



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

IN REPLY PLEASE
REFER TO OUR FILE

October 19, 2015

Via Electronic 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
Answer to Second Motion for Scheduling of Settlement Conference

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Bureau of Investigation and Enforcement's Answer in Opposition to the Second Motion of Uber Technologies, Inc., et al. for Scheduling of Settlement Conference and Assignment of Settlement Judge in the above-captioned matter.

Copies have been served on the parties of record in accordance with the Certificate of Service.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Michael L. Swindler
Deputy Chief Prosecutor

Enclosure

cc: *via hand delivery* unless otherwise indicated:

Gladys M. Brown, Chairman
John F. Coleman, Jr., Vice Chairman
Pamela A. Witmer, Commissioner
Robert F. Powelson, Commissioner
Andrew G. Place, Commissioner
Jan Freeman, Executive Director
Mary Beth Osborne, Director of Regulatory Affairs
Office of Special Assistants (*via e-mail*)
Mary D. Long, Administrative Law Judge (*via e-mail & first class mail*)
Jeffrey A. Watson, Administrative Law Judge (*via e-mail & first class mail*)
As per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | |
|--|---|----------------|
| Pennsylvania Public Utility Commission, | : | |
| Bureau of Investigation and Enforcement, | : | |
| Complainant, | : | |
| | : | |
| v. | : | C-2014-2422723 |
| | : | |
| Uber Technologies, Inc., et al., | : | |
| Respondents | : | |

**ANSWER OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT
IN OPPOSITION TO THE SECOND MOTION OF UBER TECHNOLOGIES,
INC., ET AL. FOR SCHEDULING OF A SETTLEMENT CONFERENCE
AND ASSIGNMENT OF SETTLEMENT JUDGE**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

Pursuant to 52 Pa. Code § 5.103(c), the Bureau of Investigation and Enforcement (I&E) of the Pennsylvania Public Utility Commission (Commission), Complainant in the above-docketed matter, by and through its prosecuting attorneys, hereby files this Answer in Opposition to the Second Motion of Uber Technologies, Inc., *et al.* (Uber or Respondent) for Scheduling of a Settlement Conference and Assignment of Settlement Judge (Motion).¹ For the reasons explained herein, I&E respectfully submits that Uber's Motion, which was brought before the Commission after the close of the record in this

¹ Uber's Motion contains procedural defects. First, Uber ignored the requirements of Section 5.103(b) of the Commission's regulations, 52 Pa. Code § 5.103(b), by failing to include a written notice stating that a responsive pleading must be filed within twenty (20) days of the date of service of the Motion. Additionally, Uber did not send I&E a copy of the Motion by electronic mail when the Motion was filed, even though the Certificate of Service implicitly suggests that service was made by electronic mail due to the inclusion of the e-mail addresses of the I&E prosecutors.

proceeding and while the matter is pending a decision from the Office of Administrative Law Judge (OALJ), should be summarily denied.

I. Introduction

1. I&E hereby incorporates the procedural history of this proceeding as detailed in the proprietary and non-proprietary versions of I&E's Main Brief filed on July 8, 2015. Subsequent to the filing of I&E's Main Brief, Uber filed its Brief on August 7, 2015. I&E filed a Reply Brief on August 14, 2015. By Interim Order dated August 17, 2015, the record in this matter was closed. Currently, the matter is pending a decision from the presiding Administrative Law Judges (ALJs).

2. Uber filed the instant Motion nearly two months after the close of the record - on October 13, 2015. Further, Uber directed the Motion to the Commission and cites to no regulation to support this procedure given that the matter is pending a decision from the ALJs.

3. The instant Motion is the second motion that Uber filed in this proceeding seeking a settlement conference and assignment of a settlement judge. Uber's initial Motion on this very same issue was denied by Interim Order dated January 23, 2015.² Uber did not file a petition to the Commission seeking interlocutory review regarding the denial of Uber's request for a settlement conference and now, for the first time nine months later, raises this issue before the Commission.

4. Not only did Uber file the Second Motion for Settlement Conference and

² On February 4, 2015, Uber filed a Motion for Reconsideration of the Interim Order regarding the scheduling of a settlement conference and assignment of a settlement judge. I&E responded to this Motion on February 6, 2015. A ruling has not yet been made on the Motion.

