, Respondents informed I&E that the App was launched in Allegheny County on February 11, 2014, one month earlier than I&E's allegations claimed, and provided documentation to

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[70] I&E Brief at 48-49.
[71] Motion for Scheduling of Settlement Conference and Assignment of Settlement Judge filed January 14, 2015 at this docket; Exhibit ALJ 1-Revised.

substantiate that date. Respondents also eased I&E's burdens by offering a detailed explanation of the roles played by the subsidiaries in operating the digital platform.[72]

8. No civil penalty is necessary to deter future violations.

The eighth factor is the consideration of the amount of civil penalty that is necessary to deter future violations. Since Rasier-PA is operating under a two-year experimental authority certificate issued by the Commission on January 29, 2015, I&E's desired compliance has been achieved. Indeed, Rasier-PA's application was filed two months before the Complaint was even initiated. By the time the evidentiary hearing was held in this case, Rasier-PA had been operating under authority granted by the Commission for over eight months. Moreover, during the pendency of this proceeding:

- Rasier-PA filed its ETA application for Allegheny County
- The Commission granted ETA to Rasier-PA for Allegheny County
- The Commission conditionally approved Rasier-PA's applications for two-year certificates to provide experimental service authority in Allegheny County and throughout Pennsylvania
- Rasier-PA filed Compliance Plans as required by the *December 5, 2014 Orders*
- The Commission approved Rasier-PA's Compliance Plans by the *January 29, 2015 Order*
- Rasier-PA received statewide property authority from the Commission on April 14, 2015
- Rasier-PA filed its first Quarterly Report on April 30, 2015 and its second Quarterly Report on July 23, 2015

Therefore, no civil penalty is necessary to deter future violations.

As to I&E's references to Respondents as a "large start-up company with significant capital," they are without support in the record and are irrelevant to any civil penalty that is

[72] I&E Exhibit No. 4.

imposed. Moreover, imposing a $19 million civil penalty on Respondents as a way of deterring "other motor carriers or brokers of transportation who are likely monitoring this enforcement proceeding," is unwarranted, particularly due to the unique circumstances of this case involving unchartered territories requiring interpretations of the Code and the introduction of new legislation.

9. Consideration of past Commission decisions in similar situations warrant a lower penalty.

The ninth factor calls for consideration of past Commission decisions in similar situations. I&E cites three Commission cases, none of which support its proposal for an arbitrary and capricious $19 million civil penalty. In fact, in *Bleiman*, the Commission imposed a $20 per day civil penalty on the electric utility as a result of incorrect charges appearing on the bill, which supports Respondents' argument for any civil penalty being calculated on a per day basis. As to the decision in *Pa. Public Utility Commission, Bureau of Transportation & Safety v. Steve R. Brungard and Rosemarie Metz-Brungard, t/d/b/a Protean Potentials*, Docket No. A-00113098C0101, 202 Pa. PUC LEXIS 23 (Order entered June 3, 2002), the Commission again imposed a per day civil penalty in case involving unauthorized service. Specifically, in *Brungard*, the respondent was required to pay a civil penalty of $2,000 or $10 per day, despite engaging in the unlawful conduct for a period of several years and having a prior compliance history including the cancellation of its certificate of public convenience. The other case cited by I&E, *Blue & White Lines, Inc. v. Katrina V. Waddington, t/d/b/a Waddington Tours*, Docket No. A-00108279C9301, 1995 Pa. PUC LEXIS 22 (Order entered February 13, 1995), likewise provides no support for its position. That case involved an already licensed carrier who had previously been fined for unauthorized service and knew that the activities in which it was engaged went beyond the scope of its existing authority. Moreover, since the seven occurrences

of authorized service happened on seven different days, it does not support the per day civil penalty approach that I&E seeks to use here.

Notably, I&E makes no mention of the Commission's decision in the Lyft proceeding, which provides the most accurate comparison to this case. In that proceeding, which involves the same factual and legal allegations concerning unauthorized passenger trips, the Commission approved a $250,000 civil penalty. It is noteworthy that I&E similarly sought an arbitrary and capricious civil penalty from Lyft in the amount of $7 million prior to reaching that much more reasonable settlement.

10. Other relevant factors weigh against the imposition of a civil penalty.

The Commission's policy statement also affords it an opportunity to consider other relevant factors. Here, Respondents enabled thousands of passengers in Allegheny County to obtain reliable, affordable and safe transportation through an App and to do so through an easy, cashless transaction. In providing transportation network services, Respondents filled a void in the existing transportation infrastructure, which the Commission recognized when it approved Rasier-PA's ETA application on July 24, 2014. Specifically, the Commission found "that an immediate need for Rasier's service exists and that there is a substantial benefit to be derived from the initiation of a competitive service." *Application of Rasier-PA for Emergency Temporary Authority*, Docket No. A-2014-2429993 (Order adopted July 24, 2014, at p. 16). In granting ETA to Rasier-PA, the Commission expressly noted the inadequacy of existing transportation services in Allegheny County. Through the launch of the App, passengers in Allegheny County were able to get home safely from bars, go to school and doctor's appointments and visit dying relatives in the hospital. This factor weighs in favor of no penalty or a lower penalty.

