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December 8, 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:

I have enclosed for electronic filing the **corrected** Exceptions on Behalf of Uber Technologies, Inc., et al., in the above-captioned matter. The only changes from what was filed on December 7, 2015 are corrections to the Table of Contents and Table of Authorities, which we became aware of after filing the Exceptions.

Copies have been served on all parties as indicated in the attached Certificate of Service.

Sincerely,

Karen O. Moury

KOM/bb
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.*	:	

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

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Dated: December 7, 2015

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I. THIS PROCEEDING SHOULD HAVE BEEN SETTLED.

The regulations governing the Commission's practice state that "[i]t is the policy of the Commission to encourage settlements." 52 Pa. Code § 5.231(b). For well over one year, Uber Technologies, *et al.* ("Respondents") made numerous good faith attempts to reach a settlement with the Commission's Bureau of Investigation and Enforcement ("I&E"). While the Respondents continue to believe that the provision of transportation network services through the mobile application ("App") did not violate the Public Utility Code,[1] they recognize that a settlement would have saved valuable resources, including ratepayer money, and would have provided a level of certainty that does not exist when cases are fully litigated at the Commission and through the appellate review process.

The Respondents made a settlement offer in December 2014 that, at the time, would have been, by far, the highest civil penalty ever imposed by the Commission in the transportation industry. I&E rebuffed the Respondents' settlement offer and refused to make a counteroffer. I&E proceeded to settle with Lyft, Inc. ("Lyft") for $250,000. The Respondents were forced, over the course of several months, to file *two* separate motions seeking the assistance of an administrative law judge ("ALJ") to facilitate settlement discussions, which were opposed by I&E and denied by the ALJs.[2] After the hearing in the proceeding, where I&E obtained all of the relevant data it needed, the Respondents again made another good faith attempt to settle by offering an amount that was more than 60% higher than the Lyft's settlement.[3] Again, I&E rebuffed the Respondents' offer and refused to make a counteroffer. Following the filing of Briefs, the Respondents reached out again to I&E to enter into settlement discussions and filed

[1] 66 Pa. C.S. §§ 101 *et seq.*
[2] The motions were filed on January 14, 2015 and February 4, 2015. *See* Respondents' Brief at 4-7.
[3] The Commission's regulations do not preclude a party from surrendering the confidentiality of their own settlement positions. 52 Pa. Code § 5.231(d).

another motion seeking the assistance of an ALJ to facilitate settlement discussions, which I&E again opposed and the ALJs again denied. I&E simply refused to settle.

This proceeding involves new and innovative transportation network services available to riders through a mobile application ("App") in Allegheny County from February 11, 2014 through August 20, 2014. On August 21, 2014, the Respondents obtained authority from the Commission to lawfully provide these services in Allegheny County and throughout the Commonwealth.[4] The Respondents' services did not in any way jeopardize public safety. Thousands of passengers obtained safe rides that were not available through the existing transportation infrastructure. In fact, the record establishes that the cornerstone of the Respondents' business model is facilitating a safe ride, which includes liability insurance coverage well in excess of state minimums. I&E failed to offer any evidence to the contrary.

I&E chose to allocate the Commission's limited resources in a deeply flawed hearing (the exceptions are detailed below) that eventually led to the ALJs issuing an Initial Decision (I.D.) on November 17, 2015, recommending the imposition of a $50 million civil penalty. This recommendation has been near unanimously criticized throughout the Commonwealth.

The Editorial Board for the Pittsburgh Post-Gazette ("PPG") described the $50 million fine recommended by the ALJs as a "disproportionate punishment that is wildly unfair" and "an absurd overreach." The PPG Editorial Board also accurately observed that the "offenses the fine seeks to punish, operating without a license and withholding information, are now moot." Comparing it to the significantly lower fine recently paid by Lyft for the same activities, the PPG

[4] Uber Technologies, Inc. and three subsidiaries were named as Respondents in this proceeding. One of those subsidiaries, Rasier-PA LLC, obtained a certificate of public convenience from the Commission on August 21, 2014 at Docket No. A-2014-2429993. A fuller description is provided below.

Editorial Board noted that the "purpose of fines it not to fill government coffers, but to compel compliance," which has already been achieved.[5]

The Tribune-Review referred to this proceeding as an "insidious war against modern conveyances" and criticized the restraint of trade by government through attempts to interfere with free competition in business. Calling the ALJs' recommended fine "ludicrous," the Tribune-Review discerned that this proceeding was about the Respondents' "audacity to challenge the…taxi monopoly" while offering an App-based, arms-length, transaction that better serves the public.[6]

The Editorial Board of the Times-Tribute called the suggested fine "wildly excessive" and appropriately recognized that its imposition by the Commission would not be an act of "regulatory deterrence," but rather one of "competitive preemption." The Times-Tribute Editorial Board also aptly noted that transportation network services "pose a huge challenge to conventional taxi operations that are regulated by the PUC" because passengers can summon and pay for a ride using a smart phone App.[7]

The I.D. must be set aside in its entirety, with the Commission stepping in to conduct a full-blown review of the evidentiary record to reach a fair, reasonable and appropriate outcome that is consistent with well-established Commission precedent. While mischaracterizing or ignoring the testimony and legal arguments advanced by the Respondents, the I.D. recommends an arbitrary and capricious civil penalty of $50 million. The I.D. also contains numerous specific errors, which include:

(1) Failing to consider a civil penalty paid in an identical proceeding involving Lyft, and instead recommending a civil penalty that is 200 times the amount that Lyft paid and almost 30 times the highest amount ever ordered by the Commission;

[5] See Exhibit A attached to the Exceptions.
[6] See Exhibit B attached to the Exceptions.
[7] See Exhibit C attached to the Exceptions.

(2) Finding that a monstrous fine is needed to deter future violations when the Respondents have been lawfully operating pursuant to Commission authority since August 2014;

(3) Ignoring the compelling benefits of transportation network services to the riding public, the drivers and the economy in Allegheny County;

(4) Disregarding the complete lack of any evidence in the record of unsafe business practices or any harm to the public;

(5) Refusing to take into account the Respondents' business model that is premised on the safety and protection of the public; and

(6) Discounting the Respondents' impeccable track record of complying with the Commission's requirements.

The transportation network services provided in Allegheny County that are at issue in this proceeding have been lawfully provided by Rasier-PA LLC ("Rasier-PA"), one of the named Respondents, pursuant to emergency temporary authority ("ETA") granted by the Commission in August 2014.[8] Notably, the I.D. ignores that fact while also failing to recognize that these new and innovative services have filled massive voids in Allegheny County's existing transportation infrastructure by providing reliable, affordable and safe transportation alternatives to the public.

In support of Rasier-PA's request for ETA, rider after rider told tales of their dreadful experiences with available transportation options and pleaded with the Commission to allow these new and innovative services to help them get to school, work, medical appointments and home safely after an evening out, without drinking and driving.[9] Testifying in support of Rasier-

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[8] *Application of Rasier-PA LLC for Emergency Temporary Authority in Allegheny County*, Docket No. A-2014-2429993) (Commission Order entered July 24, 2014) ("*ETA Order*").

[9] *See Application of Rasier-PA LLC for Emergency Temporary Authority in Allegheny County*, Docket No. A-2014-2429993 (filed July 2, 2014 and supplemented July 7, 2014) (Commission Order entered July 24, 2014). Since this filing is part of a public record on file at the Commission, and the Commission has issued a decision based on this record, the Respondents submit that the Commission may take official notice or judicial notice of this information. *See* 52 Pa. Code § 5.408.

PA's two-year experimental authority application, Ms. Sally Guzik offered particularly compelling testimony regarding her use of these services, as follows:

> I began using Uber in the middle of February of 2014. At that time I had a family member that was very ill of terminal cancer and I work a late shift at a restaurant as well as consulting job, and I used that app to secure a ride to and from the hospital during off hours or other forms of peak transportation hours...I'm a frequent pedestrian and also public transit user, have tried using other services as well, either to not have a phone call received or returned or to ever be picked up, and that has been my experience. With the new ride sharing application, I have never had to wait more than 15 minutes.[10]

As a result of the failure of the I.D. to review the entire record, accurately characterize the legal and factual issues, and appropriately apply well-established Commission precedent, the Commission must step into the role of presiding officer. Just over a year ago, the Commission was placed in exactly the same position when the ALJs' Recommended Decision (R.D.) would have dismissed outright Raiser-PA's two-year experimental service application. Despite the Commission's earlier grant of ETA to Rasier-PA in July 2014 to operate in Allegheny County due to an immediate need for these App-based transportation services, the R.D. issued in September 2014 did not even address the merits of the application, instead recommending its dismissal because the applicant did not produce confidential trip data for inclusion in the record. Granting Rasier-PA's two-year experimental application on November 13, 2014, the Commission was required to draft a lengthy and detailed motion and order to address all of the substantive issues (*i.e.*, public need and the fitness of the applicant) required to adjudicate the application, without the benefit of a meaningful R.D.

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[10] August 18, 2014 Transcript at 36-37 in *Application of Rasier-PA, LLC for Experimental Service Authority Between Points in Allegheny County*, Docket No. A-2014-2416127 (Order entered December 5, 2014) ("*December 5, 2014 Order*"). Since this testimony is part of a public record on file at the Commission, and the Commission has issued a decision based on this record, the Respondents submit that the Commission may take official notice or judicial notice of this information. *See* 52 Pa. Code § 5.408.

Again, in this proceeding, the I.D. issued by the ALJs is unsalvageable. The Commission must, once again, set it aside and go back to square one to determine: (i) whether the services provided by the Respondents from February 11, 2014 through August 20, 2014 required authority from the Commission; (ii) if so, whether a civil penalty should be imposed; and (iii) if so, the appropriate amount of a civil penalty. In making these determinations, the Commission must conduct its own review of the evidence produced and legal arguments made in this proceeding. Indeed, the I.D. is so lopsided against the Respondents that it cannot even be relied upon for an accurate description of either the factual evidence or the legal arguments.

If, after a review of the evidentiary record and the legal arguments, the Commission believes that a civil penalty is warranted, the only logical basis for determining an appropriate amount is the Lyft settlement. In that proceeding, which involved the provision of identical transportation network services over the exact time period in the same geographic region, the Commission has found that a $250,000 civil penalty is in the public interest. Given the Commission's well-established precedent of considering other similar decisions when determining an appropriate civil penalty, this would be a reasonable outcome here. By contrast, imposition of the recommended multi-million penalty would be arbitrary and capricious, without support in the record and contrary to prior Commission rulings.

These Exceptions fully incorporate by reference the Brief filed by the Respondents on August 7, 2015. The Respondents urge the Commission to reverse the I.D. and dismiss the Amended Complaint. In the alternative, if the Commission sustains the Amended Complaint and determines that a civil penalty is warranted, the Respondents point to the settlement approved by the *Lyft Order* since that proceeding involved identical transportation network services, the exact time period and the same geographic region. Any other result cannot be supported by the record or well-established Commission precedent.

II. EXCEPTIONS

A. **Exception No. 1**: As the I.D. recommends an arbitrary and capricious penalty and contains numerous factual and legal errors, it must be set aside in its entirety.