Assignment of Settlement Judge *after* the close of the record in this proceeding, but Uber also filed the Motion in violation of the Interim Order Setting Procedural Schedule dated October 2, 2014, which established a deadline of January 16, 2015 for serving motions in this proceeding. Therefore, Uber's Motion is untimely as well as procedurally defective.

II. Discussion

a. Uber Defied the Orders of the Presiding Administrative Law Judges During the Litigation of this Proceeding

5. I&E does not dispute that it is the Commission's policy to encourage settlements, pursuant to 52 Pa. Code § 5.231(a). In most instances, I&E would not hesitate to further engage in settlement discussions, as such discussions are commonly premised on the notion of fairness and with the understanding that both parties would act in good faith in an effort to reach an amicable resolution of issues at hand. However, in this case, Uber's recalcitrance and uncooperative nature has, in the opinion of I&E, resulted in a total absence of good faith dealings on Uber's part throughout the course of this proceeding.

6. Uber withheld discoverable information from I&E that Uber was compelled by the presiding ALJs to disclose.³ The information sought included trip data, or the number of rides provided to passengers in Pennsylvania via the connections made with drivers through Uber's digital software. Despite being directed to provide this trip data to I&E in October 2014, Uber waited to disclose the information until the day of the evidentiary hearing in this matter on May 6, 2015. (May 6, Tr. 77).

³ See *Interim Order on Motion to Compel and Motion for Continuance* dated October 3, 2014 and *Interim Order on Motion to Compel Set II Interrogatories* dated November 25, 2014.

7. I&E was deprived of the opportunity to conduct a full analysis of the trip data with the supporting documentation, *i.e.* invoices, e-mails, etc., that I&E first requested on August 8, 2014. In fact, I&E's request for the trip data was, in part, intended to comply with the Commission's directive set forth in its Secretarial Letter dated July 28, 2014 entered in this proceeding, which ordered the parties to address the number of trips provided by Uber prior to the time that Uber, or an affiliate, obtained operating authority from this Commission in order to create a complete record in this proceeding. I&E waited for more than nine months from the issuance of the Commission's Secretarial Letter for Uber's partial disclosure of information to I&E. As a result of Uber's tactical misconduct, I&E was forced to assume the accuracy of Uber's trip data still sans the requested supporting documentation – not just on the day of the hearing, but without the ability to independently verify the veracity of the information provided – due to Uber's continual refusal to respond to I&E's discovery.

8. This Commission has held that a “failure to comply with the rules of discovery directly affects the due process rights of the promulgating party, thus preventing orderly and fair litigation.” *Nippes v. PECO Energy Company*, Docket No. C-2013-2363324, 2013 Pa. PUC. LEXIS 573 at *8 (Initial Decision issued August 15, 2013) (Final Order adopting Initial Decision entered September 30, 2013). Uber's inappropriate behavior prevented fair and orderly litigation and prolonged the litigation of this matter.

9. In fact, the presiding ALJs sanctioned Uber for disobeying their interim orders related to discovery.⁴ The November 26, 2014 Sanctions Order assessed a civil penalty in the amount of \$500 per day for each day Uber failed to answer discovery until the conclusion of the evidentiary hearing on the above-captioned complaint.⁵ The March 25, 2014 Sanctions Order imposed an additional civil penalty in the amount of \$500 per day from December 12, 2014 to the date that Uber fully complies with the previous discovery orders or the date of the conclusion of the evidentiary hearing, whichever is first met.

10. Although the ALJs' sanction orders directed that these sanction penalties be paid daily as assessed, Uber made no effort to comply with the Orders and the Commission has yet to receive one dollar from Uber related to the sanctions that were imposed in this proceeding. (May 6, Tr. 55).

11. Now, Uber files this frivolous request for a settlement conference after the close of the record in this proceeding and for the second time, after already having been denied an identical request.

12. I&E should not be coerced into settlement discussions with a party that continually defies the orders of this Commission's ALJs and whose inappropriate litigation strategy deprived I&E of the essential fairness guaranteed to parties. Further, it is not in the Commission's interest to grant a disobedient party a settlement conference,

⁴ See *Interim Order Motion for Sanctions* dated November 26, 2014 (hereinafter referred to as November 26 Sanctions Order) and *Interim Order Granting In Part, BIE's Second Motion for Sanctions* dated March 25, 2015 (hereinafter referred to as March 25, 2014 Sanctions Order).

