



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE  
REFER TO OUR FILE  
C-2014-2422723

August 14, 2015

*Via e-filing*

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission, Bureau of Investigation  
and Enforcement v. Uber Technologies, Inc., *et al.*  
Docket No. C-2014-2422723

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Reply Brief of the Bureau of Investigation and Enforcement in the above-referenced proceeding. Copies have been served on the parties of record in accordance with the Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephanie M. Wimer".

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Enclosure

cc: As per certificate of service  
Honorable Mary D. Long  
Honorable Jeffrey A. Watson

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement	:	
	:	
v.	:	Docket No. C-2014-2422723
	:	
Uber Technologies, Inc., Rasier-PA LLC,	:	
Rasier LLC and Gegen LLC	:	

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**REPLY BRIEF OF THE  
BUREAU OF INVESTIGATION AND ENFORCEMENT**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
I. INTRODUCTION.....	1
A. Overview .....	1
B. History of Proceeding.....	1
II. SUMMARY OF ARGUMENT .....	2
III. ARGUMENT .....	4
A. Offers Of Settlement Are Not Admissible In Evidence And, Therefore, Are Impertinent, Immaterial And Irrelevant, And A Public Discussion Of Confidential Settlement Negotiations Is Inappropriate And Should Be Stricken Or, At The Very Minimum, Ignored .....	4
B. Respondents Engaged In Activity Requiring Authority From The Commission During The Time Period Covered In The Amended Complaint.....	8
C. I&E’s Civil Penalty, Which Is Based On Uber’s Numerous Violations Of The Public Utility Code, Is Appropriate .....	14
1. A Civil Penalty Is Warranted Because Respondents Cannot In Good Faith Argue That They Were Unaware That Their Actions Were Unlawful .....	14
2. The Civil Penalty Requested By I&E Is Based On Each Violation Committed By Uber And, Therefore, Was Not Developed In An Arbitrary & Capricious Manner .....	15
3. Assessing A Civil Penalty For Each Violation Is Lawful ...	17
4. The “Per-Trip” Civil Penalty Should Start On February 11, 2014, When Uber Commenced Its Service In Allegheny County.....	18

5.	Application Of The <i>Rosi</i> Standards Supports I&E’s Civil Penalty.....	19
a.	Uber’s Misconduct Was Of A Serious Nature.....	19
b.	Adverse Consequences Occurred As A Result Of Uber’s Misconduct .....	21
c.	Uber’s Misconduct Was Intentional .....	21
d.	Respondents Made No Attempt To Modify Their Internal Practices And Procedures To Address Their Misconduct .....	22
e.	The Impact Of Uber’s Misconduct Was Extensive.....	23
f.	Uber’s Compliance History .....	23
g.	Uber’s Failure To Cooperate With I&E .....	24
h.	I&E’s Requested Civil Penalty Is Necessary To Deter Future Violations .....	24
i.	Past Commission Decisions In Similar Situations .....	25
j.	Other Relevant Factors .....	25
D.	A Civil Penalty Is An Appropriate Sanction For Respondents’ Continuing Failure To Respond To Court-Ordered Discovery .....	26
IV.	CONCLUSION .....	29

## TABLE OF AUTHORITIES

### Cases

<i>Aronimink Transportation Co. v. Pub. Serv. Comm'n</i> , 170 A. 375, 377 (Pa. Super. 1934).....	12
<i>Brink's Express Company v. Pub. Serv. Comm'n</i> , 178 A. 346, 349 (Pa. Super. 1935).....	12
<i>Newcomer Trucking, Inc. v. Pa. Pub. Util. Comm'n</i> , 531 A.2d 85 (Pa. Cmwlth. 1987) .....	17, 25

### Statutes

66 Pa. C.S. § 102 .....	9
66 Pa. C.S. § 505 .....	24
66 Pa. C.S. § 1102 .....	23
66 Pa. C.S. § 2501(b) .....	9, 22
66 Pa. C.S. § 2505(a).....	23
66 Pa. C.S. § 3301 .....	17, 27
66 Pa. C.S. § 3301(a).....	2, 3, 16
66 Pa. C.S. § 3301(c).....	16

### Rules and Regulations

52 Pa. Code § 1.27(a)(4) .....	26
52 Pa. Code § 1.81 .....	18
52 Pa. Code § 3.10 .....	18
52 Pa. Code § 5.231(d).....	5, 6
52 Pa. Code § 29.44 .....	21
52 Pa. Code § 69.1201 .....	19
52 Pa. Code § 69.1201(c).....	3, 21
52 Pa. Code § 69.1201(c)(7) .....	24
225 Pa. Code § 408(a).....	5

### Other Authorities

<i>Application for approval of abandonment of service by Equitable Gas Company to twenty-three (23) field gathering line customers in Washington County, Pennsylvania, Docket No. A-2009-2089152, 2010 Pa. PUC Lexis 127 (Initial Decision issued January 8, 2010).....</i>	6
---	---

*Application of Gegen, LLC, for the additional right to begin to transport, as a common carrier, by motor vehicle, persons in 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, Docket Nos. A-6915035 and A-2012-2339043 (Order entered August 15, 2013)..... 11*

*Application of Gegen, LLC, for a brokerage license, evidencing the Commission’s approval of the right and privilege to operate as a broker, to arrange for the transportation of persons, between points in Pennsylvania. A-2012-2317300 (Order entered January 24, 2013)..... 11*

*Application of Kenneth Scott Cobb t/a Kenny's Cab, for the right to transport, as a common carrier, by motor vehicle, persons upon call or demand, from points in the Counties of Dauphin, York, Cumberland and Adams, Docket No. A-00123917, 2009 Pa. PUC LEXIS 1043 (Order entered February 5, 2009) ..... 14*

*Application of Rasier-PA LLC, a limited liability company of the State of Delaware, for the right to begin to transport, by motor vehicle, persons in the experimental service of shared-ride network for passenger trips between points in Allegheny County, Docket No. A-2014-2416127 ..... 10, 12, 25*

