



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

IN REPLY PLEASE  
REFER TO OUR FILE

December 17, 2015

**Via Electronic Filing**

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

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

Dear Secretary Chiavetta:

On behalf of the Bureau of Investigation and Enforcement, enclosed please find a Motion to Strike the Exceptions of Uber Technologies, Inc., *et al.* in the above-referenced proceeding. Copies have been served on the parties of record in accordance with the Certificate of Service.

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

Sincerely,

A handwritten signature in blue ink that reads "Stephanie M. Wimer".

Stephanie M. Wimer  
Prosecutor

Enclosure

cc: As per certificate of service  
Honorable Mary D. Long  
Honorable Jeffrey A. Watson  
[ra-OSA@pa.gov](mailto:ra-OSA@pa.gov)

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement, Complainant	: : : : :	
v.	: : : :	Docket No. C-2014-2422723
Uber Technologies, Inc., <i>et al.</i> , Respondents	: : :	

**NOTICE TO PLEAD**

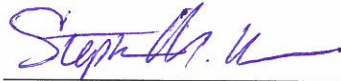
*To: Karen O. Moury, Esq. Counsel for Uber Technologies, Inc., et al.*

Pursuant to 52 Pa. Code § 5.103(b), you are hereby notified to file a written response to the enclosed Motion to Strike of the Bureau of Investigation and Enforcement (I&E) within twenty (20) days from the date of service of this notice. If you do not file a written response denying the enclosed Motion to Strike within twenty (20) days of service, the Pennsylvania Public Utility Commission (Commission) may rule on this Motion without further input.

All pleadings, such as answers to motions, must be filed with the Secretary of the Pennsylvania Public Utility Commission:

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

You must also serve a copy of your response on the undersigned prosecutors.



Stephanie M. Wimer, Prosecutor  
PA Attorney ID No. 207522

Michael L. Swindler, Deputy Chief Prosecutor  
PA Attorney ID No. 43319

Bureau of Investigation & Enforcement  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Dated: December 17, 2015

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**MOTION OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT  
TO STRIKE THE EXCEPTIONS OF UBER TECHNOLOGIES, INC., ET AL.**

TO THE HONORABLE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

The Bureau of Investigation and Enforcement (I&E) of the Pennsylvania Public Utility Commission (Commission), by and through its prosecuting attorneys, pursuant to 52 Pa. Code § 5.103, files this Motion respectfully requesting that this Commission strike the Exceptions of Uber Technologies, Inc., *et al.* (Uber or Respondents) in their entirety for failure to adhere to the Commission’s page limitation for exceptions. In the alternative, should this Commission elect to not strike Uber’s Exceptions in their entirety, I&E moves to strike specific, objectionable and improper portions of Uber’s Exceptions that: (1) utilize multiple references to failed settlement negotiations for the sole purpose of unfairly portraying I&E as being unreasonable when Uber repeatedly refused to respond to discovery as directed by the presiding Administrative Law Judges (ALJs); and (2) include discussion and the introduction of attached exhibits that are irrelevant and outside the body of record evidence upon which this Commission is to base its determination.

## I. BACKGROUND

1. I&E hereby incorporates the procedural history set forth in its Main Brief filed on July 8, 2014. An abbreviated procedural history is as follows:

2. On February 11, 2014, Uber launched a mobile app (the Uber App) in Pittsburgh, Allegheny County, Pennsylvania<sup>1</sup> enabling passengers to connect with individuals who registered with Uber as drivers to obtain transportation for compensation.<sup>2</sup> From February 11, 2014 through and including August 20, 2014, neither Uber nor any Uber subsidiary held authority from the Commission to transport passengers in Pittsburgh, Allegheny County, Pennsylvania for compensation.<sup>3</sup>

3. On June 5, 2014, I&E filed a Formal Complaint (Complaint) at this docket against Uber Technologies, Inc. alleging, *inter alia*, that Uber Technologies, Inc. violated the Public Utility Code (Code) by offering passenger transportation service to the public for compensation via the Uber App.<sup>4</sup>

4. On June 16, 2014, during the pendency of the Complaint proceeding, I&E filed a Petition for Interim Emergency Relief seeking an order from the Commission directing Uber to immediately cease and desist from operating its passenger transportation service until it receives the requisite authority to do so.<sup>5</sup> I&E's Petition for Interim Emergency Relief was granted by

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<sup>1</sup> I.D. at 5, Finding of Fact No. 8.