On the basis of the recommended excessive civil penalty alone, the I.D. must be set aside in its entirety. This arbitrary and capricious recommendation single-handedly demonstrates a glaring lack of fundamental fairness and objectivity required of Commission rulings.

1. The Commission has the power to disregard and supersede the I.D.

Section 335(a) of the Public Utility Code ("Code") provides that "[o]n review of the initial decision, the commission has all the powers which it would have in making the initial decision."[11] Under well-established Pennsylvania case law, the Commission is always free to wholly disregard and supersede an initial decision. *See, e.g., City of Philadelphia v. Pennsylvania Public Utility Commission*, 73 Pa. Cmwlth. 355, 361, 458 A.2d 1026 (1983) (a "broader grant of power to the Commission in the disposition of initial decisions...can scarcely be imagined").

Indeed, in the *December 5, 2014 Order*, the Commission wholly rejected the R.D. issued by the ALJs, which would have dismissed the experimental services application outright due to the applicant not producing confidential trip data for inclusion in the record. The R.D. contained no discussion of the merits of the application, such as public need or fitness of the applicant, as are required to be addressed in the adjudication of an application. Upon a review of the Exceptions filed by Rasier-PA, the Commission reversed the R.D. and relied upon the evidence in the record and sound legal principles to approve the application.[12]

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[11] 66 Pa. C.S. § 335(a).

[12] *See also 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 December 5, 2014).

The Commission has also significantly reduced civil penalties imposed by ALJs, based upon a review of the record and mitigating factors. *See, e.g., Pa. Pub. Util. Comm'n., Bureau of Transportation and Safety v. Steven R. Brungard and Rosemarie Metz-Brungard, t/d/b/a Protean Potentials*, Docket No. A-00113098C0101 (Order entered June 3, 2002) ("*Protean Potentials*"); *Pa. Pub. Util. Comm'n., Law Bureau Prosecutory Staff v. Roc Taxi, Inc.*, Docket No. A-00119936M0401, 2005 WL 6498986 (Order entered March 8, 2005). In *Protean Potentials*, the respondent was found to have rendered common carrier by motor vehicle service and held itself out via website as providing transportation to the public for compensation without holding a certificate of public convenience. Finding that the respondent's "continued course of conduct over the past four plus years demonstrates a disrespect for the Commission and a contempt for the law that cannot be tolerated in a civilized society," ALJ Wayne Weismandel recommended the imposition of a civil penalty of $92,800. *Protean Potentials* I.D. at 15.

In reigning in the ALJ, the Commission characterized his recommendation as constituting a "very substantial civil penalty" and exercised its discretion to drastically reduce the fine by more than 90% to $10,180, a mere fraction of what he had proposed. *Protean Potentials* at 5.[13] Although the Commission warned the respondent not to construe the sizeable penalty reduction as "countenance of their prior and continuing actions before the Commission," it concluded that the reduced amount was likely sufficient to deter the respondent from future and continued violations of the Code. *Id.* at 10.

Notably, in that case, the respondent's certificate of public convenience had previously been revoked and it had failed to pay civil penalties in connection with unauthorized service which had been adjudicated in prior proceedings. *See Pa. Pub. Util. Comm'n., Bureau of*

[13] Notably, the Commission took this action despite the recidivist nature of the respondent described below.

Transportation and Safety v. Brungard, Docket No. A-00113098C9902 (Order entered November 13, 2000). *Protean Potentials* at 9, fn. 6. In fact, the only defense or mitigating factor presented by the respondent involved the effect of a federal statute on the Commission's jurisdiction, which the Commission had previously expressly rejected in finding that the respondent's operations required authority from the Commission. *Protean Potentials* at 7-9. By contrast, the experimental services in question in this proceeding are new and innovative; and at a minimum, they fall into a grey area in terms of the Commission's jurisdiction, which has not yet been determined.

2. The reasons for disregarding the I.D. in this proceeding are numerous.

A review of the prior civil penalties imposed by the Commission and an evaluation of the overall record in this proceeding demonstrate the excessiveness of the ALJs' proposed $50 million fine to the extent that the I.D. must be completely disregarded by the Commission. A civil penalty is arbitrary and capricious if it bears no rational connection to the relevant factors in the proceeding. *See Shandong Huarong Machinery Co., Ltd. v. United States*, 435 F. Supp. 2d 1261 (2006). The key factors showing the arbitrary and capricious nature of the I.D.'s recommended civil penalty include:

(1) The Commission's approval of a radically lower $250,000 civil penalty in the *Lyft Order* as being in the public interest;[14]

(2) Other drastically lower monetary penalties imposed by the Commission in situations involving fatalities of adults and children, serious bodily injury and significant property damage, as compared to the record in this proceeding that is devoid of any evidence of safety concerns or actual harm to the public;

(3) The lack of any need for a deterrent given the fact that the Respondents now hold authority to provide the transportation network services that are at issue in the proceeding;

[14] This amount was also appreciably lower than the $7 million civil penalty originally sought by I&E in the Amended Complaint filed on October 8, 2014.

(4) The Commission's prior rulings that transportation network services fill massive voids in Allegheny County's transportation infrastructure; and

(5) The Respondents' impeccable track record of safe business practices since the launch of operations in Allegheny County, as well as compliance with Commission requirements since becoming certificated in August 2014.

Moreover, the I.D. is so lopsided against the Respondents that it cannot even be relied upon for an accurate description of either the evidence or the legal arguments.

a. Lyft civil penalty

In *Pa. Pub. Util. Comm'n., Bureau of Investigation and Enforcement v. Lyft, Inc.*, Docket No. C-2014-2422713 (Initial Decision issued June 5, 2015) ("*Lyft Initial Decision*"); (Final Order entered July 15, 2015) ("*Lyft Order*"), I&E filed an Amended Complaint against Lyft on October 8, 2014, which mirrors the allegations and issues raised in this proceeding. Through that Amended Complaint, I&E sought a civil penalty of nearly $7 million based on allegations that Lyft had launched transportation network services in Allegheny County on February 7, 2014 without Commission authority and continued to provide such services through August 13, 2014 when Lyft obtained ETA from the Commission.

By the *Lyft Order*, the Commission approved a settlement agreement between I&E and Lyft which contained a civil penalty in the amount of $250,000, including $16,000 already paid by drivers operating on Lyft's platform prior to August 13, 2014.[15] The remaining amount of $234,000 was ordered to be paid in two equal installments of $117,000, with the first installment due within 60 days and the second due one year thereafter. *See Lyft Initial Decision* at 10, 19-20. The *Lyft Initial Decision*, which was adopted without modification by the *Lyft Order*, determined that the civil penalty of $250,000 was in the public interest. *Lyft Initial Decision* at 18. *See Pa.*

[15] Similarly, drivers operating on the Respondents' platform have also paid civil penalties in full satisfaction of I&E complaints filed against them. *See* I&E Amended Complaint ¶¶ 23-24.

Pub. Util. Comm'n. v. PPL Utilities Corporation, Docket No. M-2009-2058182 (Order entered November 23, 2009); 52 Pa. Code § 69.1201 (under well-established precedent, the Commission must review proposed settlements to determine whether their terms are in the public interest).[16]

As Lyft was providing identical services over the same time period in the exact geographic region as the Respondents, and the Commission has determined that a $250,000 civil penalty for such operations is in the public interest, it is impossible to justify the imposition of a fine that is 200 times that amount. In fact, any departure from the amount that has already been determined to be in the public interest would be difficult to rationalize. The sole distinction between the cases is that one was settled and the other was not. Since the Respondents made numerous good faith efforts to resolve this matter through a comparable settlement, only to be repeatedly rebuffed by I&E, it would be wholly inappropriate and unfair to impose a civil penalty that bears no resemblance to the Lyft civil penalty, any prior Commission decisions or the record in this proceeding.

Prior to the imposition of a $250,000 civil penalty through the *Lyft Order*, the highest civil penalties imposed in the transportation industry were in the $20,000 range.[17] Those cases involved operating without insurance and failing to provide adequate service.

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[16] The Respondents are aware that the Commission has found that settlements do not establish legal precedent. *See, e.g., Petition of PECO Energy Company for Approval of Default Service Program,* Docket No. P-2014-2409362 (Order entered December 4, 2014) ("*PECO Default Service Order*"). However, that does not mean that the Commission should disregard civil penalties established by settlements. Indeed, the fact that the Commission found a $250,000 civil penalty to be in the public interest in an *identical* proceeding is of extremely strong persuasive value in determining an appropriate civil penalty here. This is particularly true when I&E exercised its prosecutorial discretion to enter into a settlement with Lyft but has refused to enter into a similar settlement with the Respondents. To ignore the Lyft settlement in adjudicating this matter would afford inappropriate discretion to I&E in making those arbitrary judgment calls.

[17] *See, e.g. Pa. Pub. Util. Comm'n, Bureau of Transportation and Safety v. Alpha Moving and Storage, Inc.*, Docket No. C-2010-2187846 (Order adopted January 27, 2011); *Pa. Pub. Util. Comm'n., Bureau of Transportation and Safety v. S.S. Sahib Cab Co.*, Docket No. A-00121184C0601 (Order entered March 1, 2007) ("*Sahib Cab*"); *Pa. Pub. Util. Comm'n v. Pegasus Transportation Holdings, Inc., t/d/b/a Pegasus Chauffered Motor Cars*, Docket No. A-00116364C0502 (Order adopted September 25, 2006).

b. Other monetary penalties

i. Cases involving unsafe business practices or fatalities, serious bodily injury and/or significant property damage

A review of other monetary penalties imposed by the Commission further illustrates the vast excessiveness of the I.D.'s proposed $50 million civil penalty. The Commission has recently assessed civil penalties ranging from $96,000 to $1,000,000 amidst allegations of unsafe or inadequate business practices jeopardizing public safety or resulting in fatalities, serious bodily injury and/or significant property damage, as follows:[18]

- *UGI Utilities, Inc. – Gas Division* - allegations relating to a natural gas ignition incident that required the company to revise its operating procedures - *$96,000*[19]
- *Columbia Gas of Pennsylvania, Inc.* - allegations relating to excessive pipeline pressures, excavation damage and lack of pressure regulation devices - *$200,000*[20]
- *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*[21]
- *Pennsylvania Electric Company* – termination of service that preceded a fire resulting in serious injury to an occupant of the residence - *$200,000*[22]
- *PPL Electric Utilities* – termination of electric service that preceded a fire, resulting in the death of two children - *$300,000*[23]

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[18] Again, the Respondents recognize that these are settlements involving serious public safety concerns may not necessarily establish legal precedent (*see* fn. 17), they are offered to demonstrate the irrationality of the recommended civil penalty in a case where no issues jeopardizing public safety or concerns resulting in harm to the public have been identified. Also, while it is true that settlements do not normally contain admissions of wrongdoing, the factual scenarios in most of the examples cited here left no doubt as to violations by the public utilities or regarding the consequences, including fatalities, serious bodily injury and significant property damage.

[19] *Pa. Pub. Util. Comm'n., Bureau of Investigation and Enforcement v. UGI Utilities, Inc. - Gas Division,* Docket No. M-2013-2313375 (Order adopted April 23, 2014).