*Application of Rasier-PA LLC, a limited liability company of the State of Delaware, for the right to begin to transport, by motor vehicle, persons in the experimental service of shared-ride network for passenger trips between points in Pennsylvania, excluding those which originate or terminate in the Counties of Beaver, Clinton, Columbia, Crawford, Lawrence, Lycoming, Mercer, Northumberland and Union, Docket No. A-2014-2424608..... 10, 12, 25*

*Application of Yellow Cab Company of Pittsburgh, Inc., t/a Yellow X, for the additional right to begin to transport, by motor vehicle, persons in the experimental service of Transportation Network Service for passenger trips originating or terminating within Allegheny County, Pennsylvania, Docket No. A-2014-2410269 (Order entered May 22, 2014) ..... 15*

*Black’s Law Dictionary 315 (8<sup>th</sup> ed. 1999)..... 21*

*Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Blue Pilot Energy, LLC, Docket No. C-2014-2427655 (Order entered August 4, 2015)..... 27, 28*

<i>James Munro v. PECO Energy Company</i> , Docket No. C-2010-2214718, 2012 Pa. PUC Lexis 945 (Order entered June 21, 2012).....	6
<i>Mari Jo Jensen v. PECO Energy Company</i> , Docket No. F-2011-2270675, 2012 Pa. PUC Lexis 905 (Order entered December 20, 2012) .....	6
<i>Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Lyft, Inc.</i> , Docket No. C-2014-2422713 (Order entered July 15, 2015).....	25
<i>Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Rasier-PA LLC</i> , Docket No. C-2015-2457172 .....	24
<i>Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Rasier-PA LLC</i> , Docket No. C-2015-2474801 .....	23
<i>Pennsylvania Public Utility Commission v. Bell Telephone Co. of Pa.</i> , Docket No. R-811819, 1988 Pa. PUC Lexis 572 (Order entered November 10, 1988) at *19 .....	15, 16, 25
<i>Pennsylvania Public Utility Commission v. Pennsylvania Electric Company</i> , Docket Nos. R-80051197 and C-80072106, 1980 Pa. PUC LEXIS 5 (Order entered December 4, 1980).....	6, 7
<i>Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for an Interim Emergency Order requiring Uber Technologies, Inc. to immediately cease and desist from brokering transportation service for compensation between points within the Commonwealth of Pennsylvania</i> , Docket No. P-2014-2426846 (Order entered July 1, 2014) (Order entered July 24, 2014) .....	11, 13, 15, 18, 20, 26
<i>Rosi v. Bell-Atlantic -- Pennsylvania, Inc. and Sprint Communications, L.P.</i> , Docket No. C-00992409 (Order entered March 16, 2000).....	19

## **I. INTRODUCTION**

### **A. Overview**

The Bureau of Investigation and Enforcement (I&E) submits this Reply Brief in response to the Brief of Uber Technologies, Inc., Rasier-PA LLC, Rasier LLC and Gegen LLC (collectively, Respondents or Uber) that was filed on August 7, 2015, and pursuant to the briefing scheduled established at the conclusion of the evidentiary hearing in this matter. (May 6, N.T. 202).

I&E's Main Brief contained a comprehensive discussion of the evidence, law and I&E's positions on the issues in this proceeding. Therefore, I&E will respond only to those matters raised by Uber that were not previously addressed or require clarification. Nevertheless, I&E does not waive its opposition on contested issues by not repeating arguments here. Accordingly, I&E incorporates the arguments and analyses contained in its Main Brief filed on July 8, 2015 herein by reference.

### **B. History of Proceeding**

The procedural history of this proceeding is detailed in the proprietary and non-proprietary versions of I&E's Main Brief filed on July 8, 2015.



## II. SUMMARY OF ARGUMENT

Uber's public discussion of offers of settlement related to this proceeding as set forth in Uber's Brief should be stricken or, at the very least, ignored. Because offers of settlement are not admissible into evidence, they are impertinent, immaterial and irrelevant. In addition, the Commission has concluded that unsuccessful settlement discussions and negotiations are privileged, confidential and are not to be relied upon when determining the merits of a case.

From February 11, 2014 through and including August 20, 2014, Respondents provided unauthorized transportation in Allegheny County. Respondents were aware that such services violated the Public Utility Code because they were warned by letter from the Commission's transportation division as early as 2012, then notified by Commission advisory staff prior to April 2014 that authority was required, and finally directed by the presiding officers and the Commission to cease and desist on July 1, 2014 and July 24, 2014, respectively. Therefore, any argument that the Public Utility Code does not regulate the type of service that Respondents provide, or that Respondents found a "lack of clarity" in the Public Utility Code as it relates to Respondents' transportation service, is not credible.

A civil penalty per violation for each of the unlawful trips<sup>1</sup> that occurred fits squarely within the confines of Section 3301(a) of the Public Utility Code, 66 Pa.C.S.

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<sup>1</sup> Proprietary information, including the number of unlawful trips and the civil penalty amount per trip, is noted throughout the Proprietary Version of I&E's Main Brief in this proceeding.

§ 3301(a), and pertinent case law. In addition, such civil penalty is appropriate upon an analysis of the factors and standards set forth in the Commission's Policy Statement at 52 Pa. Code § 69.1201(c).

A sanction in the form of a civil penalty in the amount of one thousand dollars (\$1,000) per day for each discovery request that Uber continues to fail to answer until such information is produced or the instant matter is closed is appropriate. Uber was directed by the presiding officers on multiple occasions to produce the requested information and I&E's substantive rights were adversely affected by Uber's unlawful obstruction to I&E's access to the evidence.

### III. ARGUMENT

A. **Offers of Settlement Are Not Admissible In Evidence and, Therefore, Are Impertinent, Immaterial and Irrelevant, and a Public Discussion of Confidential Settlement Negotiations is Inappropriate and Should be Stricken or, at the Very Minimum, Ignored**

Uber's reliance on privileged settlement discussions is yet another desperate and divisive attempt by Uber to discredit I&E. In numerous places throughout the Brief, Uber inappropriately discusses offers of settlement associated with this proceeding. The clear purpose and design of Uber's public reference of these confidential discussions is to sway judicial and public opinion in their favor and portray Respondents as being "the reasonable parties" – despite their intentional defiance of cease and desist orders directing them to stop providing unauthorized transportation in Allegheny County and their refusal to answer court-ordered discovery. Through their statements concerning offers of settlement, Uber also clearly intends to persuade the decision maker to lower the disputed civil penalty amount requested by I&E.