⁵ On March 6, 2015, Uber provided only partial discovery responses to I&E.

especially when that party continues to disregard orders related to sanctions that were imposed.

b. The Instant Matter Has Already Been Litigated

13. Uber's request for an ALJ-facilitated settlement conference to avoid further litigation and save resources is nonsensical. (Uber Motion at 5). The litigation before the Commission has concluded, but for the release of a decision of the presiding ALJs. The record in this matter was closed approximately two months ago and the case is ripe for decision.

14. Significant valuable administrative resources were already expended during the litigation of this proceeding, in large part due to Uber's refusal to adhere to the ALJs' numerous orders. Uber is the cause of the protracted litigation of this proceeding. The record in this proceeding has been closed for months. The Commission should not set the untenable precedent of granting a settlement conference two months after the close of the record, with a decision of the presiding ALJs rendered at any moment, at the request of a party that continues to defy the ALJs' orders by refusing to pay the civil penalty sanctions, and in opposition to a party that has no intention of entering into an amicable resolution of this matter at this stage of the case.

15. Uber also submits that continued litigation serves "no purpose and is contrary to the public interest" because regulatory compliance has been achieved through the issuance of a 2-year experimental authority certificate of public convenience to an

Uber affiliate.⁶ (Motion at 2). This claim is without merit. Uber is essentially asking the Commission to completely ignore Uber's widespread illegal transportation of persons in this Commonwealth through its digital software prior to the issuance of the 2-year experimental authority certificate of public convenience despite the Commission's regulations and its legitimate concerns for the safety of the traveling public.⁷ Uber's argument is *contrary to the public interest*; the General Assembly has determined that it is in the public interest for the Commission to enforce the Public Utility Code⁸ and impose civil penalties for violations of the Public Utility Code.⁹ As previously stated, this enforcement matter has been litigated and is ripe for a decision on the merits.

16. Despite Uber's portrayal, this matter is not a simple violation complaint that can be easily comprehended by a settlement judge with no familiarity with the exhaustive record in this proceeding. The underlying enforcement issues are exacerbated by the presence of sanctions issues that take this proceeding to a level of complexity and first impression well beyond that of a simple enforcement proceeding.

⁶ *Application of Rasier-PA LLC for Emergency Temporary Authority*, Docket No. A-2014-2429993 (Order entered July 24, 2014) (hereinafter referred to as *Application of Rasier-PA*).

⁷ On July 1, 2014, the presiding ALJs directed Uber to cease and desist from operating its passenger transportation service and on July 24, 2014, the Commission upheld the ALJs' Order. *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). Despite being directed to cease and desist by the presiding ALJs' and then the Commission's Orders, Uber continued to unlawfully operate its passenger transportation service until Rasier-PA LLC was issued a Certificate of Public Convenience on August 21, 2014. See *Application of Rasier-PA*.

⁸ 66 Pa.C.S. § 501.

⁹ 66 Pa.C.S. § 3301.

c. **Uber's Continued Public Reference of Settlement Discussions Is Inappropriate**

17. It is most uncommon for any party in contested public utility proceedings to present legal arguments revealing confidential settlement discussions in pleadings, briefs or other public documents filed with the Commission. It is well-established that offers of settlement are not admissible in evidence. 52 Pa. Code § 5.231(d). Therefore, any statement related to settlement offers are impertinent, immaterial, irrelevant and should be overlooked when considering the merits of this matter. Moreover, any suggestion that I&E has not engaged in settlement discussions in this case is patently false.

18. As for Uber's second request to schedule a settlement conference, Uber's aforementioned settlement offers obviously were not acceptable to I&E which led to the litigation of this matter. Further, it is not in the Commission's interest to direct I&E to participate in a settlement conference after the matter has been litigated, the record is closed and Uber continues to defy the presiding ALJs' orders by failing to pay the civil penalties that were ordered as sanctions in this proceeding. I&E should not be coerced to enter into settlement discussions when a settled outcome is not appropriate under the circumstances.

WHEREFORE, for the reasons set forth above, the Bureau of Investigation and Enforcement respectfully requests that the Second Motion for Scheduling of Settlement Conference and Assignment of Settlement Judge of Uber Technologies, Inc., *et al.* be denied with prejudice.

Respectfully submitted,



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Dated: October 19, 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).

Service by First Class Mail and Email:

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