[20] *Pa. Pub. Util. Comm'n., Bureau of Investigation and Enforcement v. Columbia Gas of Pennsylvania, Inc.*, Docket No. M-2014-2306076 (Order adopted September 11, 2014).

[21] *Pa. Pub. Util. Comm'n., Bureau of Investigation and Enforcement v. UGI Utilities, Inc. - Gas Division*, Docket No. C-2012-2295974 (Order adopted May 9, 2013).

[22] *Pa. Pub. Util. Comm'n., Law Bureau Prosecutory Staff v. Pennsylvania Electric Company,* Docket No. M-2008-2027681 (Order adopted March 12, 2009).

[23] *Pa. Pub. Util. Comm'n., Law Bureau Prosecutory Staff v. PPL Electric Utilities Corp.*, Docket No. M-2008-2057562 (Order adopted March 26, 2009).

- *UGI Utilities, Inc.* – natural gas explosion that resulted in five fatalities amidst allegations of inadequate leak detection measures and insufficient pipeline replacement - *$500,000*[24]

- *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; failure to minimize the danger of natural gas ignition or comply with emergency procedures that require protection of people first; and failure to take steps to reasonably protect the public from danger - *$500,000*[25]

- *UGI Penn Natural Gas* – allegations of natural gas leaks, inadequate repairs, and insufficient monitoring of a hazardous condition - *$1,000,000*[26]

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, including two children. *UGI Order I.* For a visual comparison of these civil penalties, please review the charts included as Exhibit D, attached to these Exceptions.

Notably, the highest civil penalty noted above -- of $1 million -- was imposed on the natural gas company after five years of repeated violations of gas safety regulations which resulted in multiple deaths as well as property damage. *UGI Order II* at 18. ("This is the ninth time in approximately five years in which a matter containing allegations of gas safety violations by a UGI-owned gas distribution utility has come before this Commission"). In adjudicating the matter, the Commission described the departures from gas safety standards as including: (i) failing to ascertain sufficient information to properly grade a gas leak; (ii) exceeding the maximum allowable operating pressure of a gas main; (iii) improperly repairing a gas main; (iv) failing to adequately monitor a hazardous condition; (v) violating procedures for documenting

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[24] *Pa. Pub. Util. Comm'n., Bureau of Investigation and Enforcement v.UGI Utilities, Inc. - Gas Division*, Docket No. C-2012-230-2308997 (Order adopted January 24, 2013) ("*UGI Order I*").

[25] *Pa. Pub. Util. Comm'n., Bureau of Investigation and Enforcement v. Philadelphia Gas Works*, Docket No. C-2011-2278312 (Order adopted July 16, 2013).

[26] *Pa. Pub. Util. Comm'n., Bureau of Investigation and Enforcement v. UGI Penn Natural Gas, Inc.,* Docket No. M-2013-2338981 (Order adopted August 29, 2013) ("*UGI Order II*").

gas leaks; (vi) failing to cathodically protect a high pressure distribution gas line; (vii) failing to evaluate unprotected pipelines; (viii) failing to employ a program to minimize the effects of interference; (ix) failing to cathodically protect twenty-four of the service lines; (x) failing to substantiate the maximum allowable operating pressure before returning pipeline to service; (xi) failing to document the condition of the gas main; and (xii) failing to produce documentation to substantiate the established maximum allowable operating pressure. *UGI Order II* at 14-15.

Focusing on the failure to monitor the hazardous condition, and the evidence indicative of active corrosion, the Commission in the *UGI Order II* observed that these serious departures from established gas safety standards placed the public safety at great risk, warranting the imposition of the "high civil penalty" of $1 million. *Id.* at 15, 20. By contrast, the I.D. here recommends a civil penalty that is 50 times more than that "high civil penalty," despite the fact that the record is devoid of any evidence of unsafe or inadequate business practices jeopardizing public safety or any harm resulting to the public.

It is also of significance that in 2012, the General Assembly revised Code Section 3301(c)[27] to increase the Commission's authority in imposing civil penalties for gas pipeline safety violations. While the Commission's authority had previously been capped at a total of $500,000 for any related series of violations, Code Section 3301(c) now permits the Commission to impose a civil penalty of $200,000 for each violation of gas pipeline safety standards for each day that the violation persists.[28] However, the statute limits the Commission to a maximum civil penalty of $2,000,000 for a series of ongoing violations related to gas pipeline safety standards apply to the transportation of natural gas, flammable gas, or gas that is toxic or corrosive.[29]

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[27] 66 Pa. C.S. § 3301(c).
[28] *Id.*
[29] *Id.*

ii. Cases involving financial harm to consumers or other alleged violations unrelated to public safety concerns or unsafe business practices.

The highest civil penalty ever imposed by the Commission, of which the Respondents are aware, is $1.8 million. *Pa. Pub. Util. Comm'n., Bureau of Investigation and Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Commission Order entered December 3, 2015) ("*HIKO Energy Order*"). By the *HIKO Energy Orde*r, the Commission approved without modification the Initial Decision issued by the ALJs on August 21, 2015 ("*HIKO Energy Initial Decision*"). In the proceeding that culminated in the issuance of the *HIKO Energy Order*, the electric generation supplier ("EGS") admitted that it had enrolled customers in guaranteed savings plans and did not honor those guarantees in bills issued in January through April 2014.

I&E's complaint sought the imposition of a $15 million civil penalty on the EGS, characterizing the EGS's actions as constituting "brazen, selfish, deliberate, and egregious misconduct." *HIKO Energy Initial Decision* at 20. The ALJs agreed that the EGS committed an egregious violation of the law when it "made a conscious decision to disregard the express terms of its Price Offering in order to 'stay in business' during the polar vortex despite the ramifications this decision had on its end user retail customers." *HIKO Energy Initial Decision* at 38.

Following a review of the Commission's policy statement factors,[30] including factors warranting a higher civil penalty – intentional decision not to honor terms of contract; prior regulatory violations of the EGS; financial harm to consumers; the fact that the EGS was operating under a conditional license at the time of the current violations; and the options available to the EGS of returning customers to default service -- the ALJs recommended that a

[30] 52 Pa. Code § 69.1201.

substantially reduced civil penalty of $1.8 million be imposed on the EGS. The Commission approved the imposition of this civil penalty on the EGS. *HIKO Energy Order* at 54.

The next highest civil penalty ever imposed by the Commission, of which the 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.[31] 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.[32]

These comparisons further illustrate the arbitrary and capricious nature of the civil penalty recommended by the I.D. As a result, the only choice the Commission has is to set aside the I.D., step into the role of presiding officers, and reach a reasonable and appropriate resolution of this matter.

c. Deterrent is unnecessary

The fact that the Respondents have been authorized by the Commission since August 21, 2014 to provide the transportation network services that are the subject of this proceeding is also indicative of the extremeness of the proposed civil penalty. On April 14, 2014, about two months prior to the filing of the original complaint that initiated this proceeding, Rasier-PA filed its application for a two-year experimental services authority application. While the application was languishing due to the filing of protests by the incumbent transportation monopolies in Pennsylvania, Rasier-PA filed its ETA application on July 2, 2014. By the *ETA Order*, the Commission conditionally granted Rasier-PA's ETA application on July 24, 2014, and issued a

[31] *Pa. Pub. Util. Comm'n., Bureau of Investigation and Enforcement v. West Penn Power Company*, Docket No. C-2014-2417325 (Order adopted August 22, 2014); 66 Pa. C.S. § 2806.1.

[32] 66 Pa. C.S. § 2806.1(f)(2)(i). Even for violations of these requirements, which carry $1 million minimum penalties, the maximum amount that an electric distribution company may be penalized is $20 million.

certificate of public convenience on August 21, 2014. Rasier-PA successfully operated under the ETA authority until January 29, 2015 when the Commission issued a two-year experimental services certificate, under which Rasier-PA continues to operate. As compliance is the goal of enforcement efforts and civil penalties, it has been achieved.

Further, Rasier-PA presented extensive evidence in this proceeding showing its ongoing commitment to compliance with Commission requirements, as follows:[33]

- 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 Order*, and provided the trip data to the Commission 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;
- Filed its Assessment Report on March 31, 2015;
- Filed an application on March 31, 2015 requesting statewide authority to transport property, which was granted on April 16, 2015;
- Submitted its first Quarterly Report on the Compliance Plans on April 30, 2015;[34] and
- Filed 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 routine and periodic audits, to document compliance with the vehicle safety and driver integrity requirements which the Commission imposed. In fact, Rasier-PA has gone to great lengths to cooperate with I&E on routine compliance matters and investigations involving individual consumers. Notably,

[33] Tr. 139-142; Respondent Ex. No. 2.

[34] A review of the docket for the application proceeding reveals that subsequent quarterly reports were filed on July 23, 2015 and October 29, 2015: http://www.puc.pa.gov/about_puc/consolidated_case_view.aspx?Docket=A-2014-2416127.

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 network services.

Also demonstrating the Respondents' commitment to the Commission's regulatory and public protection requirements is the evidence produced during this proceeding of compliance with those standards before authority was granted in August 2014. Even prior to being certificated, the Respondents complied with or exceeded the Commission's requirements for driver integrity, vehicle safety and liability insurance coverage.

Specifically, Mr. Feldman testified that during the time period from February 11, 2014 through August 20, 2014, the Respondents required all vehicles to be registered and inspected before operating on the platform.[35] He further noted that the process for checking driver history records and criminal backgrounds, as thoroughly described in Rasier-PA's Quarterly Report on the Compliance Plans,[36] was followed during that entire time period.[37] As noted in the Quarterly Report, that process included the disqualification or deactivation of drivers who did not meet the stringent standards imposed by the Respondent.[38] Mr. Feldman further testified that during the period in question, the Respondents adhered to a "zero-tolerance policy" regarding the use of alcohol or controlled substances while operating on the platform.[39] He explained that under this policy, all potential drivers are disqualified for past alcohol or drug violations and a current driver is immediately deactivated, pending investigation, if a rider suggests that the driver may have been intoxicated or under the influence of drugs during the trip. If the investigation concludes that the driver was in violation of the policy, "the driver is permanently deactivated

[35] Tr. 130-131.
[36] Respondent Exhibit No. 2.
[37] Tr. 132-133 (May 6, 2015).
[38] Respondent Exhibit No. 2 at Section B (pp. 3-6).
[39] Tr. 133 (May 6, 2015).

and banned across the country from access to the platform."[40] The Respondents also carried $1 million in liability insurance to ensure that the public is protected from financial loss when accidents do occur.[41]

The fact that Respondents have authority from the Commission to provide the very transportation network services that are the subject of this proceeding, along with these various compliance measures and business practices geared toward safety and the protection of the public, demonstrates that deterrence need not be a goal of any civil penalty imposed in this proceeding. These facts further support the need to set aside the I.D. in its entirety.

d. Commission's prior rulings of immediate need

The rationale underlying the Commission's *ETA Order* and its grant of a two-year experimental certificate are further evidence of the arbitrary and capricious nature of the I.D.'s recommended civil penalty. In the *ETA Order*, the Commission recognized an 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 scheduling of transportation services."[42] The Commission reaffirmed these findings in granting Rasier-PA two-year experimental authority certificates to provide transportation network services in Allegheny County.[43] Therefore, the recommendation that a $50 million fine be imposed on the Respondents for providing Allegheny County residents and visitors access to desperately needed reliable, affordable and safe transportation during a brief period of operation prior to obtaining authority from the Commission demonstrates that the

[40] Tr. 133-134 (May 6, 2015).
[41] Tr. 128 (May 6, 2015).
[42] *ETA Order* at 12.
[43] *December 5, 2014 Order.* The Commission approved Rasier-PA's Compliance Plan and issued the certificate on January 29, 2015.

