PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held April 21, 2016

Commissioners Present:

Gladys M. Brown, Chairman
Andrew G. Place, Vice Chairman
Pamela A. Witmer, Statement, dissenting
John F. Coleman, Jr.
Robert F. Powelson, Statement, dissenting

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement — C-2014-2422723

v.

Uber Technologies, Inc., Gegen, LLC,
Rasier LLC, and Rasier-PA, LLC

OPINION AND ORDER
(Non-Proprietary Version)

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BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Uber Technologies, Inc., Gegen, LLC, Rasier LLC, and Rasier-PA, LLC[1] on December 7, 2015,[2] to the Initial Decision (I.D.) of Administrative Law Judges (ALJs) Mary D. Long and Jeffrey A. Watson, issued on November 17, 2015, in the above-captioned proceeding. Also, before the Commission is the Motion to Strike the Exceptions of Uber (Motion) filed by the Commission's Bureau of Investigation and Enforcement (I&E) on December 17, 2015. Also on December 17, 2015, I&E filed Replies to Exceptions. On January 6, 2016, Uber filed an Answer to the Motion. For the reasons stated below, we will deny the Motion, grant the Exceptions, in part, and deny them, in part, and modify the ALJs' Initial Decision.

I. History of the Proceeding

On June 5, 2014, I&E filed a Formal Complaint (Complaint) against Uber[3] alleging that the Respondent provides internet and mobile application software (Uber app) connecting passengers with individuals who have registered with Uber as drivers. According to the Complaint, the Uber app permits a passenger's phone to locate the nearest available Uber driver, and then alerts the Uber driver of the ride request. Complaint at 1.

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[1] Gegen, LLC (Gegen), Rasier LLC (Rasier) and Rasier-PA, LLC (Rasier-PA) are subsidiaries of Uber Technologies, Inc. Unless the context suggests otherwise, we shall collectively refer to these Parties in the singular as Respondent or Uber.

[2] On December 8, 2015, Uber filed "corrected Exceptions" which it contends only contain corrections to the Table of Contents and Table of Authorities. Uber states that it became aware of the errors after the filing of the Exceptions.

[3] I&E filed the Complaint against Uber Technologies, Inc. As discussed below, on January 9, 2015, I&E filed an Amended Complaint which added three wholly-owned subsidiaries of Uber Technologies, Inc., as named Respondents.

I&E alleged that Uber drivers use their personal vehicles to respond to ride requests and that, through the use of the Uber app, the Respondent is acting as a broker of transportation in Pennsylvania without proper Commission authority.[4] I&E averred that brokers of transportation must obtain a Commission-issued brokerage license before engaging in the business of being a broker, and that Uber does not hold a brokerage license. Complaint at 1-2.

According to the Complaint, I&E's Motor Carrier Enforcement Manager Charles Bowser (Officer Bowser) downloaded the Uber app to a mobile phone and requested passenger transportation in Pittsburgh on eleven separate occasions between March 31, 2014, and April 21, 2014. Uber drivers transported Officer Bowser using their personal vehicles and charged fares ranging from $5 to $8. In its Complaint, I&E averred that the Uber drivers responding to Officer Bowser's requests provided transportation without proper Commission authority to transport persons for compensation within Pennsylvania. Additionally, I&E alleged that Uber violated Section 1101 of the Public Utility Code (Code), 66 Pa. C.S. § 1101, by offering to broker transportation of persons

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[4] A "broker" is defined as:

> Any person or corporation not included in the term "motor carrier" and not a bona fide employee or agent of any such carrier, or group of such carriers, who or which, as principal or agent, sells or offers for sale any transportation by a motor carrier, or in the furnishing, providing, or procuring of facilities therefor, or negotiates for, or holds out by solicitation, advertisement, or otherwise, as one who sells, provides, furnishes, contracts, or arranges for such transportation, or the furnishing, providing or procuring of facilities therefor, other than as a motor carrier directly or jointly, or by arrangement with another motor carrier, and who does not assume custody as a carrier.

66 Pa. C.S. § 2501(b).

for compensation without authority when it announced the launch of its ride-sharing program and initiated the Uber app. Complaint at 2-3.

For the allegations related to the offering of broker transportation without authority and the initiation of the Uber app, I&E proposed a civil penalty of $84,000. I&E requested an additional civil penalty of $11,000 for the eleven trips in which Uber allegedly brokered transportation for compensation without authority to do so. *Id.* at 3.