D. No civil penalty is warranted for failure to respond to discovery requests.

I&E also seeks to have a civil penalty imposed in the amount of $1,000 per day per unanswered discovery request until such information is provided or until this proceeding is closed. Two discovery requests remain unanswered. The first request is for invoices, receipts, emails, records and documents sent to individuals who received rides in Allegheny County between February 11, 2014 and August 20, 2014. Although Respondents objected to the overly burdensome nature of this request, due to the excessive time it would take to physically print and manually redact (*i.e.* with a permanent marker) each document individually to exclude private customer information, and sought to provide factual support for this claim through testimony at the hearing, the ALJs did not permit this testimony.[73] Given that Respondents provided the trip data at the hearing, and common sense suggests that scores of boxes would have been necessary to provide the additional documentation, it would serve no purpose to impose a civil penalty on Respondents.

The second outstanding discovery request is for copies of licensing agreements between Uber Technologies, Inc. and its subsidiaries. I&E stated in its Motion to Compel that it needed this information to identify the functions performed by the subsidiaries. As that information was furnished through other discovery responses, the Stipulations of Fact and Mr. Feldman's testimony, no additional purpose would be served by producing these proprietary documents.

Moreover, discovery sanctions are not intended to be punitive. The Commission's regulations specify certain sanctions that are available when a party fails to respond to discovery requests, including factual inferences, prohibitions on introducing evidence, and striking pleadings, or the issuance of another order "as is just." 52 Pa. Code § 5.372(a). In providing for

[73] May 6, 2015 Transcript at 94-96, 108-109.

other relief "as is just," the Commission's regulations are patterned after Pennsylvania Rules of Civil Procedure ("Pa.R.C.P.") Rule 4019(c)(5). Appellate courts reviewing sanctions orders issued pursuant to Pa.R.C.P. 4019(c)(5) have considered whether the lower court struck the appropriate balance between the procedural need to move the case to prompt disposition and the substantive rights of the parties. *See Marshall v. SEPTA,* 76 Pa.Cmwlth. 205, 463 A.2d 1215 (1983); *Gonzales v. Procaccio Brothers Trucking Company*, 268 Pa. Super. 245, 407 A.2d 1338 (1979). In this case, the ALJs issued an Interim Order on March 26, 2015 imposing several sanctions on Respondents, including limitations on their ability to defend the factual allegations in the Amended Complaint through cross-examination or the introduction of evidence. As neither outstanding discovery request was needed to move the case to prompt disposition, I&E's prosecution was not hampered and sanctions have already been imposed, no additional sanctions are appropriate or warranted.

In *Raymond J. Smolsky v. Globel Tel*Link Corporation,* Docket No. C-20078119, 2009 Pa. PUC LEXIS 455 (Order entered January 15, 2009), cited by I&E in support of a civil penalty as a discovery sanction, the non-compliant party had repeatedly filed untimely pleadings, including the filing of an answer to the complaint eleven weeks late, delayed the proceeding by not entering an appearance of counsel and provided false answers to discovery requests. Because this conduct actually prevented the proceeding from moving forward, the Commission viewed the matter as "justice delayed is justice denied" and imposed a civil penalty. Nothing in that decision supports the imposition of monetary sanctions on Respondents in this case.

In the other case relied upon by I&E, the quotation regarding sanctions is taken completely out of context. Specifically, in *Application of K & F Medical Transport, LLC*, Docket No. A-2008-2020353, 2008 Pa. PUC LEXIS 208 (Initial Decision entered April 25, 2008), the Commission noted that is empowered to impose sanctions in the form of civil

penalties when a party litigates in bad faith. However, the matter did not involve a discovery dispute. Rather, the applicant in that case asked for sanctions against the protestant for filing the protest in bad faith. The Commission declined to impose monetary sanctions, as it should in this case.

VI. CONCLUSION

Based upon the foregoing, Respondents respectfully request that the Amended Complaint filed by the Bureau of Investigation and Enforcement be dismissed with prejudice and that the Commission grant any other such relief that may be just and appropriate.