I.D. is based on emotions or a desire for media attention (albeit negative) rather than the record and Commission precedent.

e. Good faith belief that no authority was required

The suggestion that an excessive civil penalty be imposed on the Respondents also does not reflect the evidence that was introduced in this proceeding to show that the Respondents had a good faith belief that no additional authority was required. Mr. Feldman testified that before deciding to launch transportation network services in Allegheny County, the Respondents considered both market demand and regulatory permissibility. Based on the Respondents' research, it was clear that the demand was tremendous.[44] In considering the regulatory regime, Mr. Feldman testified that the Respondents had a brokerage license issued to Gegen, LLC ("Gegen"),[45] which they believed created regulatory permission to launch the service.[46]

In fact, the Respondents continue to believe that transportation network services are outside the Code's definition of "common carrier." Even the Commission has recognized that this is a grey area, specifically pointing to the various bills that are pending in the General Assembly. *ETA Order* at 20. Indeed, in approving the settlement in the *Lyft Initial Decision*, the ALJs recognized that the "uncertainty in the regulatory framework relating to transportation network companies may offer some justification for the launch" of transportation network services without first securing authority from the Commission. *Id.* at 18. Yet, the lack of the same acknowledgment in the I.D. in this proceeding demonstrates a lack of impartiality that is required of Commission rulings.

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[44] Tr. 134 (May 6, 2015).
[45] Gegen has authority to operate as a broker under a license issued by the Commission on March 1, 2013 at Docket No. A-2012-2317300 and to operate as a limousine provider under a certificate of public convenience issued by the Commission on October 29, 2013 at Docket No. A-2012-2339043.
[46] Tr. 135.

f. Mischaracterization of facts and legal positions

As will be demonstrated throughout the Exceptions, the I.D. mischaracterizes many of the facts in the record and the legal positions of the Respondents to the point that it cannot be relied on even for an accurate recitation of these items. By way of example, the I.D. suggests that the Respondents continued operating after the issuance of the cease and desist order because they "did not want to comply with it"[47] and "based on Uber's view of the needs of the market.[48]

However, testifying for the Respondents, Mr. Feldman provided a detailed explanation for that decision, noting initially that on July 24, 2014, the very same date on which the Commission issued the cease and desist order, it also granted conditional ETA to Rasier-PA based on an immediate need that existed for the Respondents' services in Allegheny County. He further explained that by then, the Respondents had been operating for five months and had offered thousands of trips, meaning that individuals who previously could not move around the City of Pittsburgh were now relying on the App-based service for transportation to medical appointments and getting home safely from a bar at night, rather than drinking and driving. Besides the tremendous need for the service, Mr. Feldman also noted that drivers were relying on the income earned from operating on the platform to pay their bills and raise their families. He concluded: "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."[49]

Another example of a mischaracterization relates to the reason for filing the experimental services application by Rasier-PA. The I.D. finds that "Uber filed an application for experimental authority because the Commission advisory staff advised that Uber needed

[47] I.D. at 26.
[48] I.D. at 7, Finding of Fact No. 25.
[49] Tr. 137-138 (May 6, 2015).

additional authority other than the authority provided by Gegen's brokerage license."[50] A review of the testimony cited by the I.D. shows that Mr. Feldman actually testified that the application was filed because the Commission advisory staff suggested that there may be a need for additional authority.[51] While this may not seem like a significant difference, the I.D. later comments that the Respondents filed an application because they knew that additional authority was required based on discussions with staff.[52] As this factor is relevant to the Respondents' good faith in launching operations without authority and in continuing to provide services after the issuance of the cease and desist order, it is important for the Commission to have an accurate description of Mr. Feldman's testimony.

The I.D. also finds that "[f]rom February 11, 2014 through and including August 20, 2014, there were at least nine accidents which "could lead to an insurance claim."[53] In reality, Mr. Feldman's testimony was that there were *only* (not at least) nine accidents *or incidents* during that timeframe that could have even led to the filing of an insurance claim.[54] Further, the I.D. finds that "Mr. Feldman did not know if there were other incidents that did not lead to an insurance claim."[55] However, he testified that those nine incidents were the extent of "anything that could even be considered towards an insurance claim,"[56] and that to his knowledge, there were no other accidents or incidents.[57]

Just these few examples demonstrate the overall unreliability of the I.D. in describing the testimony and the Respondents' positions. As the I.D. appears to go to great lengths to portray

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[50] I.D. at 7, Finding of Fact 22.
[51] Tr. 135 (May 6, 2015).
[52] I.D. at 25-26.
[53] I.D. at 8, Finding of Fact 32.
[54] Tr. 138-139, 168 (May 6, 2015).
[55] I.D. at 8, Finding of Fact 33.
[56] Tr. 138-139 (May 6, 2015).
[57] Tr. 168 (May 6, 2015).

all of Respondents' testimony and arguments in the most negative light possible, the Commission cannot rely on it for even the most basic purposes and must go back to square one, placing itself in the role of the presiding officers.

B. **Exception No. 2**: The I.D. errs in finding that the services provided by the Respondents fall under the statutory definition of common carrier or broker.

The I.D. improperly concludes that the Respondents offered transportation for compensation without authority from the Commission in violation of Code Sections 1101 and 2501.[58] 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.[59] 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."[60] 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

[58] 66 Pa. C.S. §§ 1101 and 2501. I.D. at 12-17 and 53 (Conclusion of Law 3).
[59] 66 Pa.C.S. §§ 1101 and 2505.
[60] 66 Pa.C.S. § 102 (definitions).

partnering with drivers using their own personal vehicles to transport persons who requested transportation through the App.[61] Therefore, they were not operating as common carriers.

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), 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. *See 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) ("*Drexelbrook*"), 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.

The I.D. finds the Respondents' reliance on these cases misplaced, reasoning that "[a]ccess to a mobile device or computer in order to arrange for transportation does not identify a

[61] Exhibit ALJ 1-Revised.

special class of persons who may use the Uber service."[62] In reaching this finding, the I.D. fails to properly characterize or consider the Respondents' legal argument. Specifically, the Respondents did not claim that access to a mobile device or computer identifies a special class of persons who may use the App to arrange for transportation. Rather, the Respondents argued that "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."[63]

Therefore, having access to a mobile device or computer is only one of four steps that a potential rider must take in order to be eligible to use the service. In addition, the potential rider must also download the App, agree to the Respondents' terms and conditions and provide valid payment information, such as a credit card. These other elements are all required in order for a potential rider to be able to arrange transportation though the App. Since the Respondents' services are only available to the segment of the public that fulfills these four criteria, they are private in nature and do not require a certificate of public convenience.

Similarly, the Respondents were not acting as 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."[64] The Respondents were not engaged in selling, providing, furnishing, contracting or arranging transportation by a motor carrier. Rather, the Respondents' activities were limited to partnering with drivers to operate on the platform and receive leads from potential riders via the App. Further, the Respondents were not contracting for or arranging specific transportation for passengers. To the contrary, the riders themselves used the App, after

[62] I.D. at 16.
[63] Respondents' Brief at 22.
[64] 66 Pa.C.S. § 2505(a).

agreeing to terms and conditions established by the 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.[65]

C. **Exception No. 3**: In recommending an arbitrary and capricious civil penalty that bears no resemblance to the record in this proceeding, the I.D. errs in applying the relevant factors set forth in the Commission's policy statement.

The Commission's policy statement[66] 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 – Pennsylvania, 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.

An appropriate application of these standards would result in the imposition of no civil penalty or a low civil penalty - certainly no more than was imposed on Lyft. Every single factor supports the imposition of no civil penalty or a low civil penalty. In proposing a civil penalty that is 200 times that imposed by the *Lyft Order*, the I.D. fails to appropriately apply these standards. The I.D.'s numerous errors are discussed below.

1. Seriousness of conduct and seriousness of consequences resulting from conduct.

The I.D. reviews the first two factors of the policy statement together and concludes that "providing transportation without authorization from the Commission is a serious violation of the

[65] Exhibit ALJ 1-Revised.
[66] 52 Pa. Code § 69.1201.

Public Utility Code,"[67] and that the "risk to public safety as a consequence of the violation merits a higher penalty."[68] In reaching these conclusions, the I.D. summarily dismisses the Respondents' arguments and heavily relies on I&E testimony from the June 26, 2014 hearing about potential public safety concerns, which was offered in support I&E's Petition for Interim Emergency Relief.[69]

The Commission should reject the I.D.'s conclusions that the conduct merits a higher civil penalty for several reasons. Initially, when the Respondents launched the App in February 2014, they believed that the Gegen brokerage license covered their operations.[70] By the time the Commission had 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.[71] Moreover, at the same time as the Commission reached this determination, it also conditionally granted ETA to Rasier-PA, finding "that an immediate need for Rasier's service exists and that there is substantial benefit to be derived from the initiation of a competitive service." *ETA Order* at 10. Concluding that the consumer statements supporting the underlying application demonstrated "the inadequacy of existing transportation services in Allegheny County," the Commission found that the introduction of this App-based service would "provide a wide ranging, faster and more user-friendly scheduling of transportation services." *Id.* at 13.

In the *Lyft Initial Decision*, the ALJs acknowledged the "novel nature of service and the uncertainty of the Commission's jurisdiction" over the use of an App to facilitate transportation

[67] I.D. at 24.
[68] I.D. at 24.
[69] I.D. at 22-23.
[70] Tr. 135 (May 6, 2015).
[71] Tr. 137-138 (May 6, 2015).

network services[72] and found that the "uncertainty in the regulatory framework relating to transportation network companies may offer some justification for the launch...without first securing authority from the Commission."[73] The ALJs made these concessions in the *Lyft Initial Decision* even though Lyft had relied on no other authority from the Commission to explain its rationale for launching operations.

In the I.D. in this proceeding, the ALJs offer no such allowances, but rather focus extensively on I&E's unsubstantiated and speculative concerns about public safety.[74] As the Respondents argued in their Brief, the record is completely devoid of any evidence about public safety ever being in jeopardy.[75] Respondents further pointed to the following reasons as explaining why public safety was not in jeopardy: (i) they have compelling business reasons to ensure driver integrity and vehicle safety; (ii) they follow standard business practices that include criminal background checks, driver history checks, and vehicle inspections; and (iii) they hold $1 million in liability insurance that ensures that the public is protected from financial loss when accidents do occur.[76]

Indeed, I&E's own witness could cite to no safety concerns that he observed during the trips he arranged through the App. He also acknowledged that companies have their own inherent business reasons to employ practices designed to avoid accidents and incidents and that regulatory oversight does not prevent them from occurring.[77] It is particularly telling that despite all of I&E's hyperbole about public safety concerns, and I&E's ability to conduct vehicle

[72] Lyft I.D. at 14.
[73] Lyft I.D. at 18.
[74] I.D. at 24.
[75] Respondents' Brief at 36-39.
[76] Respondents' Brief at 36.
[77] Tr. 38-40 (June 26, 2014).

inspections since August 21, 2014, it introduced not a single shred of evidence of any unsafe practices of the Respondents during the pendency of this proceeding.