On June 16, 2014, I&E filed a Petition for Interim Emergency Order (Petition) at Docket No. P-2014-2426846. The Petition sought a Commission Order requiring Uber to immediately cease and desist from brokering transportation service for compensation between points within Pennsylvania. In its Petition, I&E incorporated the averments of its Complaint and contended that, pursuant to 52 Pa. Code § 3.6, it was entitled to emergency relief.

I&E asserted that the need for relief was immediate and ongoing as it had attempted, without success, to stop Uber from unlawfully brokering transportation services using non-certificated drivers. Additionally, I&E alleged that injury would be irreparable if relief were not granted and that, by using uncertificated drivers, Uber had unilaterally deprived the Commission of its obligation to ensure driver integrity, vehicle safety and the maintenance of sufficient insurance coverage. Further, I&E asserted that the Commission could not be certain that its regulations pertaining to driver safety were being met because Uber drivers were not certificated motor carriers. Additionally, I&E contended that the Commission could not verify that vehicles of the Uber drivers complied with vehicle safety requirements, which include equipment standards and compliance with inspection requirements of the Pennsylvania Department of Transportation and the Commission and evidence of insurance coverage. Petition at 8-12.

Lastly, I&E averred that its requested relief was not injurious to the public interest because Uber had no lawful right to broker transportation for compensation. Until Uber would become licensed and its drivers certificated, I&E argued it would be unable to guarantee that Uber was brokering transportation using drivers who adhered to the Commission's safety and insurance regulations, which were designed to safeguard the public. *Id.* at 12.

On June 23, 2014, Uber filed an Answer to I&E's Petition averring that it was not a broker, but rather a software company that licensed a smartphone application. According to Uber, it licensed its application to Gegen, a company which received approval to operate as a broker to arrange for transportation of persons between points in Pennsylvania.[5] Uber argued, in part, that if I&E's Petition were granted, the Commission would be ordering a software company to cease operating without a comprehensive review of whether any activities violate the Code. Petition Answer at 2, 11.

On June 26, 2014, Uber filed an Answer to the Complaint admitting that Uber licensed an Internet and mobile software application connecting passengers and drivers but denied that the drivers were "Uber drivers." In addition, Uber admitted to not holding a Commission-issued broker license. However, the Respondent averred that it had not brokered transportation in Pennsylvania and requested the dismissal of the Complaint with prejudice. Answer to the Complaint at 1-3.

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[5] *See Application of Gegen, LLC for a Brokerage License*, Docket No. A-2012-2317300 (Order entered January 24, 2013) (*Gegen Order*).

A hearing on the Petition was held before ALJs Long and Watson on June 26, 2014. I&E presented the testimony of one witness and sponsored three exhibits.[6] Uber was represented by counsel, but did not present any witnesses or exhibits.

On July 1, 2014, ALJs Long and Watson issued an Order granting I&E's Petition, and certifying the granting of relief by interim emergency order to the Commission as a material question, in accordance with 52 Pa. Code § 3.10(b) (*July 1, 2014 Order*). The ALJs determined that I&E demonstrated the requisite need to order Uber to immediately cease and desist from utilizing its digital platform to facilitate transportation for compensation to passengers using non-certificated drivers in their personal vehicles within Pennsylvania. Accordingly, Uber was ordered to cease and desist its operations in Pennsylvania utilizing its digital platform to facilitate transportation for compensation to passengers utilizing non-certificated drivers in their personal vehicles. *July 1, 2014 Order* at 6, 16.[7]

Following certification of the *July 1, 2014 Order*, we determined that I&E met the requirements for obtaining interim emergency relief and affirmed the granting of the Petition by Order entered July 24, 2014 (*July 24, 2014 Order*).

Concurrent with the *July 24, 2014 Order*, then-Commissioner James H. Cawley issued a Statement requesting the issuance of a Secretarial Letter

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[6] The first exhibit, a certification from the Secretary of the Commission dated June 24, 2014, certifying that Uber does not hold a certificate of public convenience to operate as a motor carrier of passengers and has not been issued a license to broker transportation in Pennsylvania, was admitted into the record. The second exhibit, a twenty-nine page document consisting of email communications and receipts for payment between Uber and Officer Bowser, also was admitted into the record. However, only the first two pages of the third exhibit, consisting of a news release from the Commonwealth of Pennsylvania and a press release related to Uber, were admitted into the record.