It is most uncommon for any party in contested public utility proceedings to present legal arguments revealing confidential settlement negotiations in pleadings, briefs or other public documents filed with the Commission. A Motion to Strike the portions of Uber's Brief that discuss offers of settlement would be justified; however, in the interest of moving the case forward at this late stage, I&E elected to address the matter herein. The natural reaction is for I&E to respond to each statement in kind, however, I&E will maintain its professionalism by not divulging the details of privileged conversations.

Rather, I&E will present legal argument demonstrating why Uber's briefing of settlement discussions is inappropriate and should be stricken, or at the minimum, ignored.

It is well-established Pennsylvania law that offers of settlement are not admissible in evidence. Therefore, Uber's statements related to their settlement offers are impertinent, immaterial, and irrelevant and should be stricken from Uber's brief or, at the minimum, be given no weight and be overlooked by the presiding Administrative Law Judges (ALJs) and the Commission as they serve no valid purpose. Section 5.231(d) of the Commission's regulations provides as follows:

(d) Offers of settlement, of adjustment, or of procedure to be followed, and proposed stipulations not agreed to by every party, including proposals intended to resolve discovery disputes, will not be admissible in evidence against a counsel or party claiming the privilege.

52 Pa. Code § 5.231(d). The Commission's regulation is consistent with Rule 408(a) of the Pennsylvania Rules of Evidence, relating to Compromise Offers and Negotiations, which states the following:

*Prohibited Uses.* Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

- (1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and
- (2) conduct or a statement made during compromise negotiations about the claim.

225 Pa. Code § 408(a).

The Commission has refused to consider statements made in relation to settlement discussions when considering the merits of a particular case. *James Munro v. PECO Energy Company*, Docket No. C-2010-2214718, 2012 Pa. PUC Lexis 945 (Order entered June 21, 2012). In *Munro*, the complainant filed an exception to an initial decision arguing that the ALJ did not properly consider information regarding settlement discussions between PECO Energy Company (PECO) and complainant. In denying complainant's exception, the Commission found that the ALJ's decision not to address settlement discussions in the initial decision was appropriate and consistent with Section 5.231(d) of the Commission's regulations, 52 Pa. Code § 5.231(d). *See also Mari Jo Jensen v. PECO Energy Company*, Docket No. F-2011-2270675, 2012 Pa. PUC Lexis 905 (Order entered December 20, 2012) (The Commission refused to consider portions of the complainant's formal complaint that referred to offers of settlement made by PECO during settlement negotiations); *Application for approval of abandonment of service by Equitable Gas Company to twenty-three (23) field gathering line customers in Washington County, Pennsylvania*, Docket No. A-2009-2089152, 2010 Pa. PUC Lexis 127 (Initial Decision issued January 8, 2010) (A protestant in the proceeding submitted a brief that referred to testimony excluded at the evidentiary hearing because it involved discussions the parties engaged in during settlement negotiations. The ALJ did not strike the offending brief, however, the ALJ noted that the testimony was deemed inadmissible and did not rely on it in the initial decision).

The Commission has also determined that unsuccessful settlement discussions and negotiations are privileged. In *Pa. Pub. Util. Comm'n v. Pennsylvania Electric*

*Company*, Docket Nos. R-80051197 and C-80072106, 1980 Pa. PUC LEXIS 5 (Order entered December 4, 1980) the Commission stated:

The rule of evidence which excludes unaccepted settlement offers is well established and is based upon two considerations: (1) the recognition that the relevance of unaccepted proposals of settlement is limited at best; and (2) public policy favors excluding such evidence in order to foster settlements. See *Redevelopment Authority of the City of Philadelphia v Pennsylvania Electric Co.*(1979) 48 Pa. Cmwlth 68, 409 A2d 122; The Federal Rules of Evidence, Rule 408; "*McCormick on Evidence*," 2nd ed, § 274; "*Wigmore on Evidence*," Chadbourn edition, § 1061. In the instant case, we need not delve into case law in order to determine the existence or nonexistence of a privilege in administrative proceedings, for we find one clearly recognized in 1 Pa Code § 35.115. That provision, placed as it is within prehearing conference procedures, indicates that **the privilege reasonably extends to any unaccepted proposals of settlement or to any discussions regarding settlement, as well as a wide variety of other matters which would expedite the proceeding.** Consequently, the scope of the privileged subject matter is to be interpreted broadly. Accordingly we find that settlement negotiations are privileged, confidential and inadmissible into evidence . . . .

*Id.* at \* 18-20. (Emphasis added).

Because offers of settlement are privileged, confidential and inadmissible into evidence, the following portions of Uber's Brief should be stricken or, in the alternative, not considered by the presiding ALJs and the Commission:

- Page 1, paragraphs 1 and 2;
- Pages 4-6 and page 7, up to the segment beginning with "Procedural History;"
- Page 43, third paragraph, second line; and
- Appendix A, page 2, Finding of Fact No. 15.

For the foregoing reasons, the statements in Uber’s Brief concerning offers of settlement are inadmissible and inappropriate, and consequently should be stricken or, at minimum, ignored.

**B. Respondents Engaged in Activity Requiring Authority from the Commission During the Time Period Covered in the Amended Complaint**

From February 11, 2014 to August 20, 2014, Rasier LLC (Rasier), a wholly-owned subsidiary of Uber Technologies, Inc., provided transportation between points in Pennsylvania that connected passengers who downloaded and requested a ride through digital software (the Uber App) with the nearest available driver for compensation. At the conclusion of each trip, a fare was charged to the passenger’s credit card or other form of payment provided by the passenger upon establishing an account with Uber. (Exhibit ALJ 1 – Revised at 7, 8, 9 and 13). Rasier contracted with drivers who operated their personal automobiles to provide the transportation requested by passengers. (Exhibit ALJ 1 – Revised at 16). From February 11, 2014 through and including August 20, 2014, neither Rasier, nor Uber Technologies, Inc. nor any other subsidiary of Uber Technologies, Inc. held authority from this Commission to transport passengers in Pittsburgh, Allegheny County, Pennsylvania. (Exhibit ALJ 1 – Revised at 15).