Respectfully submitted,

Dated: August 7, 2015

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APPENDIX A

PROPOSED FINDINGS OF FACT

1. Uber Technologies, Inc. licenses a mobile or internet application ("App") that is used to connect passengers and drivers in cities, including in Pittsburgh, Allegheny County, Pennsylvania. (Exhibit ALJ 1-Revised at 1).

2. Gegen LLC ("Gegen"), Rasier LLC ("Rasier") and Rasier-PA LLC ("Rasier-PA") are all wholly-owned subsidiaries of Uber and operate or have operated within Pennsylvania from February 2014 to the present. (Exhibit ALJ 1-Revised at 2).

3. Gegen operates as a broker under a license issued by the Pennsylvania Public Utility Commission ("Commission") on March 1, 2013, pursuant to the Commission's Order approving Gegen's application to arrange for the transportation of persons between points in Pennsylvania at Docket No. A-2012-2317300. (Exhibit ALJ 1-Revised at 3).

4. Gegen also operates as a limousine provider under a certificate of public convenience issued by the Commission on October 29, 2013, pursuant to the Commission's order approving Gegen's application to provide limousine service from points in Bucks, Chester, Delaware and Montgomery Counties to points in Pennsylvania, and return, excluding areas under the jurisdiction of the Philadelphia Parking Authority at Docket No. A-2012-2339043. (Exhibit ALJ 1-Revised at 4).

5. On August 21, 2014, Rasier-PA began operating as a transportation network company ("TNC") between points in Allegheny County, Pennsylvania under a certificate of public convenience issued that same date, pursuant to the Commission's Order approving Rasier-PA's application for emergency temporary authority at Docket No. A-2014-2429993. (Exhibit ALJ 1-Revised at 5).

6. Rasier-PA is currently operating as a TNC throughout Pennsylvania under certificates of public convenience issued on January 29, 2015, pursuant to the Commission's Orders approving Rasier-PA's applications for experimental services authority at Docket Nos. A-2014-2416127 and A-2014-2424608. (Exhibit ALJ 1-Revised at 6).

7. On February 11, 2014, Respondents, through Rasier, launched the App in Pittsburgh, Allegheny County, Pennsylvania and offered transportation network services through August 20, 2014. (Exhibit ALJ 1-Revised at 7 and 8).

8. A passenger who has downloaded the App, established an account and provided payment information may use the App to locate the nearest available driver who is logged onto the App. (Exhibit ALJ 1-Revised at 9).

9. When a passenger submits a request for transportation through the App by entering a desired destination, the App discloses the applicable rates for that trip request and provides the passenger with the option of requesting an estimated fare. (Exhibit ALJ 1-Revised at 10).

10. Drivers are alerted of the trip request through the App. (Exhibit ALJ 1-Revised at 11).

11. When a driver accepts the passenger's request for transportation through the App, the passenger receives through the App the driver's estimated time of arrival, along with a photo of the driver and a description of the driver's vehicle. (Exhibit ALJ 1-Revised at 12).

12. Upon arrival to the passenger's desired destination, the request for transportation through the App is deemed completed and the fare is charged to the credit card or other form of payment provided by the passenger upon establishing an account to use the App. (Exhibit ALJ 1-Revised at 13).

13. Once the payment has been processed, the passenger receives through the App an electronic receipt documenting the details of the completed trip. (Exhibit ALJ 1-Revised at 14).

14. I&E settled with Lyft, Inc. for $250,000 on a nearly identical complaint. (Joint Settlement Petition filed on April 30, 2015 at Docket No. C-2014-2422713).

15. On January 14, 2015 and February 4, 2015, Respondents sought the assistance of the ALJs in scheduling a settlement conference that would be facilitated by a presiding officer, but those efforts were opposed by I&E and Respondents' requests were not granted. (Motion for Scheduling of Settlement Conference and Assignment of Settlement Judge and Motion for Reconsideration of the January 23, 2015 Interim Order).

16. In the Stipulations of Fact submitted by the parties on May 4, 2015, Respondents stipulated to launching the transportation network services on February 11, 2014, over a month before the launch date alleged in I&E's Amended Complaint. (Exhibit ALJ 1-Revised at 7; I&E Amended Complaint).

17. Rasier-PA filed timely Compliance Plans with the Commission on December 24, 2014, following the conditional grant of authority by the *December 5, 2014 Orders*. (Respondent Exhibit No. 2).

18. At the evidentiary hearing on May 6, 2015, Respondents provided the number of rides received by passengers via the App from February 11, 2014 through August 20, 2014, broken down by time periods as required by the July 28, 2014 Secretarial Letter. (May 6 Tr. 86-69-Proprietary).

19. The traveling public in Allegheny County previously had inadequate access to reliable, affordable and safe transportation. (Commission's *ETA Order* adopted on July 24, 2014).