Additionally, in the context of discussing public safety concerns, the I.D. mischaracterizes Mr. Feldman's testimony regarding the minimal incidents that occurred during the period when the Respondents did not hold Commission authority. Specifically, the I.D. states that: "Mr. Feldman testified that during the relevant period of time, there were at least nine accidents which 'could lead to an insurance claim.' He did not know if there other incidents that did not lead to an insurance claim. While this may seem like a small number, it highlights the need for Commission oversight to protect the public."[78]

As explained earlier, this language in the I.D. does not accurately characterize Mr. Feldman's testimony. In reality, Mr. Feldman's testimony was that there were *only* (not at least) nine accidents *or incidents* during that timeframe that could have even led to the filing of an insurance claim.[79] He also testified that those nine incidents were the extent of "anything that could even be considered towards an insurance claim,"[80] and that to his knowledge, there were no other accidents or incidents.[81] In addition, his testimony indicated that no accidents had occurred involving fatalities or serious bodily injury, a fact that the I.D. also fails to acknowledge.[82]

The conjecture in the I.D. about the potential for serious consequences of the conduct is not consistent with Commission precedent and may not be relied upon by the Commission in determining the amount of any civil penalty. In short, no evidence has been presented of any harm that resulted from the Respondents' operations or of any shortcomings in the safety

[78] I.D. at 24-25 (footnotes omitted).
[79] Tr. 138-139, 168 (May 6, 2015).
[80] Tr. 138-139 (May 6, 2015).
[81] Tr. 168 (May 6, 2015).
[82] Tr. 138 (May 6, 2015).

practices observed by the Respondents. It is well-settled that Commission decisions must be supported by substantial evidence in the record, and that more is required than a "mere trace of evidence or a suspicion of the existence of a fact." *Norfolk and Western Railway Co. v. Pennsylvania Public Utility Commission*, 489 Pa. 109, 413 A.2d 1037 (1980).

While the Commission has considered the potential for catastrophic loss and injury in its analysis of the seriousness of the consequences, those determinations have been based on systemic evidence of widespread and ongoing improper safety practices by a public utility, where one incident could affect masses of customers. For instance, in *Pa. Pub. Util. Comm'n, Law Bureau Prosecutory Staff v. Peoples Natural Gas Company*, Docket No. M-2009-2086651, 2010 WL 1975375 (Order entered May 6, 2010), the matter involved the use of improper procedures in abandoning a natural gas service pipeline and the failure to accurately mark the pipeline. Under those circumstances where significant departures from established standards had been identified, the Commission found that "the potential for catastrophic loss and injury was very high." *Id.* at 8. In other situations, the Commission has found that consequences are not serious if they do not involve personal injury or property damage. *See, e.g., Pa. Pub. Util. Comm'n., Law Bureau Prosecutory Staff v. Duquesne Light Company*, Docket No. M-2014-2165364, 2014 WL 2427009 (Order entered October 2, 2014); *Pa. Pub. Util. Comm'n., Bureau of Investigation and Enforcement v. Scott A. Dechert t/a Distinctive Limousine Service*, Docket No. C-2012-2334904, 2013 WL 3043436 (Order entered October 17, 2013).

2. Whether conduct was intentional.

In the discussion of this factor, the I.D. characterizes the continued operation after July 1, 2014 as "a deliberate disregard of the Commission's authority" and refers to the filing of an ETA application on July 2, 2014 as evidencing the Respondents' "awareness that it was providing

transportation in violation of the Public Utility Code."[83] Although the Respondents do not dispute that the decision to continue operating after July 1, 2014 was intentional, the Respondents disagree that the decision was made in "a deliberate disregard of the Commission's authority." To the contrary, as Mr. Feldman explained, the Respondents considered various factors in making the decision to continue operating – a decision that they still believe was lawful given the statutory definitions of common carrier and broker.

Mr. Feldman noted initially that on July 24, 2014, the very same date on which the Commission issued the cease and desist order, it also granted conditional ETA to Rasier-PA, finding that an immediate need existed for the Respondents' services. He further explained that the Respondents had been operating for five months and were offering thousands of trips. This meant that individuals who previously could not move around the City of Pittsburgh were now relying on the service for transportation to medical appointments and getting home safely from a bar at night, rather than drinking and driving. Besides the tremendous need for the service, Mr. Feldman also noted that by the time the cease and desist order was issued, drivers were relying on the income earned from operating on the platform to pay their bills and raise their families. He concluded: "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."[84]

As to the filing of the ETA application on July 2, 2014, its mere filing is not evidence of any awareness or agreement that authority was required. Indeed, the Respondents are continuing to argue in these Exceptions that its operations do not fall under the statutory definitions of "common carrier" or "broker" requiring Commission authority. The only significance of the

[83] I.D. at 27.
[84] Tr. 137-138 (May 6, 2015).

filing of the ETA application on July 2, 2014 is that it shows a desire on the part of the Respondents to be in compliance -- as soon as possible -- with the requirements that the ALJs set forth in the July 1, 2014 cease and desist order. The Respondents made the ETA filing the very next day, which demonstrates how seriously the Respondents viewed that order.

The I.D. also claims that the Respondents have "not been 'contrite' or in any way recognized the necessity of a consequence for flouting the Commission's authority."[85] Given that this matter has proceeded to full litigation, despite the Respondents' numerous good faith efforts to reach a settlement with I&E, the Respondents have necessarily taken litigation positions designed to fully protect their rights and defend the Amended Complaint. However, through the filing of no less than three motions seeking the assistance of the ALJs to facilitate settlement discussions with I&E, and advancing numerous settlement offers to I&E, the Respondents certainly have offered significant consequences in the form of a civil penalty as a result of the operation of the platform prior to obtaining Commission authority. Moreover, the Respondents have set forth legitimate explanations and valid legal arguments for why their operations did not require Commission authority and have described their solid reasons for continuing to operate after the issuance of the cease and desist order.

Finally, it is difficult to surmise how a company can be described as "flouting the Commission's authority" when it obtained a brokerage license before launching the App; took the advice of advisory staff to file an application for experimental authority; filed an ETA application immediately following the issuance of a cease and desist order by the ALJs; and promptly complied with the Commission's conditions in approving the ETA application, which resulted in the issuance of a certificate of public convenience on August 21, 2014. Rasier-PA's

[85] I.D. at 29.

exemplary track record of compliance since being certificated is also well-known to the Commission and paints the picture of a model certificate holder, certainly not an entity that flouts the Commission's authority.

3. Modification of internal practices.

In considering this factor, the I.D. acknowledges that once Rasier-PA was granted authority in August 2014, "it has complied with the technical directives of the Commission regarding the ridesharing service."[86] The I.D. goes on to say, however, that "this compliance occurred well after Uber was aware that its ridesharing service provided transportation without proper authorization from the Commission. Therefore, while it may offer some mitigation of penalty, it is only a small measure."[87]

These few sentences contain several errors and again show the lack of objectivity that is required of Commission rulings. At the outset, Rasier-PA has done far more than comply "with the technical directives of the Commission," as suggested by the I.D. The Compliance Plan-Quarterly Report filed by Rasier-PA on April 30, 2015[88] demonstrates full and ongoing compliance with the numerous substantive directives in the Commission's *December 5, 2014 Order* in the areas of: (i) primary liability insurance coverage, including notifications to drivers; (ii) driver integrity measures, comprised of information about annual criminal background checks, annual reviews of driver history records, automatic disqualifications, and zero tolerance policy for drug and alcohol use; (iii) vehicle safety standards, including annual inspections, vehicle maintenance, age of vehicles, and markings on vehicles; and (iv) recordkeeping, reports and audits, under which the Respondents have been subjected to numerous Commission staff requests relating to the review of documents.

[86] I.D. at 29-30.
[87] I.D. at 30.
[88] Respondent Ex. No. 2.

The Respondents have also filed new applications for authority from the Commission. Specifically, they filed an application on February 27, 2015 requesting authority to operate transportation network services in the counties previously excluded from its statewide application. Due to the filing of a protest and the applicant's request to hold the matter in abeyance pending the possible enactment of legislation covering transportation network services, the application is still pending.[89] The Respondents also filed a statewide property application on March 31, 2015 which was approved by Secretarial Letter issued on April 14, 2015, with a certificate of public convenience issued on April 16, 2015.[90]

As to the timing of compliance, Rasier-PA complied with the Commission's *ETA Order* within a matter of weeks after its entry. Since the cease and desist order was entered on the same date as the *ETA Order*, complying within a few weeks is hardly "well after" being aware that the Commission viewed the transportation network services as requiring Commission authority. Moreover, throughout the period of operations without Commission authority, the Respondents were in communications with advisory staff about what authority may be needed;[91] filed a two-year experimental authority application; filed an ETA application; complied with the conditions of the *ETA Order*; and obtained a certificate. This level of activity is not indicative of a company that is ignoring the law, but rather one that is striving for compliance.

In any event, it is customary for modifications to internal practices to occur after the filing of a complaint, even following its adjudication. By way of example, in *Commonwealth of Pa., et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Initial Decision issued November 19, 2015) ("*IDT Initial Decision*"), the respondent - an electric generation supplier - was alleged

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[89] *Application of Rasier-PA for Experimental Services (Excluded Counties)*, Docket No. A-2015-2469287.
[90] *Application of Rasier-PA for Statewide Property Authority*, Docket No. A-2015-2474715 (Secretarial Letter dated April 16, 2015).
[91] Tr. 135 (May 6, 2015).

to have engaged in misleading and deceptive marketing prices. In the *IDT Initial Decision*, the ALJs reviewed the factors established by the policy statement to determine whether provisions of a settlement agreement were in the public interest.

Discussing this factor relating to "efforts to modify internal practices and procedures," the ALJs referred to the "extensive and pervasive modification to business practices" that the respondent had agreed to as part of the settlement. *Id.* at 54. Those modifications included future changes that the respondent would make to its product offering, marketing practices, third party verifications, disclosure statement, training, compliance monitoring, reporting and customer service. *Id.* The ALJs found that these modifications that would be made in the future were relevant in adjudicating the matter. *Id.* at 55. *See also Pa. Public Util. Comm'n., Law Bureau Prosecutory Staff v. PPL Electric Utilities Corporation*, Docket No. M-2009-2058182 (Order entered September 10, 2009). Therefore, certainly, modifications made during the pendency of the proceeding to ensure compliance with the Commission's requirement should weigh heavily in mitigating any civil penalty.