Respondents first argue that such activity does not fall within the statutory definitions of “common carrier” or “broker” as set forth in the Public Utility Code and, therefore, does not require authority approved by the Commission. (Uber Brief at 21-22). Respondents’ argument simply fails. The Public Utility Code is clear: passenger

transportation that is open to the public, rendered for compensation and occurs between points within the Commonwealth is regulated by the Commission, either as service provided by common carriers by motor vehicle or as transportation service arranged by licensed brokers. *See* 66 Pa.C.S. § 102 (related to definitions of “Common carrier by motor vehicle” and “Public utility”) and 66 Pa.C.S. § 2501(b) (related to definition of “Broker”).

Respondents’ attempt to distance themselves from the core of their business – transporting passengers – by stating that their “activities were limited to partnering with drivers using their own personal vehicles to transport persons who requested transportation through the App” is specious at best. (Uber Brief at 21). At the same time, Respondents argue that they exercised substantial control over the transportation service that took place in Allegheny County between February and August 2014 by claiming to ensure that the Commission’s high standards of driver integrity and vehicle safety were met by conducting criminal background checks, driver history checks and vehicle inspections. (Uber Brief at 36). Respondents also claimed to hold \$1 million in liability insurance to ensure that the public was protected from financial loss when accidents occurred. *Id.*<sup>2</sup> While the Commission was unable to verify these claims during the time period set forth in I&E’s Amended Complaint because Respondents refused to submit to the Commission’s regulatory oversight, Respondents managed the day-to-day operations of passenger transportation service in Allegheny County and the true nature of their

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<sup>2</sup> No proof of such insurance coverage is included in the evidentiary record of this proceeding.



business was far more involved than the mere creation of digital software from an ivory tower in San Francisco.

Moreover, Respondents knew that Commission authority was required to operate in Allegheny County during the time period referenced in I&E's Amended Complaint. By letter dated July 6, 2012, the Commission's Bureau of Technical Utility Services – Transportation Division warned Uber that it received information indicating that Uber was acting as an unlicensed broker and directed Uber to cease and desist. *See* letter attached to Amended Complaint. Then, prior to April 2014, Commission staff advised Uber to file an application for authority to cover their operations. (May 6, N.T. 135). Next, Rasier-PA applied for authority to operate a ride-sharing network on April 14, 2014 while its sister subsidiary, Rasier, continued its unlawful operation in Allegheny County.<sup>3</sup> Then, I&E filed the initial Complaint in this proceeding on June 5, 2014, thereby making Uber aware of allegations that they were operating unlawfully. Finally and most egregiously, Respondents admit that they continued to operate in defiance of the July 1,

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<sup>3</sup> *See Application of Rasier-PA LLC, a limited liability company of the State of Delaware, for the right to begin to transport, by motor vehicle, persons in the experimental service of shared-ride network for passenger trips between points in Allegheny County, Docket No. A-2014-2416127; and Application of Rasier-PA LLC, a limited liability company of the State of Delaware, for the right to begin to transport, by motor vehicle, persons in the experimental service of shared-ride network for passenger trips between points in Pennsylvania, excluding those which originate or terminate in the Counties of Beaver, Clinton, Columbia, Crawford, Lawrence, Lycoming, Mercer, Northumberland and Union, Docket No. A-2014-2424608 (hereinafter collectively referred to as Applications of Rasier-PA).*

2014 and July 24, 2014 Orders, which directed Uber to cease and desist from facilitating transportation services via the Uber App.<sup>4</sup> (Exhibit ALJ 1 – Revised at 15).

Notably, Respondents fail to explain why in 2013, Gegen LLC (Gegen), a wholly-owned subsidiary of Uber, obtained a brokerage license<sup>5</sup> and a Certificate of Public Convenience to operate as a common carrier by motor vehicle in certain counties<sup>6</sup> if Respondents' services did not require Commission authority.

Therefore, Uber's argument that the lack of clarity in the Public Utility Code rendered their conduct to be unintentional is not credible. (Uber Brief at 25, 39). Uber was duly warned and advised to obtain appropriate operating authority from the Commission, they were aware of the Commission's requirements as evidenced by Gegen's authority and they defied the Commission's and ALJs' Orders to cease and desist.

Respondents' claim that given pending legislation concerning the transportation they provide, their services *currently* do not fall under the Commission's jurisdiction or fall in a "grey area," is also without merit. (Uber Brief at 23). The Commission already determined that existing law covers the precise type of service provided by Uber when it

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<sup>4</sup> *Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for an Interim Emergency Order requiring Uber Technologies, Inc. to immediately cease and desist from brokering transportation service for compensation between points within the Commonwealth of Pennsylvania*, Docket No. P-2014-2426846 (Order entered July 1, 2014) (Order entered July 24, 2014) (hereinafter referred to as *Petition for Interim Emergency Relief*).

<sup>5</sup> *Application of Gegen, LLC, for a brokerage license, evidencing the Commission's approval of the right and privilege to operate as a broker, to arrange for the transportation of persons, between points in Pennsylvania*. A-2012-2317300 (Order entered January 24, 2013).

<sup>6</sup> *Application of Gegen, LLC, for the additional right to begin to transport, as a common carrier, by motor vehicle, persons in 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*, Docket Nos. A-6915035 and A-2012-2339043 (Order entered August 15, 2013).

granted Rasier-PA's applications to operate as a motor common carrier of persons in experimental service.<sup>7</sup>

Similarly, Respondents' argument that Uber's service does not constitute "common carrier" service because it is only open to a segment of the public since it requires downloading the Uber App defies logic. (Uber Brief at 21-22). Again, the Commission has already determined that Rasier-PA's service is jurisdictional. *Id.* Further, the cases cited by Respondents support the proposition that Uber's service is open to the public at large and not just a segment. In *Aronimink Transportation Co. v. Pub. Serv. Comm'n*, 170 A. 375, 377 (Pa. Super. 1934) (emphasis added), the Superior Court stated that "a common carrier of passengers is one who undertakes for hire to carry all persons indifferently **who may apply for passage**, so long as there is room, and there is no legal excuse for refusing." In *Brink's Express Company v. Pub. Serv. Comm'n*, 178 A. 346, 349 (Pa. Super. 1935), the Superior Court indicated that the test for distinguishing whether a carrier is engaged in offering a public or private service is:

. . . whether or not a person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.