<sup>2</sup> I.D. at 6, Finding of Fact Nos. 12-16.

<sup>3</sup> I.D. at 8, Finding of Fact No. 29-30; Exhibit ALJ 1-Revised at ¶ 15.

<sup>4</sup> The name of the Uber affiliate responsible for providing the transportation, Rasier LLC (Rasier), and the exact date of the launch, February 11, 2014, was not known to I&E at the time the initial Complaint was filed and, in fact, such information was not provided until March 6, 2015, in defiance of numerous orders compelling the production of that information.

<sup>5</sup> *Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for an Interim Emergency Order requiring Uber Technologies, Inc. to immediately cease and desist from brokering transportation service for compensation between points within the Commonwealth of Pennsylvania*, Docket No. P-2014-2426846 (hereinafter referred to as "Petition for Interim Emergency Relief").

presiding Administrative Law Judges (ALJs) on July 1, 2014<sup>6</sup> and the Commission upheld the presiding ALJs' Order on July 24, 2014.<sup>7</sup> Nevertheless, Uber or an Uber affiliate defiantly continued to operate without authority in Pittsburgh, Allegheny County, Pennsylvania until August 20, 2014.

5. On January 9, 2015, I&E filed an Amended Complaint, which identifies Uber, Rasier, Gegen LLC (Gegen) and Rasier-PA, LLC (Rasier-PA) as the proper Respondents responsible for directly or indirectly facilitating and/or providing unauthorized passenger motor carrier service within the Commonwealth of Pennsylvania. The Amended Complaint also updates and quantifies the violations alleged by I&E by removing the "per day" violation component and replacing it with a "per ride" violation component, and recalculating the appropriate civil penalty as the relief requested. In the Amended Complaint, I&E was forced to resort to the use of "proxy" trip data and name all known Uber affiliates in Pennsylvania as Respondents to the Complaint proceeding due to Uber's continued, ongoing and intentional defiance of the Commission's July 28, 2014 Secretarial Letter entered in this proceeding, the orders of the presiding ALJs, the Commission's regulations pertaining to discovery and Section 333(d) of the Code, 66 Pa.C.S. § 333(d) (relating to Interrogatories). In the Amended Complaint, I&E sought relief including: (1) a civil penalty in the amount of \$19,000,000 for the unauthorized passenger transportation service; (2) a civil penalty in the amount of \$1,000 per day per unanswered discovery request for each and every day since October 3, 2014 and up until such information is provided; and (3) any other remedy that the Commission deems appropriate.

6. The evidentiary hearing in this matter took place on May 6, 2015. For the first time at hearing, Uber provided data concerning the number of unauthorized trips furnished by

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<sup>6</sup> Petition for Interim Emergency Relief (Order entered July 1, 2014).

<sup>7</sup> Petition for Interim Emergency Relief (Order entered July 24, 2014).

Rasier between February 11, 2014 and August 20, 2014. However, discovery responses, such as supporting documentation and licensing agreements that would have enabled I&E, the ALJs and the Commission to verify the trip data and identity of the corporate entity allegedly responsible for furnishing the unauthorized passenger transportation, remain outstanding.

7. On November 17, 2015, the Initial Decision of the presiding ALJs was served upon the parties. The ALJs imposed a total civil penalty in the amount of \$49,924,800. Of this amount, \$49,852,300 was assessed for violations of the Code, *i.e.* the unauthorized passenger transportation. The ALJs' civil penalty for violations of the Code was assessed on a per trip basis and the fine per trip differed for trips occurring prior to and after the issuance of the ALJs' July 1, 2014 Order directing Uber to cease and desist. The remaining civil penalty in the amount of \$72,500 was imposed as a sanction for violating the Commission's discovery rules.

8. On December 7, 2015, Uber filed Exceptions to the Initial Decision. Uber's Exceptions are a document containing 53 numbered pages, and 4 pages of attached Exhibits, for a total of 57 pages of substantive material for the Commission's consideration.

9. On December 17, 2015, I&E filed Replies to Uber's Exceptions should the Commission determine that it will entertain Uber's Exceptions if they are not stricken in their entirety.