21. Rasier-PA filed its Assessment Report on March 31, 2015.

22. Rasier-PA timely filed its first Quarterly Report on the Compliance Plans on April 30, 2015.

23. Rasier-PA filed its Self-Certification Form on April 30, 2015.

24. On March 31, 2015, Rasier-PA filed an application for statewide property authority, which was approved by the Commission on April 14, 2015.

25. On February 27, 2015, Rasier-PA filed an application requesting authority to operate transportation network services in the counties previously excluded from its applications. This application is still pending.

26. Officer Bowser was not involved in the determination of the proposed civil penalty. (May 6 Tr. 73).

27. I&E needed a 15-minute break after receiving the trip data before recalling Officer Bowser as a witness. (May 6 Tr. 109).

28. In determining a proposed per trip penalty, I&E simply divided the proposed civil penalty of $19 million by the number of actual trips that were provided. No other factors were considered. (May 6 Tr. 113).

29. I&E introduced no evidence of public safety concerns, and to the contrary, Officer Bowser testified that he had observed no safety issues when taking trips arranged through the App. (June 26 Tr. 35, 38-39).

30. Prior to July 24, 2014, Respondents were not aware of the Commission's position as to whether a certificate of public convenience or brokerage license was needed to provide transportation network services. (Exhibit ALJ 3).

31. Rasier-PA filed its application for experimental authority to provide transportation network services in Allegheny County on April 14, 2014 on the basis of Commission staff's advice that the brokerage license held by Gegen may not cover those operations. (May 6 Tr. 135).

32. Respondents continued providing transportation network services after the issuance of the Commission's cease and desist order because there was a tremendous need for the services; the Commission had conditionally granted Rasier-PA emergency temporary authority on the same date; and a shutdown of operations would have adversely impacted riders and drivers. (May 6 Tr. 137-138).

33. Respondents followed standard business practices that complied with and exceeded the Commission's requirements in the areas of criminal background checks, driver history checks, vehicle inspections, and liability insurance. (Respondent Exhibit No. 2; May 6 Tr. 128, 130-134; *December 5, 2014 Orders*).

34. As Respondents believed that the Gegen brokerage license covered its operations at the time of the launch in February 2014, their conduct was not of a serious nature. (May 6 Tr. 135).

35. No adverse consequences occurred as a result of Respondents' conduct. (May 6 Tr. 138-139).

36. The launch of operations by Respondents in February 2014 was not an intentional violation of the Code. (May 6 Tr. 135).

37. Rasier-PA has taken numerous measures to ensure full compliance with the Commission's regulations, requirements and conditions, demonstrating that it has modified its internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. (May 6 Tr. 139-142).

38. The launch of Respondent's operations gave thousands of riders access to reliable, affordable and safe transportation that was otherwise unavailable. (Application filed on July 2, 2014 at Docket No. A-2014-2429993).

39. Respondents have no record of non-compliance. (May 6 Tr. 142).

40. Respondents had no obligation to cooperate with I&E since this was a complaint proceeding, not an investigation. (Amended Complaint filed January 9, 2015).

41. As Respondents are fully compliant with the Code and operating under authority granted by the Commission on January 29, 2015, no civil penalty is necessary to deter future violations. (Respondent Exhibit No. 2).

42. A consideration of past Commission decisions in similar situations warrants a significantly lower penalty than proposed by I&E. (Joint Settlement Petition approved in *Lyft*).

APPENDIX B

PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction to regulate the operations of common carriers by motor vehicles. 66 Pa.C.S. §§ 102 and 1101.

2. The Commission has jurisdiction to regulate the operations of brokers. 66 Pa.C.S. § 2505.

3. The statutory definitions of common carriers by motor vehicle and broker do not describe the transportation network services provided by Respondents. 66 Pa.C.S. §§ 102 and 2505.

4. The transportation network services provided by Respondents did not require Commission authority.

5. No civil penalty is warranted for the allegations in the Amended Complaint or for Respondents' failure to provide two pieces of discovery that were overly burdensome, unnecessary and irrelevant.

6. Because it was not developed using the Commission's penalty guidelines, I&E's proposed penalty is arbitrary and capricious. 52 Pa. Code § 69.1201.

7. If a civil penalty is warranted, it must be calculated on a per day basis, rather than a per trip basis, to reflect the continuing nature of the offense. 66 Pa.C.S. § 3301(b).

8. Application of the Commission's standards does not support the civil penalty proposed by I&E. 52 Pa. Code § 69.1201.

APPENDIX C

PROPOSED ORDERING PARAGRAPHS

1. That the Amended Complaint filed by the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission against Uber Technologies, Inc. et al. is dismissed.

2. This docket shall be marked closed.

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