*Id.* The Court in *Brinks* further noted that "the fact that only a limited number of persons may have occasion to use it does not make of it a private undertaking if the public generally has a right to such use." *Id.*

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<sup>7</sup> See *Applications of Rasier-PA*.

With regard to the instant matter, any member of the public who chooses to avail himself or herself of Uber's transportation service by downloading the Uber App may receive transportation service from Uber. The sheer number of rides provided during a 6-month period in Allegheny County, as admitted by Uber, further evidences that Uber's transportation service was open to the public.

Lastly, Respondents argue that I&E's "undocumented" public safety concerns have no bearing on whether a certificate of public convenience or brokerage license is required. (Uber Brief at 24). Uber misses the point. The Commission has a duty to protect the public interest and public utilities are required to submit to the Commission's regulatory oversight, which Uber failed to do during the time period referenced in I&E's Amended Complaint. In granting I&E's Petition for Interim Emergency Relief and directing Uber to cease and desist, the Commission expressed a clear public safety concern regarding Uber's unauthorized transportation. The Commission stated:

Based on the evidence adduced at the hearing, Uber has not complied with the Code. As such, the Commission has no information related to vehicle safety inspections, driver histories, criminal background checks of drivers, or insurance certifications on vehicles. We believe that failure to submit to the Commission's oversight and the lack of information related to the Uber drivers and their vehicles constitutes an immediate safety risk for the general public.

Petition for Interim Emergency Relief (Order entered July 24, 2014) at 18.

Therefore, the transportation provided by Respondents has always required authority from the Commission, from the time that Uber unlawfully launched in Allegheny County on February 11, 2014 to the present.

C. **I&E's Civil Penalty, Which Is Based on Uber's Numerous Violations of the Public Utility Code, Is Appropriate**

1. **A Civil Penalty Is Warranted Because Respondents Cannot In Good Faith Argue That They Were Unaware That Their Actions Were Unlawful.**

Respondents claim that the Public Utility Code lacks clarity regarding the nature of service that they provide and, therefore, they should not be subject to a civil penalty for the transportation that occurred during the time period set forth in the Amended Complaint. (Uber Brief at 25). A detailed discussion regarding the numerous warnings, communications, allegations and directives made by the Commission to Uber regarding the fact that their transportation service required authorization appears in the previous section and will not be repeated here for the sake of brevity. Moreover, it is well settled that ignorance of the law is no excuse.<sup>8</sup>

Uber further argues that any transportation occurring after the issuance of the cease and desist orders by the presiding ALJs and the Commission, on July 1, 2014 and July 24, 2014, respectively, was excusable because Uber's service fulfilled a critical and urgent transportation need in Allegheny County. (Uber Brief at 26). However, the Commission summarily rejected this argument in directing Uber to cease and desist. Specifically, the Commission stated:

Although the granting of emergency relief during the pendency of the proceeding may result in the limitation of options for some riders in Allegheny County and may impact the business interests of Uber

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<sup>8</sup> *Application of Kenneth Scott Cobb t/a Kenny's Cab, for the right to transport, as a common carrier, by motor vehicle, persons upon call or demand, from points in the Counties of Dauphin, York, Cumberland and Adams*, Docket No. A-00123917, 2009 Pa. PUC LEXIS 1043 (Order entered February 5, 2009).

and its drivers, such considerations do not outweigh the higher goal of public safety. Under the delegated authority of the General Assembly, we have the responsibility, and the public expects, that we will work to ensure that the travelling public is transported safely.

Petition for Interim Emergency Relief (Order entered July 24, 2014) at 24.

Furthermore, a plethora of transportation options were available to the riding public in Allegheny County between February 2014 and August 2014, including a number of certificated taxi cab companies, a public transportation system operated by the Port Authority of Allegheny County consisting of buses, a light rail system and inclines, and one transportation network company – Yellow X.<sup>9</sup> Uber was not the only transportation provider in town as they seek to portray in their Brief. Therefore, Uber's actions are not excusable.

2. **The Civil Penalty Requested By I&E Is Based On Each Violation Committed By Uber And, Therefore, Was Not Developed In An Arbitrary & Capricious Manner.**

Uber desperately attempts to compare I&E's requested civil penalty in this litigated proceeding to prior cases where a civil penalty was agreed-upon by the parties in a settlement. The entirety of the cases cited by Respondents on pages 27 and 28 of their Brief involve matters that were amicably settled. It is not appropriate to consider a settlement, which is intended to be an amicable resolution of disputed claims, as precedent in any subsequent proceeding. *See Pa. Pub. Util. Comm'n, v. Bell Telephone*

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<sup>9</sup> *Application of Yellow Cab Company of Pittsburgh, Inc., t/a Yellow X, for the additional right to begin to transport, by motor vehicle, persons in the experimental service of Transportation Network Service for passenger trips originating or terminating within Allegheny County, Pennsylvania, Docket No. A-2014-2410269 (Order entered May 22, 2014).*

*Co. of Pa.*, Docket No. R-811819, 1988 Pa. PUC Lexis 572 (Order entered November 10, 1988) at \*19 (where the Commission made it clear that “we vigorously, and without equivocation, reject considering a settlement as precedent, as to *any* subsequent issue, in *any* proceeding”). (Emphasis added). Therefore, Uber’s reliance on Commission Orders involving settled matters where the parties agreed-upon a civil penalty is misplaced.

Uber also erroneously attempts to compare civil penalties of *settled* matters involving pipeline safety to the civil penalty requested in this proceeding. However, Section 3301(c) of the Code, 66 Pa.C.S. § 3301(c), provides a different scheme for civil penalties pertaining to gas pipeline safety violations and, as such, is irrelevant to violations involving providers of transportation.