10. I&E files the instant Motion to Strike pursuant to 52 Pa. Code § 5.103, after the record in this proceeding has been closed and the Initial Decision having been entered, due to Uber's clear violations of the Commission's regulations in its Exceptions.

## II. MOTION TO STRIKE

### A. **Uber's Exceptions Are Procedurally Deficient In That They Disregard The Commission's Page Limitation and Uber's "Corrected" Exceptions Were Untimely Filed.**

11. The Commission's Rules of Practice and Procedure at 52 Pa. Code § 5.533(c)

state, in pertinent part, as follows:

(c) The exceptions must be concise. The exceptions and supporting reasons must be limited to 40 pages in length.

12. The Exceptions filed by Uber on December 7, 2015 contain 53 numbered pages, and 4 additional pages consisting of "Exhibits," for a total of 57 pages of substantive material.

13. Uber's Exceptions exceed the Commission's 40-page limitation by nearly fifty percent. Moreover, there is no indication that Uber sought, much less received, a waiver of the Commission's regulation regarding the express 40-page limitation for exceptions.

14. Uber's act in exceeding the page limitation is prejudicial to I&E because I&E, as the responding party, was forced to reply to a document that was nearly fifty percent larger than permitted with a confined 25 pages, pursuant to 52 Pa. Code § 5.535(a).

15. In addition, on December 8, 2015, one day after Uber's Exceptions were due, Uber filed "corrected Exceptions." Again, Uber sought no waiver from the Commission to file exceptions beyond the due date of twenty days after issuance of the Initial Decision pursuant to 52 Pa. Code § 5.533(a).<sup>8</sup>

16. For the reasons set forth above, these procedural defects are sufficient, in and of themselves, to warrant striking Uber's Exceptions in their entirety.

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<sup>8</sup> The "corrections" were unrelated to Uber's violation of the page limitation.

**B. In The Alternative, If Not Stricken In Their Entirety, Portions Of Uber’s Exceptions Should Be Properly Stricken.**

**1. Uber Has Disregarded The Commission’s Prohibition Against Reliance Upon Failed Settlement Negotiations In Exceptions As Set Forth At 52 Pa. Code § 5.231(d).**

17. Uber’s reliance on privileged settlement discussions is yet another desperate and divisive attempt by Uber to discredit I&E. In numerous places throughout its Exceptions, Uber inappropriately discusses offers of settlement associated with this proceeding. The clear purpose and design of Uber’s public reference of these confidential discussions is to sway judicial and public opinion in their favor and portray Respondents as being “the reasonable parties” – despite Uber’s intentional defiance of the ALJs’ and Commission’s cease and desist orders and the ALJs’ interim orders related to discovery and sanctions.

18. It is well-established Pennsylvania law that offers of settlement are not admissible in evidence. Section 5.231(d) of the Commission’s regulations provides as follows:

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

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

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

(1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and



(2) conduct or a statement made during compromise negotiations about the claim.

225 Pa. Code § 408(a). Therefore, Uber's statements related to its settlement offers are impertinent, immaterial, and irrelevant and should be stricken from Uber's Exceptions or, at the minimum, be given no weight and be overlooked by the Commission as they serve no valid purpose.

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

however, the ALJ noted that the testimony was deemed inadmissible and did not rely on it in the initial decision).

20. The Commission has also determined that unsuccessful settlement discussions and negotiations are privileged. In *Pa. Pub. Util. Comm'n v. Pennsylvania Electric Co.*, Docket Nos. R-80051197 and C-80072106, 1980 Pa. PUC LEXIS 5 (Order entered December 4, 1980) the Commission stated:

The rule of evidence which excludes unaccepted settlement offers is well established and is based upon two considerations: (1) the recognition that the relevance of unaccepted proposals of settlement is limited at best; and (2) public policy favors excluding such evidence in order to foster settlements. . . . In the instant case, we need not delve into case law in order to determine the existence or nonexistence of a privilege in administrative proceedings, for we find one clearly recognized in 1 Pa. Code § 35.115. That provision, placed as it is within prehearing conference procedures, indicates that the privilege reasonably extends to any unaccepted proposals of settlement or to any discussions regarding settlement, as well as a wide variety of other matters which would expedite the proceeding. Consequently, the scope of the privileged subject matter is to be interpreted broadly. Accordingly we find that settlement negotiations are privileged, confidential and inadmissible into evidence. . . .