4. Number of affected customers.

The I.D. finds that "a substantial number of people were put at risk which merits a higher penalty."[92] This finding is based on the speculative testimony of I&E's witness suggesting that "[e]ach and every customer could have been potentially affected, and every member of the public, including motorists and pedestrians that were in the area, *could* have also been affected."[93]

Simply stated, there is absolutely no support in the record for any finding concerning the number of customers who were adversely affected or in concluding that that the potential for

[92] I.D. at 30.
[93] I.D. at 30; Tr. 115-16 (May 6, 2015) (emphasis added).

adverse impact existed. As discussed above, the record is devoid of any evidence about public safety ever being in jeopardy.

Indeed, I&E's own witness could cite to no safety concerns that he observed during the trips he arranged through the App. He also acknowledged that companies have their own inherent business reasons to employ practices designed to avoid accidents and incidents and that regulatory oversight does not prevent them from occurring.[94] Despite I&E's ability to conduct vehicle inspections since August 21, 2014, it introduced not a single shred of evidence of any unsafe practices of the Respondents during the pendency of this proceeding.

The Respondents further pointed to the following reasons as explaining why public safety was not in jeopardy: (i) they have compelling business reasons to ensure driver integrity and vehicle safety; (ii) they follow standard business practices that include criminal background checks, driver history checks, and vehicle inspections; and (iii) they hold $1 million in liability insurance that ensures that the public is protected from financial loss when accidents do occur.[95] In addition, Mr. Feldman testified that no accidents had occurred involving fatalities or serious bodily injury, and that an extremely small number of accidents or incidents occurred that could even lead to the filing of an insurance claim.[96]

The factor about the number of affected customers should be viewed from the opposite angle in this case: how many members of the public would have gone without transportation if they had been unable to access transportation network services through the Respondents' App? The launch of the App gave thousands of riders access to reliable, affordable and transportation

[94] Tr. 38-40 (June 26, 2014).
[95] Respondents Brief at 36.
[96] Tr. 138-139 (May 6, 2015).

that was otherwise unavailable, filling a massive void in Allegheny County's transportation infrastructure.[97]

No customers complained about the services they received through the App. To the contrary, customers used the services and overwhelmingly supported Rasier-PA's ETA application, urging the Commission to ensure that these services continued to be made available.[98] The consideration of this factor weighs in favor of no or a lower penalty.

5. Compliance history.

Reasoning that this factor focuses on a respondent's historical conduct and the Respondents began operating in 2014, the I.D. concludes that the Respondents have no prior compliance history and that this factor "merits neither mitigation nor magnification of the civil penalty."[99] However, evidence was introduced into the record to show that Gegen has authority to operate as a broker under a license issued by the Commission on March 1, 2013 at Docket No. A-2012-2317300,[100] and additional authority to operate as a limousine provider under a certificate of public convenience issued by the Commission on October 29, 2013.[101] As Mr. Feldman testified, no complaints have been sustained against Gegen under either the license or the certificate.[102] Therefore, the Respondents have an unblemished compliance history and this factor mitigates any civil penalty that is imposed.

Moreover, nothing in the policy statement suggests that compliance during the pendency of a proceeding cannot be considered in the evaluation of this factor. As noted above, the Respondents have a proven track record of compliance over the past year, including adherence to

[97] Tr. 134-135, 137-138.
[98] ETA Application and *ETA Order*.
[99] I.D. at 31.
[100] Exhibit ALJ-1 Revised ¶ 3.
[101] Exhibit ALJ-1 Revised ¶ 4.
[102] Tr. 142 (May 6, 2015).

all of the conditions and requirements imposed on Rasier-PA in connection with its ETA and its two-year experimental services authority. This evidence further support a mitigated civil penalty.

6. Cooperation with investigation.

Referring to a separate civil penalty relating to discovery disputes and sanctions, the I.D. concludes that "the factor regarding cooperation does not play a role in our civil penalty assessment."[103] Yet, the title of the subheading for the discussion of this this factor is: "Uber did not cooperate with the Commission: 69.1201(c)(7)." Further, the ALJs' perception of a lack of cooperation by the Respondents infiltrates the discussion and conclusions throughout the I.D.

As this was a litigated proceeding, this factor does not apply. In *Bleiman v. PECO Energy Company*, Docket No. F-2012-2284038 (Initial Decision issued November 20, 2012; Order entered June 13, 2013), the ALJ concluded that this factor does not apply because the case did not involve a Commission prosecution. While the I.D. in this proceeding refers to the Respondents' characterization of *Bleiman* as misleading, it was exactly on point. Just like in *Bleiman*, this proceeding was initiated by the filing of a complaint. It was not an informal investigation, as defined by the Commission's regulations.[104] Therefore, this factor is not relevant.

In any event, the Respondents did, in fact, cooperate with I&E in several significant ways. Besides several good faith attempts to resolve this matter through a settlement, the Respondents entered into numerous factual stipulations that allowed I&E to forego the presentation of evidence on many of the key allegations in its Amended Complaint. Importantly, the Respondents stipulated that the App was launched in Allegheny County on February 11,

[103] I.D. at 32.
[104] 52 Pa. Code § 3.113.

2014, one month earlier than claimed by I&E, and provided documentation to substantiate that date.[105] The Respondents also eased I&E's burden of proof by offering a detailed explanation of the roles played by the subsidiaries in operating the digital platform.[106]

7. Deterrence.

The I.D. finds that "[d]eterrence is a significant consideration when crafting an appropriate civil penalty."[107] While the Respondents do not take issue with that statement, the remainder of the I.D.'s discussion should be disregarded. The entire basis for the I.D.'s conclusion that "this factor merits heavily in favor of a substantial civil penalty"[108] is that it "serves a wider public purpose of deterring other entities who may wish to launch an innovative utility service without Commission approval."[109] The I.D. contains no discussion of the amount of civil penalty that is needed to deter the Respondents from future violations. Further, it ignores the fact that the Respondents have already obtained the authority that is the subject of this proceeding and that compliance has been achieved; nor does it address why deterrence is a factor at all.

In the *HIKO Initial Decision*, which involved improper billing practices of an EGS, the ALJs rejected the testimony of the I&E witness suggesting that the civil penalty should serve to deter other entities in the retail electric market. They concluded that "[w]hether the civil penalty will deter other EGSs from the same misconduct is not a factor for consideration before us because the Commission" did not expressly define the deterrence factor in the policy statement to include such a consideration. Therefore, the ALJs did not consider the level of civil penalty necessary to deter other EGSs from violating the Commission's regulations. *Id.* at 48. These

[105] Exhibit ALJ-1 Revised ¶ 7; I&E Exhibit No. 4.
[106] I&E Exhibit No. 4.
[107] I.D. at 33.
[108] I.D. at 34.
[109] I.D. at 33.

conclusions are consistent with the analyses typically performed by the Commission in reviewing the adequacy of civil penalties where no mention is made of the need to deter other entities from violations. *See, e.g., UGI Order* at 21 ("We also believe that, along with the remedial measures that UGI-PNG is engaging in to enhance the safety of its distribution system, the civil penalty amount here....will be a sufficient deterrent to prevent similar occurrences in the future").

In the recent *HIKO Energy Order*, the Commission agreed that it normally crafts "penalties specific to the individual case and circumstances at hand." *Id.* at 44, fn. 13. However, it found that it has "leeway" to consider the impact of its "actions as a deterrence to the industry as a whole." *Id.* The Commission explained that "[d]oing so is an effective means of assuring the industry understands the importance of compliance with our Regulations to the development of a fair and reliable competitive market." *Id.* The Commission referred to another decision where it had indicated a "need to send a clear message to EGSs that the egregious and deliberate behavior utilized in this case...will not be tolerated." *Towne v. Great American Power, LLC*, Docket No. C-2012-2307991 (Order entered October 18, 2013) at 22.

The Commission's rationale in the *HIKO Energy Order* for considering the deterrent effect of a civil penalty on the EGS industry is not applicable here. In that case, the Commission was interpreting and applying specific regulations that apply to EGSs and seeking to ensure that all EGSs participating in the market are fully aware of the importance of compliance with those requirements. In this proceeding, the only other known entity providing transportation network services in Pennsylvania has already obtained a certificate of public convenience from the Commission.[110] "Sending a message" to unknown entities that may, in the future, launch a new

[110] *Applications of Lyft, Inc.*, Docket Nos. A-2014-2415045 and A-2415047 (Orders entered February 12, 2015).

and innovative service that has yet to be identified, and that may or may not require Commission authority, serves no purpose.

In any event, the fact that the Respondents have been authorized by the Commission since August 21, 2014 to provide the very transportation network services that are the subject of this proceeding demonstrates that deterrence is not a factor at all. The Commission conditionally granted Rasier-PA's ETA application on July 24, 2014,[111] and Rasier-PA complied with the conditions, resulting in the issuance of a certificate of public convenience on August 21, 2014. Rasier-PA successfully operated under the ETA authority until January 29, 2015 when the Commission issued a two-year experimental services certificate. Rasier-PA continues to operate under the experimental certificate. As compliance is the goal of enforcement efforts and civil penalties, it has been achieved.

Other factors that weigh against any need for deterrence include the commitment to compliance with Commission requirements that has been demonstrated in this proceeding, through the filing of compliance plans, new applications for approval to provide service, and industry-wide reports. In addition, the Respondents have gone to great lengths to cooperate with I&E on routine compliance matters, investigations involving individual consumers and information requests.

8. Past Commission decisions in similar situations.

The I.D. errs when it finds that the *Lyft Order* "plays no role in our determination," and that the Respondents' reliance on the civil penalty approved in the *Lyft Order* is "misplaced and

[111] *ETA Order.*

inappropriate."[112] The factor in the policy statement is straightforward and provides simply that the Commission *will* consider "[p]ast Commission decisions in similar situations."[113]

It would be impossible to find a more similar proceeding than presented by the *Lyft Order*. That proceeding involved identical transportation network services, the exact time period and the same geographic region. Given the Commission's criterion explicitly requiring a consideration of outcomes in similar proceedings, the I.D. commits a fundamental error in disregarding the civil penalty approved in the *Lyft Order*.[114]

Nothing in the policy statement suggests that past decisions in settled proceedings may not or should not be considered. The I.D. refers only to the provision in the policy statement that provides that in settled cases, the "factors and standards will not be applied in as strict a fashion as in a litigated proceeding."[115] However, affording the parties some flexibility in reaching amicable resolutions to complaints does not mean that Commission orders approving settlement agreements are of no value in resolving litigated proceedings. Indeed, despite giving settling parties some flexibility, the policy statement still requires the use of these factors to determine if a settlement is "in the public interest."[116] Having concluded in the *Lyft Order* that the civil penalty was in the public interest, it is incumbent upon the Commission to use that civil penalty as a basis upon which to establish any civil penalty in this identical proceeding.

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[112] I.D. at 34.
[113] 52 Pa. Code § 69.1201(c)(9) (emphasis added).
[114] The Respondents are aware that the Commission has found that settlements do not establish legal precedent. *See PECO Default Service Order*. However, that does not mean that the civil penalties established in settlements should be ignored. Indeed, the fact that the Commission found a $250,000 civil penalty to be in the public interest in an *identical* proceeding is of extremely strong persuasive value in determining an appropriate civil penalty here. This is particularly true when I&E exercised its prosecutorial discretion to enter into a settlement with Lyft but has refused to enter into a similar settlement with the Respondents. To ignore the Lyft settlement in adjudicating this matter would afford inappropriate discretion to I&E in making those arbitrary judgment calls.
[115] 52 Pa. Code § 69.1201(b).
[116] 52 Pa. Code § 69.1201(a).