Uber next argues that I&E developed the requested civil penalty in an arbitrary and capricious manner. I&E’s civil penalty has always been based on a monetary amount not exceeding \$1,000 and assessed per violation, consistent with Section 3301(a) of the Public Utility Code, 66 Pa.C.S. § 3301(a). It was due to Uber’s contumacious behavior that I&E was unable to determine the precise number – and thus the precise civil penalty per violation – until the closing moments of the evidentiary hearing. Uber unlawfully obstructed I&E from gaining access to evidence – namely, trip data – which I&E first requested in discovery on August 8, 2014 despite the presiding ALJs’ directives requiring Uber to furnish I&E with the trip data in the October 3, 2014 Discovery Order and November 26, 2014 Sanctions Order in this proceeding. Uber did not comply with the

Orders and preferred to be sanctioned rather than abide by the Commission's discovery rules and act fairly towards opposing counsel.

**3. Assessing a Civil Penalty for Each Violation is Lawful.**

Uber's argument that assessing a civil penalty per trip is without basis is absurd. In *Newcomer Trucking, Inc. v. Pa. Pub. Util. Comm'n*, 531 A.2d 85 (Pa. Cmwlth. 1987), the Commonwealth Court held that Section 3301 of the Code, 66 Pa.C.S. § 3301, authorizes the Commission to impose a civil penalty of up to \$1,000 for each and every discrete violation, regardless of the number of violations. In *Newcomer*, the trucking company violated its certificate restriction for a total of 184 times on 128 separate days. The Commonwealth Court affirmed the Commission's Order and found that since 184 unlawful shipments were identified, each shipment constituted a violation. It is difficult to comprehend Uber's apparent belief that *Newcomer* is distinguishable and that the assessment of a "per trip" civil penalty is unlawful when I&E's requested penalty fits squarely within the parameters of the Public Utility Code and case law.

A large number of trips took place while Uber lacked authority to operate in Allegheny County and this Commission lacked the ability to provide oversight regarding, *inter alia*, the background of drivers and the safety of the vehicles. Each trip constitutes a separate and discrete violation of the Public Utility Code and presented a separate and distinct opportunity to jeopardize the safety of the riding public. I&E has requested an amount less than \$1,000 per violation, thus rendering I&E's civil penalty to be entirely lawful. (May 6, N.T. 112).



Uber also complains that in I&E's Amended Complaint, I&E changed the structure of the requested penalty and that this approach is "inappropriate and should not be endorsed by this Commission." (Uber Brief at 32). However, Section 1.81 of the Commission's regulations permits "an amendment to a submittal or pleading [to be] tendered for filing at any time . . . ." 52 Pa. Code § 1.81. Therefore, I&E's action to amend its Complaint to include a civil penalty based on each violation committed by Uber is lawful.

4. **The "Per-trip" Civil Penalty Should Start on February 11, 2014, When Uber Commenced Its Service in Allegheny County.**

Uber requests that if any civil penalty should be imposed, such civil penalty should start on July 24, 2014, when the Commission entered an order directing Uber to cease and desist, and not prior to that time since the Commission made no pronouncements about whether Uber's transportation required authority. (Uber Brief at 33). Uber's argument is contrary to the law. Interim emergency orders become **effective** when issued by a presiding officer. 52 Pa. Code § 3.10. The interim emergency order entered by the presiding ALJs on July 1, 2014 directed Uber to "**immediately** cease and desist from utilizing its digital platform to facilitate transportation to passengers utilizing non-certificated drivers in their personal vehicles until such time as it secures appropriate authority from the Commission."<sup>10</sup>

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<sup>10</sup> Petition for Interim Emergency Relief (July 1, 2014 Order) at Ordering Paragraph 2. (Emphasis added).

Uber is essentially requesting the Commission to determine that the orders of a presiding officer are not binding directives and rather, serve as optional guidance until a final Commission order is entered on a particular matter. The fact that Respondents continue to raise this argument shows their defiance, disrespect and zero appreciation for the integrity of the judiciary at the Commission. Uber is REQUIRED to adhere to *all* orders of a presiding officer, including an order granting or denying a petition for interim emergency relief.

A per-trip civil penalty should begin on February 11, 2014, which was the first occasion that Uber committed violations of the Public Utility Code by facilitating or providing passenger rides through the Uber App. While Respondents attempt to avoid any penalty for their misconduct by arguing that it was unclear as to whether Commission authority was required for their service until July 24, 2014, this argument is not credible.

**5. Application of the *Rosi*<sup>11</sup> Standards Supports I&E's Civil Penalty.**

**a. Uber's Misconduct Was Of A Serious Nature**

Respondents argue that they provided a needed service and therefore, their conduct was not serious. Uber glosses over the fact that from February 11, 2014 through and including August 20, 2014, they provided widespread unauthorized transportation service and did not submit to the Commission's regulatory oversight, which is designed to protect the public interest. As noted in I&E's Main Brief, the presiding ALJs have

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<sup>11</sup> The present standard for the imposition of a civil penalty was developed in *Rosi v. Bell-Atlantic - - Pennsylvania, Inc. and Sprint Communications, L.P.*, Docket No. C-00992409 (Order entered March 16, 2000) and is promulgated in a Policy Statement at 52 Pa. Code § 69.1201.

already recognized that Uber's conduct was serious when directing Uber to cease and desist:

Under the circumstances, the Commission cannot currently determine that the vehicles arranged by Uber comply with its vehicle safety requirements nor that the drivers possess the requisite qualifications to maintain the public safety. The occurrence of a fatal or injurious motor vehicle accident, which could be avoided with appropriate Commission oversight, could be catastrophic.

The Commission cannot accurately determine the existence of adequate insurance coverage for riders using the Uber service in order to ensure the public safety. The occurrence of a fatal or injurious motor vehicle accident, without adequate insurance coverage, could also be catastrophic.

Petition for Interim Emergency Relief (July 1, 2014 Order) at 14. Therefore, Uber's misconduct was serious in that substantial safety risks were posed to the public by Uber's unlawful and unregulated operations.