*Id.* at \* 18-20.

21. Exactly two weeks ago, the Commission reiterated this concept in *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Order entered December 3, 2015), Order at 43, by stating that “We affirm the importance of retaining the confidentiality of settlement discussions and, therefore, confirm that we gave no consideration to either party’s assertions regarding settlement discussions in our disposition.”

22. Because offers of settlement are privileged, confidential and inadmissible into evidence, the following portions of Uber’s Exceptions should be stricken or, in the alternative, be given no weight in the Commission’s consideration of the ALJs’ Initial Decision:

- Pages 1-6 (the section entitled “This Proceeding Should Have Been Settled”); and
- Any and all references to settlement discussions throughout the body of Uber’s Exceptions.

**2. Uber Submitted Extra-Record Evidence In Disregard of the Commission’s Regulation at 52 Pa. Code § 5.533(c)**

23. Uber’s reliance on extra-record evidence at this stage of the proceeding is not permitted and such extra-record evidence and all discussion related thereto must be stricken from Uber’s Exceptions.

24. Section 5.533(c) mandates that Exceptions must “incorporate by reference and citation, relevant portions of the record and passages in previously filed briefs.” 52 Pa. Code § 5.533(c).

25. In its Exceptions, Uber references comments made in three Pittsburgh newspapers regarding the Initial Decision issued by presiding ALJs Long and Watson and relies upon those comments in support of its position that the ALJs’ decision was “near unanimously criticized throughout the Commonwealth.” Uber Exceptions at 2.

26. Uber attached to its Exceptions as Exhibits A, B and C purported published editorial comments from the Pittsburgh Post-Gazette, Tribune-Review and Times-Tribute [sic]. Uber offers no support for its inclusion of this extra-record evidence.

27. Uber’s extra-record evidence regarding newspaper reaction to the ALJs’ decision are improper and the following should be stricken:

- Page 2, line 16, through page 3, line 14;
- Exhibit A attached to the Exceptions;
- Exhibit B attached to the Exceptions; and
- Exhibit C attached to the Exceptions.

28. Additionally, Uber impermissibly attempts to introduce extra-record evidence in the form of a demonstrative aid attached as “Exhibit D” to its Exceptions. “Exhibit D” was not

admitted into the record or even presented as an exhibit at hearing. I&E had no opportunity to cross-examine Uber's witness as to Exhibit D or discuss Exhibit D in briefs. As such, Exhibit D should be stricken.

29. In further support of its claim that the ALJs' decision should be set aside, Uber relies upon purported testimony from *Application of Rasier-PA LLC for Emergency Temporary Authority in Allegheny County*, Docket No. A-2014-2429993. See Uber Exceptions at 4, footnote 9.

30. Uber claims that Commission consideration of this extra-record evidence is permitted pursuant to 52 Pa. Code § 5.408 (relating to official and judicial notice of fact). *Id.* See also Uber Exceptions at 5, footnote 10.

31. Factual testimony from lay persons raised in a separate proceeding should not be taken into consideration here because I&E had no opportunity to cross-examine those witnesses. Thus, official and judicial notice of facts should not be taken as to this information and to do otherwise would deprive I&E of due process.

32. Therefore, Uber's extra-record evidence regarding factual testimony not of this proceeding is improper and the following should be stricken:

- Page 4, line 18, through page 5, line 10;
- Footnote 9;
- Footnote 10; and
- Footnote 34.

### III. CONCLUSION

For the reasons set forth above, the Bureau of Investigation and Enforcement respectfully requests that the Commission grant this Motion and issue an Order striking the Exceptions of Uber Technologies, Inc., *et al.*, in their entirety. Alternatively, if not stricken in its entirety, I&E requests that the Commission issue an Order directing that the above-cited portions of Uber's Exceptions be stricken.

Respectfully submitted,



Stephanie M. Wimer  
Prosecutor  
PA Attorney ID No. 207522

Michael L. Swindler  
Deputy Chief Prosecutor  
PA Attorney ID No. 43319

Johnnie E. Simms  
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Dated: December 17, 2015

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

### **Service by First Class Mail and Email:**

Karen O. Moury, Esq.  
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Dated: December 17, 2015