Rather than relying on the only identical proceeding that exists, and in fact expressly disregarding it, the I.D. refers to other cases in which the Commission has imposed civil penalties on entities that provided transportation services without authority from the Commission. However, in each of those cases, the entities were providing traditional transportation services that were clearly regulated by the Commission. In some situations, the entities had previously been found by the Commission as needing authority, which they ignored. Other entities had held authority from the Commission, which had later been revoked or suspended. *See Pa. Pub. Util. Comm'n., Bureau of Transportation & Safety v. Brungard,* Docket No. A-00113098C0101 (Opinion and Order entered June 2, 2002)*; Blue & White Lines, Inc. v. Waddington,* Docket No. A-00108279C9301 (Opinion and Order entered February 13, 1995), *affirmed sub nom Publ. Util. Comm'n v. Waddington,* 670 A.2d 199 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied,* 678 A.2d 368 (Pa. 1996). Therefore, those cases are all distinguishable from this proceeding.

The only prior Commission decision that involves common questions of fact and law is the *Lyft Order*. It is an abuse of discretion to ignore it, and by doing so, the I.D. reaches an absurd result that is arbitrary and capricious, as well as contrary to well-established Commission precedent.

D. **Exception No. 4:** The I.D. errs in determining that a per trip civil penalty is lawful and appropriate.

The I.D. concludes that a per trip civil penalty should be imposed on the Respondents.[117] As this approach is not authorized by Code Section 3301[118] and is not warranted in this proceeding, the Commission should reject this conclusion.

[117] I.D. at 21-22 and at 53; Conclusion of Law 5.
[118] 66 Pa. C.S. § 3301.

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.[119] Code Section 3301(b) provides that for each and every day's continuance in such violation shall be a separate and distinct offense.[120]

The I.D. relies on the Commonwealth Court's interpretation of Code Section 3301 in *Newcomer Trucking, Inc. v. Pa. Public Utility Commission*, 531 A.2d 85 (Pa. Cmwlth. 1987) ("*Newcomer*"), 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 *Newcomer,* the allegations did not involve unauthorized service or the need to determine whether Commission authority was required. Rather, that case involved a property carrier that 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.

The present proceeding alleges unauthorized service and the issue that must be decided is whether Commission authority is required to utilize a digital platform to facilitate the transportation of passengers. Indeed, the Commission's cease and desist order did not focus on individual passenger trips but rather addressed the use of the Respondents' "digital platform to facilitate transportation of passengers utilizing non-certificated drivers in their personal vehicles." *Petition of Bureau of Investigation and Enforcement for Interim Emergency Order*,

[119] 66 Pa. C.S. § 3301(a).
[120] 66 Pa. C.S. § 3301(b).

Docket No. P-2014-2426846 (Order entered July 24, 2014), at 26 (Ordering Paragraph 3).[121] Even the Amended Complaint that I&E filed on January 9, 2015 focuses on the launch of the App facilitating passenger transportation as the activity it sought to address.[122]

Therefore, the question in this proceeding is whether using the digital 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. Therefore, any penalty that is imposed should be assessed on a per day basis. Also, because the Respondents did not know until the Commission issued a cease and desist order on July 24, 2014 that the Commission viewed the use of a digital platform to facilitate transportation of passengers required Commission authority, any civil penalty should address only the operations after that date and until August 20, 2014.

Even if the Commission determines that it *may* issue a per trip civil penalty, it should refrain from doing so in this proceeding. 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 had received a certificate to provide transportation network services, was inappropriate and should not be endorsed by this Commission.

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 it used in the original complaint involving Lyft. 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

[121] Exhibit ALJ 3 at Ordering Paragraph 3.
[122] Amended Complaint ¶ 46.

desist order by the ALJs. A per day approach has been followed on many prior occasions.[123] At best, the approaches taken by I&E in determining whether to seek a per day or per trip civil penalty in this proceeding and the *Lyft* proceeding, as well as other proceedings cited here, have been inconsistent and arbitrary.

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."[124] 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 do exist, they are all subjected to the same criminal background checks, driver history record checks, state inspections, and state requirements governing all drivers, and are covered by the same liability insurance policy,[125] rendering any differences moot.

Other compelling reasons weighing against a per trip civil penalty include the fact that the services in question fall in a grey area, at worst, and have been determined by the Commission to be "new and innovative," warranting the creation of an experimental scheme of classification. Moreover, the Respondents believed they had authority that covered these services at the time the App was launched in Allegheny County. Additionally, the services provided by the Respondents have filled a void in Allegheny County's transportation

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[123] *See, e.g. Pa. Pub. Util. Comm'n., Bureau of Transportation and Safety v. S.S. Sahib Cab Co.,* Docket No. A-00121184C0601 (Order entered March 1, 2007); *Pa. Pub. Util. Comm'n., Bureau of Transportation and Safety v. J & E Transportation Service, LLC,* Docket No. A-00122121C0601 (Order entered September 15, 2006); *Pa. Pub. Util. Comm'n, Bureau of Transportation and Safety v. M&G Trucking, Inc.* (Order entered July 20, 2006). 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 assessed on a continuing per day basis; alternatively, I&E has simply used the evidence it gathered rather than inquiring about the total number of trips that may have been provided. *See, e.g., Pa. Pub. Util. Comm'n., Bureau of Transportation & Safety v. A-Apollo Transfer, Inc.,* Docket No. A-00098529C0501 (Order adopted October 6, 2005).

[124] I&E Brief at 33.

[125] Respondent Exhibit No. 2; Tr. 130-134 (May 6, 2015).

infrastructure. Finally, the record is completely devoid of any evidence of public safety concerns or gaps in liability insurance coverage in connection with the services that were provided.

E. **Exception No. 5**: The I.D. errs in imposing a civil penalty to address discovery issues.

The I.D. recommends imposition of a $72,500 civil penalty on the Respondents for failing to provide *two* discovery responses, which were not needed for the disposition of this proceeding. The civil penalty is calculated at $500 per day for each day from the due date of December 12, 2014 through the conclusion of the evidentiary hearing on May 6, 2015.[126] These civil penalties would be in addition to the sanctions already imposed on the Respondents by the ALJs' Interim Order dated March 25, 2015, including prohibitions on presenting evidence, cross examining witnesses or raising any challenges in any way related to discovery requests propounded by I&E and unanswered by the Respondents. These sanctions included a prohibition on asserting any claim or defense that some other affiliate or subsidiary was involved in providing the transportation services which are the subject of this proceeding.

No purpose would be served by imposing additional sanctions in the form of civil penalties on the Respondents. Further, the recommended imposition of a civil penalty to address discovery issues is in error for several reasons. Despite the I.D's lengthy discussion of the need for sanctions related to discovery,[127] the indisputable bottom line is that *two* discovery requests remain unanswered. Numerous other discovery responses were provided,[128] factual stipulations were entered into by the Respondents, including the launch date and the identification of the

[126] I.D. at 51.
[127] I.D. at 35-51.
[128] I&E Exhibit No. 4. These responses included information about the Respondents; Pennsylvania addresses; physical business locations; the number of employees at each location; an identification of the entity that approves or denies the requests of individuals to operate on the platform; how the software is downloaded onto a mobile device; the name of the insurer; the name of the entity that maintains credit card information of potential passengers; the name of the entity that is the recipient of the credit card payment; and the name of the individual with information regarding the number of passenger trips given through the App.

subsidiary that provided operations before Commission authority was obtained,[129] and remaining relevant evidence was offered at the evidentiary hearing.[130]

Obviously, neither outstanding discovery response was needed for this case to be prosecuted and adjudicated. The first request was for invoices, receipts, emails, records and documents sent to individuals who received rides in Allegheny County between February 11, 2014 and August 20, 2014. The second was for copies of licensing agreements between Uber Technologies, Inc. and its subsidiaries.

As to the request for invoices, receipts, emails, records and documents sent to individuals who received rides via the App in Allegheny County between February 11, 2014 and August 20, 2014, the Respondents objected to the production of this information on the basis that it contained confidential customer information, including email addresses and payment information. The Respondents specifically noted that the release of personal information about customers poses serious dangers for the public and liability concerns for the Respondents and referred to a Commission order addressing the importance of maintaining the privacy of customers' personal information. *See Interim Guidelines for Eligible Customer Lists*, Docket No. M-2010-2183412 (Order entered November 10, 2011) ("many customers have valid reasons for not wanting to disclose their customer information, and in terms of reasonable privacy expectations, customers should have the right and reasonable means to maintain the confidentiality of their account information"). The Respondents also emphasized that in this proceeding, customers would not even have a say about the information that might be shared or with whom it might be shared.

[129] ALJ Exhibit 1-Revised.
[130] Tr. 85-90 (May 6, 2015-Proprietary).

Despite these valid customer privacy concerns, the ALJs issued an Interim Order on October 3, 2014 granting I&E's Motion to Compel. The Respondents filed a Petition for Certification seeking interlocutory review of that Interim Order, followed by a brief in support of the Petition on October 14, 2014. However, the ALJs denied this Petition for Certification by Interim Order dated October 17, 2014, refusing to have this discovery matter immediately reviewed and resolved by the Commission. Also on October 14, 2014, the ALJs amended the October 3, 2014 Interim Order to "permit" the Respondents to redact confidential customer information such as email addresses, credit card numbers and social security numbers. Since the Commission's regulations do not allow a party to challenge a discovery ruling without the certification of the presiding officers,[131] the Respondents had no recourse for Commission review until such time as the I.D. would be issued and it could file Exceptions.

Given the fact that the Respondents provided the underlying trip data to which the documentation related, the only purpose cited by the I.D. for their continued relevance is that I&E was unable to verify the accuracy of the number of trips.[132] Yet, the ALJs refused to allow the Respondents at the hearing to present evidence to show how overly burdensome it would be to produce this information in redacted form (as had been later permitted on October 17, 2014 in amending the October 3, 2104 Interim Order on the Motion to Compel). When the Respondents proffered testimony at the hearing to describe the excessive time - one person an entire year – that it would take to physically print and manually redact (*i.e.* with a permanent marker) each document individually to exclude private customer information, the ALJs did not permit this testimony.[133] 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

[131] 52 Pa. Code § 5.304.
[132] I.D. at 48.
[133] Tr. 93-96, 108-109 (May 6, 2015).

documentation, it would serve no purpose to impose a civil penalty on Respondents, especially when interlocutory review was denied by the presiding ALJs.

Moreover, at no time did I&E request the opportunity to examine these voluminous records at the Respondents' offices. To the extent that the Commission wishes to verify the trip data provided under oath by the Respondent's witness on May 6, 2015, it has the necessary powers to inspect records.[134] However, the Respondents do not view the trip data as relevant to the disposition of this case or the formulation of a civil penalty since the proceeding is focused on whether Commission authority is needed to operate a digital platform, not on how many trips were provided through that platform.