Respondents attempt to minimize the fact that their transportation service was not subject to the Commission's oversight by baldly asserting that Uber's business practices were aligned with Commission motor carrier regulations. (Uber Brief at 36). However, the Commission was never able to verify these statements during the time period covered in I&E's Amended Complaint. Further, Respondents' assertion that they maintained adequate liability insurance during this time is also not appropriate. No evidence was admitted into the record during the evidentiary hearing to support Respondents' claim that they maintain sufficient insurance coverage and Uber's witness, Jonathan Feldman, had no knowledge about the details of Uber's insurance coverage. (May 6, N.T. 146-152).

Next, Respondents argue that their act of failing to produce court-ordered discovery should not be considered as “conduct” vis-à-vis the *Rosi* standards. However, “conduct” is not defined in the Commission’s Policy Statement. 52 Pa. Code § 69.1201(c). Black’s Law Dictionary defines “conduct” as “personal behavior, whether by action or inaction; the manner in which a person behaves.” Black’s Law Dictionary 315 (8th ed. 1999). Since the word “conduct” is broad and encompasses all action and inaction, it is entirely appropriate that Uber’s intentional failure to produce court-ordered discovery responses be considered as an aggravating factor in the imposition of a civil penalty.

**b. Adverse Consequences Occurred as a Result of Uber’s Misconduct**

Uber’s attempt to minimize the fact that motor vehicle accidents occurred between February 11, 2014 and August 20, 2014 should not be credited. Because Uber failed to submit to the Commission’s regulation requiring the filing of accident reports, the Commission will never know the exact number of accidents that occurred during this time. 52 Pa. Code § 29.44. However, at least nine accidents over a six-month period were serious enough to warrant the filing of an insurance claim. (May 6, N.T. 168). Respondents’ statement that they carried \$1 million of liability insurance should not be considered because it is unsupported by record evidence. (Uber Brief at 38).

**c. Uber’s Misconduct was Intentional**

As noted above, Respondents were warned and advised that the transportation they provided in Allegheny County was unauthorized. Additionally, Uber was directed to

cease and desist providing transportation until the requisite authority was secured. Uber defied all warnings, advice, and directives to cease and desist. Clearly, Uber's conduct was intentional.

Also noted above, viable transportation alternatives were available to the riding public in Allegheny County during the six-month period of time in which Uber provided unauthorized transportation.

Moreover, Uber's belief that the brokerage license of a subsidiary, Gegen, covered the operations is not credible. First, Rasier performed the unauthorized transportation service, not Gegen. (Exhibit ALJ 1 – Revised at 7, 8, 15 and 16). Second, Uber stipulated to the fact that no subsidiary of Uber Technologies, Inc., including Rasier, Gegen and Rasier-PA, held authority from the Commission to transport passengers in Allegheny County between February 11, 2014 and August 20, 2014. (Exhibit ALJ 1 – Revised at 15). Third, when brokering transportation, brokers must use certificated motor carriers. *See* 66 Pa.C.S. § 2501(b) (related to the definition of "Broker"). Uber Technologies, Inc., Rasier, Gegen and Rasier-PA did not use certificated motor carriers in Allegheny County during the time period covered in I&E's Amended Complaint.

**d. Respondents Made No Effort To Modify Their Internal Practices And Procedures To Address Their Misconduct**

In discussing the steps taken to secure authority from the Commission, Uber conveniently overlooks the fact that Rasier continued to provide unauthorized transportation during the pendency of Rasier-PA's applications and such unauthorized transportation continued after the entry of Orders directing Uber to cease and desist.

With respect to the misconduct that is at issue in this proceeding, Uber made no effort to modify or cease their practice in performing unauthorized passenger transportation and conform to the law. Uber's conduct was -- in and of itself -- precisely the practice that company management intended.

e. **The Impact Of Uber's Misconduct Was Extensive**

Incredibly, Uber argues that their provision of unauthorized transportation, which occurred over a six-month period of time, should be viewed positively because the traveling public had access to transportation. (Uber Brief at 42). However, in providing transportation that was not yet approved, Uber deprived the Commission of being able to fully vet the service to ensure that it was safe for the traveling public. Furthermore, motor vehicle accidents occurred during this period of time. (May 6, N.T. 168-9).

Uber desperately seeks to have the Commission overlook the statutory requirement that authority first be obtained prior to the offering or furnishing of service. *See* 66 Pa.C.S. §§ 1102 and 2505(a). Uber's argument fails under the law and the Commission should not create a dangerous precedent by accepting it.

f. **Uber's Compliance History**

Uber erroneously argues that aside from the instant proceeding, Respondents have no record of non-compliance at the Commission. (Uber Brief at 42). This is simply not true. Since the filing of I&E's Main Brief on July 8, 2015, Respondents have paid civil penalties in response to violations alleged by I&E in Formal Complaints. *See Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Rasier-PA LLC*, Docket No. C-2015-2474801 (payment of a \$50 civil penalty for an alleged failure to place proper

markings on a vehicle) and *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Rasier-PA LLC*, Docket No. C-2015-2457172 (payment of a \$500 civil penalty for an alleged refusal to provide service). These matters should be considered as aggravating factors in support of a larger civil penalty.

**g. Uber's Failure To Cooperate With I&E**

Uber argues that they are not required to cooperate with I&E. (Uber Brief at 43). This claim is laughable since “cooperation” is one of the very factors the Commission considers when evaluating a civil penalty. In addition to the Commission’s Policy Statement at Section 69.1201(c)(7), 52 Pa. Code § 69.1201(c)(7), Uber is obliged under the Public Utility Code to furnish information to I&E to aid in investigations. 66 Pa.C.S. § 505. The Commission certainly has an interest in knowing whether a public utility or other regulated entity cooperated with its enforcement bureau because, after all, the Commission has a duty to enforce the Public Utility Code.

Uber claims that no investigation existed – just a prosecution. This is false. I&E’s witness, Manager Charles Bowser, conducted an investigation of Uber’s operations until the Uber App was disabled by Uber. (May 6, N.T. 61). Therefore, Uber failed to cooperate with I&E during I&E’s investigation and this fact serves to increase the civil penalty.

**h. I&E's Requested Civil Penalty Is Necessary To Deter Future Violations**

Contrary to Uber’s assertion that no civil penalty is necessary to deter future violations since Rasier-PA has obtained operating authority, Rasier-PA is operating under

an experimental authority certificate that is only valid for two years.<sup>12</sup> (Uber Brief at 44). It is entirely conceivable that the Commission may face this precise situation in the future and a message should be sent to Uber now that providing unauthorized transportation is not acceptable.

**i. Past Commission Decisions In Similar Situations**

At the outset, it is important to note that no past Commission decisions are responsive to a similar situation in a fully litigated proceeding. For that reason, this case should be viewed on its own merits.

Uber’s argument that past Commission decisions support the imposition of a “per day” civil penalty and not a “per trip” civil penalty overlooks pertinent case law. As more fully discussed above, in *Newcomer*, the Commission imposed a “per violation” civil penalty that was upheld by the Commonwealth Court.<sup>13</sup>

Furthermore, Uber’s reliance on *Pa. Pub. Util. Comm’n, Bureau of Investigation and Enforcement v. Lyft, Inc.*, Docket No. C-2014-2422713 (Order entered July 15, 2015) is inappropriate. As noted above, the Commission has rejected any consideration of a settlement as precedent.<sup>14</sup>

**j. Other Relevant Factors**

Respondents argue that the Commission should consider the public’s need for the transportation they provide as a factor weighing against the imposition of a civil penalty.

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<sup>12</sup> See *Applications of Rasier-PA*.

<sup>13</sup> *Newcomer Trucking, Inc. v. Pa. Pub. Util. Comm’n*, 531 A.2d 85 (Pa. Cmwlth. 1987).

<sup>14</sup> See *Pa. Pub. Util. Comm’n, v. Bell Telephone Co. of Pa.*, Docket No. R-811819, 1988 Pa. PUC Lexis 572 (Order entered November 10, 1988).



However, as more fully discussed above, the Commission already concluded that the higher goal of public safety outweighed any potential limitation of transportation options for some riders in Allegheny County.<sup>15</sup> Therefore, no relevant factors exist that would serve to mitigate the proposed civil penalty sought against Uber.

**D. A Civil Penalty Is An Appropriate Sanction For Respondents' Continuing Failure To Respond To Court-Ordered Discovery**

As described in I&E's Main Brief, Respondents continue to fail to produce documents in response to the following two outstanding discovery requests propounded by I&E: I&E Discovery – Set I, No. 3 (relating to supporting documentation for the unauthorized trips)<sup>16</sup> and I&E Discovery – Set II, No. 1 (relating to licensing agreements between Uber and any other entity, including affiliates, concerning passenger transportation services in the Commonwealth). (May 6, N.T. 201). Respondents were required to respond to both requests in various orders of the presiding ALJs in this proceeding. *See* October 3, 2014 Order (compelling answers to the Set I discovery), November 25, 2014 Order (compelling answers to the Set II discovery), November 26, 2014 Order (imposing sanctions) and March 25, 2015 Order (imposing sanctions).

Uber describes the failure to abide by ALJs' orders as their "litigation strategy." (Uber Brief at 16). A litigation strategy that violates the rules is not an appropriate strategy and should be sanctioned.<sup>17</sup>

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<sup>15</sup> Petition for Interim Emergency Relief (Order entered July 24, 2014) at 24.

<sup>16</sup> This documentation included invoices for all unauthorized trips performed in Allegheny County.

<sup>17</sup> In reference to Uber's litigation strategy, the ALJs previously noted that the Commission's rules permit the revocation of the privilege of appearing or practicing before it due to repeatedly failing to follow Commission or presiding officer directives. *See* November 26, 2014 Order (citing 52 Pa. Code § 1.27(a)(4)).

I&E requests that the previously imposed civil penalty sanction of one thousand dollars (\$1,000) per day continue until such information is provided or this proceeding is closed, whichever comes first. The imposition of a civil penalty is appropriate because Uber deprived the substantive rights of I&E. Respondents argue in their Brief that I&E only needed a fifteen minute break to review the trip data that Respondents first provided on May 6, 2015 at the evidentiary hearing. (Uber Brief at 9). However, I&E was deprived of the opportunity to conduct a full analysis of the trip data with the supporting documentation I&E first requested on August 8, 2014. Given that Uber provided an essential piece of evidence to I&E for the first time near the conclusion of the hearing, I&E had no choice but to make the best use of the little time that was provided.

In addition to the cases cited by I&E in its Main Brief supporting the proposition that a sanction in the form of a civil penalty for abuses of the discovery process is permissible, a recent decision also supports I&E's position. In *Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order entered August 4, 2015) (hereinafter referred to as *Blue Pilot Order*), the ALJs noted that sanctions in the form of civil penalties are permissible. The ALJs stated:

In cases where the Commission finds that one of the parties has litigated in bad faith, the Commission is empowered to impose sanctions in the form of civil penalties against that party. 66 Pa.C.S § 3301. Section 3301 of the Public Utility Code permits the assessment of a civil penalty to "refuse to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the Commission."

*Blue Pilot Order* at 10. In *Blue Pilot*, the imposition of a civil penalty did not occur because the parties did not request it. Unlike *Blue Pilot*, I&E requests the imposition of a civil penalty for Uber's act of unlawfully obstructing I&E's ability to obtain discoverable information in defiance of the orders of the presiding ALJs.

## V. CONCLUSION

For all of the foregoing reasons, as well as those set forth in I&E's Main Brief, I&E respectfully requests that the Commission: (1) find Respondents to be in violation of the Public Utility Code for each unauthorized trip that took place in Pittsburgh, Allegheny County from February 11, 2014 up to and including August 20, 2014; (2) impose a cumulative civil penalty upon Respondents in the amount of Nineteen Million Dollars (\$19,000,000); (3) impose an additional civil penalty in the amount of One Thousand Dollars (\$1,000) per day per unanswered discovery request until such information is produced or the instant Complaint proceeding is closed; and (4) order such other remedy as the Commission may deem to be appropriate.

Respectfully submitted,



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Dated: August 14, 2015

## 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 52 Pa. Code § 1.54 (relating to service by a party).

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