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 filed on November 13, 2014 that it needed this information to identify the functions performed by the subsidiaries. As the necessary information was furnished through other discovery responses,[135] the Stipulations of Fact[136] and Mr. Feldman's testimony,[137] no additional purpose would have been served by producing these proprietary documents. It is also noteworthy that the Respondents provided a copy of an Affiliated Interest Agreement to the Commission as part of its Compliance Plan filing pursuant to the *December 5, 2014 Order*, which was also included in the discovery responses furnished to I&E.[138] A civil penalty for failing to provide these confidential documents is therefore inappropriate.

Besides inappropriately imposing a civil penalty on the Respondents for failing to answer discovery that would have disclosed private consumer information and that would have provided

[134] 66 Pa. C.S. § 506.
[135] I&E Exhibit No. 4.
[136] ALJ Exhibit 1-Revised.
[137] Tr. 98 (May 6, 2015).
[138] I&E Exhibit No. 4.

confidential documents reiterating information already furnished, the I.D. errs in imposing this civil penalty because discovery sanctions are not intended to be punitive, but rather to move the case to orderly disposition. As demonstrated above, neither of the missing items was needed for that purpose.

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 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,[139] no additional sanctions are appropriate or warranted.

In *Raymond J. Smolsky v. Global Tel*Link Corporation,* Docket No. C-20078119, 2009 Pa. PUC LEXIS 455 (Order entered January 15, 2009), cited by the I.D. in support of a civil

[139] See Interim Order on Second Motion for Sanctions dated March 25, 2015.

penalty as a discovery sanction,[140] 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 for not providing information that was not needed to dispose of this matter.

In *Application of K & F Medical Transport, LLC*, Docket No. A-2008-2020353, 2008 Pa. PUC LEXIS 208 (Initial Decision entered April 25, 2008), which is also relied on by the ALJs,[141] 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. A party does not litigate a case in bad faith when it provides all but two discovery responses during the course of the proceeding, and has shown legitimate reasons for why they were not produced and also explained how they were not needed for the disposition of this proceeding.

[140] I.D. at 41.
[141] I.D. at 43-44.

III. CONCLUSION

Based upon the foregoing, Respondents respectfully request that the Exceptions be granted and that the Amended Complaint filed on January 9, 2015 be dismissed and that other relief be granted as appropriate.

Respectfully submitted,

Dated: December 7, 2015

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EXHIBIT A

post-gazette.com
Pittsburgh Post-Gazette

1. Road rage: The PUC overreacts with a huge fine for Uber

November 19, 2015 12:00 AM

By the Editorial Board

The Public Utility Commission proposes to hit ride-sharing pioneer Uber with a $50 million fine for violations last year. It is the largest fine recommended by PUC administrative law judges to the agency — and a disproportionate punishment that is wildly unfair. A fraction of that amount would be sufficient.

The fine would punish San Francisco's Uber Technologies for actions in 2014 when the company began operating in Pennsylvania before receiving permission from the commission. Although Uber was later granted an experimental license that allows it to operate in most of the state for two years, the PUC's judges said Uber's defiance "warrants a serious penalty to deter future violations."

What nonsense. The offenses the fine seeks to punish, operating without a license and withholding information, are now moot.

Uber's main competitor, Lyft, paid a $250,000 fine earlier this year for similar violations. The second-highest fine recommended by administrative law judges to the PUC was $1.8 million against Hiko Energy for over-billing customers last winter.

Compared with these, the Uber fine is an absurd overreach, exceeding even the penalty suggested in January by the commission's enforcement bureau, which brought the initial complaint and recommended a $19 million fine plus $1,000 per day.

The purpose of fines is not to fill government coffers, but to compel compliance. That has already been achieved. In the past two years, ride-sharing companies have gone from outliers to mainstream and become leaders in the sharing economy. Last year, Uber said it enabled more than 1 million rides each day, and Republican Jeb Bush famously uses the app for his presidential campaign.

No longer an upstart seeking to establish service in cities uncertain of how to manage ride-sharing companies, Uber and its competitors are not renegades threatening perpetual lawbreaking. This fine, like Lyft's, should be proportional to the offense.

Meet the Editorial Board.

Editor's note, Nov. 20: The earlier version of the editorial incorrectly described the fine. The $1.8 million fine against Hiko Energy for over-billing customers last winter was the second-highest recommended by the administrative law judges from the PUC.

EXHIBIT B

Uber's fine: The insidious PUC

By The Tribune-Review
Wednesday, Nov. 18, 2015, 9:00 p.m.

"Restraint of trade" is a precise term of law that involves illegally interfering with free competition in business and commercial transactions, which tend to restrict production, affect prices or otherwise control the market to the detriment of purchasers or consumers of goods and services.

This staple of common law, nowadays applied through the Sherman Antitrust Act, is invoked when companies collude or otherwise "cooperate" to corner a market and/or protect market share.

What a pity it can't be applied to government, which regularly engages in restraint of trade. Consider the Pennsylvania Public Utility Commission's insidious war against modern conveyances.

PUC judges Tuesday voted to fine Uber, the ride-sharing service, $49.9 million for having the audacity to challenge the long PUC-protected taxi monopoly.

Yes, the PUC this year granted Uber a license to operate in the commonwealth — but only after inflicting serious material harm on it. And the PUC's command economists apparently never got over an innovative company challenging the statist orthodoxy of regulatory overreach.

Thus, this week's nearly $50 million fine — for the temeritous infraction of offering app-based, arms-length transactions that better serve the same public the PUC purports to protect. How ludicrous.

EXHIBIT C

thetimes-tribune.com

1. PUC Uber fine way over top

BY THE EDITORIAL BOARD
Published: November 24, 2015

Apparently, Administrative Law Judges Mary Long and Jeffrey Watson prefer to travel by traditional taxi. Their recent recommendation that the state Public Utility Commission assess a $50 million fine against Uber, the San Francisco-based ride-sharing company, has no explanation that makes any greater sense.

Uber and similar companies, such as Lyft, pose a huge challenge to conventional taxi operations that are regulated by the PUC. Using a smart-phone app, passengers can summon a ride and pay a pre-set price.

But Uber started operations in Pennsylvania in 2014 without the PUC's approval. The PUC's investigative staff recommended a $19 million fine, less than half of the judges' recommendation.

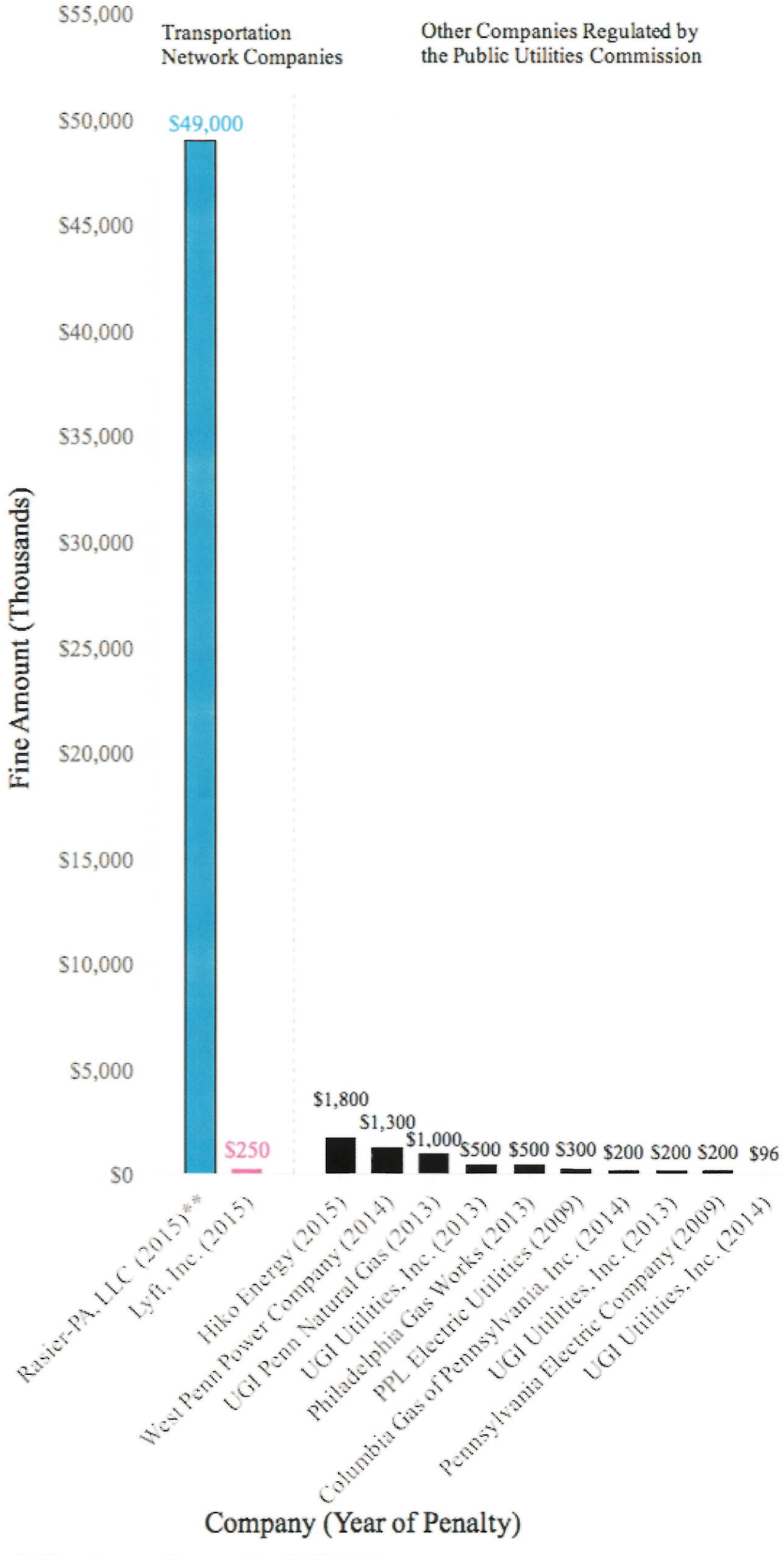
Lyft, Uber's competitor, also was not licensed when it began offering its service, but it settled its PUC case earlier this year for a $250,000 fine.

The judges claim that the Uber fine is needed as a matter of deterrence against future violations. But both companies now operate under two-year provisional licenses granted by the PUC. They are in compliance with state law and supporting regulations.

The recommendation is wildly excessive. It would be an act not of regulatory deterrence, especially since Uber has complied with state law and regulations, but of competitive pre-emption. The PUC, as it did with Lyft, should negotiate a reasonable settlement with Uber.

EXHIBIT D

Largest Fine Amounts in Pennsylvania PUC History



**Fine Amount Proposed by PUC ALJs

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY COMMISSION, BUREAU OF INVESTIGATION AND ENFORCEMENT	:	
	:	**Docket No. P-2015-2466136**
v.	:	
UBER TECHNOLOGIES, INC.	:	

CERTIFICATE OF SERVICE

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

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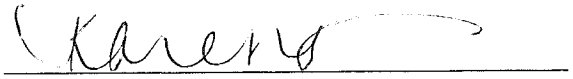
Dated this 7th day of December, 2015.



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