[7] Pursuant to 52 Pa. Code § 3.10(a), the *July 1, 2014 Order* became effective upon issuance.

seeking additional information to aid in the formulation of a final Order in this proceeding. Accordingly, by Secretarial Letter dated July 28, 2014, the Parties were directed to address questions regarding the number of trips provided by Uber during certain periods of time. Specifically, the Secretarial Letter directed the Parties to address whether refunds or credits to customers would be an appropriate remedy should there be a finding that Uber's conduct violated the Code. On August 8, 2014, I&E served its first set of interrogatories and request for documents upon Uber, intended to elicit the information directed by the Secretarial Letter.

During the course of this proceeding, I&E unsuccessfully attempted to obtain answers to this discovery as well as to its second set of interrogatories served on October 24, 2014. Uber objected to the discovery requests and I&E filed various motions to compel and motions for sanctions.

By Interim Order dated October 3, 2014 (*Interim Order I*), the ALJs directed Uber to answer the first outstanding discovery request. Thereafter, by Interim Order dated November 25, 2014 (*Interim Order II*), the ALJs ordered Uber to respond to I&E's second discovery request. Additionally, by Interim Order dated November 26, 2014 (*Interim Order III*), the ALJs granted I&E's motion for sanctions and required Uber to serve full and complete answers to the outstanding discovery requests by December 12, 2014.

On January 9, 2015, I&E filed an Amended Complaint, which replaced its prior Complaint and identified Gegen, Rasier and Rasier-PA as additional respondents affiliated with Uber and which I&E alleged were involved in the provision of unauthorized passenger motor carrier services. Furthermore, the Amended Complaint updated and quantified the alleged violations by removing the "per-day" violation component and replacing it with a "per-ride" violation component. I&E recalculated the proposed civil penalty and requested that the Commission impose a $19 million civil

penalty based upon a "proxy" number of trips because Uber had not yet provided the trip data requested in August 2014. On February 2, 2015, Uber and its affiliates filed Answers to the Amended Complaint, and requested its dismissal with prejudice.

On January 14, 2015, Uber filed a motion seeking the assignment of a settlement judge. I&E opposed the motion arguing that a settlement conference would not be productive because of Uber's continued failure to answer discovery or comply with the numerous discovery orders. By Interim Order dated January 23, 2015, the ALJs denied Uber's motion. Thereafter, Uber filed a Motion for Reconsideration of the ALJs' Interim Order.

On February 18, 2015, the ALJs heard an oral argument on I&E's second Motion for Sanctions. During the oral argument proceedings, the Parties entered into discussions in an attempt to resolve the outstanding issues in this matter and requested a continuance. By Interim Order dated February 24, 2015, the Parties were directed to submit a proposed stipulation of facts on or before March 4, 2015. In the event that the Parties were not able to enter into a stipulation, the Interim Order directed Uber to serve full and complete answers to all outstanding discovery requests and the matter would proceed to an evidentiary hearing.

Although the Parties engaged in discussions, they did not meet the March 4, 2015, deadline. Following a joint request for an extension of time, the Parties filed a timely joint status report on March 18, 2015. In the Status Report, the Parties reported that Uber had filed partial discovery responses on March 6, 2015. However, they were unable to agree on proposed stipulations.

By Interim Order dated March 25, 2015 (*Interim Order IV*), the ALJs granted I&E's motion for sanctions in part, denied I&E's request to use a "proxy number" of trips and scheduled an evidentiary hearing for Wednesday, May 6, 2015.

The hearing convened as scheduled on May 6, 2015. I&E was represented by counsel who made a motion to incorporate the record from the Petition hearing into the record of the Amended Complaint proceeding. Uber did not object, and the ALJs granted the motion. I&E presented the testimony of one witness and introduced two exhibits which were admitted into the record. Uber was represented by counsel, presented the testimony of one witness and introduced one exhibit which was admitted into the record. During the hearing, Uber provided the trip data requested by I&E through the testimony of Uber's witness, Jon Feldman. However, Mr. Feldman's testimony about the number of trips provided between February 11, 2014, and August 20, 2014, was provided pursuant to a protective order dated April 21, 2015 (Protective Order).

Additionally, the Parties agreed to the admission of a written stipulation of facts and two Commission orders. The hearings produced a record of 204 pages which comprised the transcript from the Petition hearing on June 26, 2014, and the hearing on May 6, 2015.

The Parties filed briefs and the record was closed on August 17, 2015.

On October 13, 2015, Uber filed a Motion for Settlement Conference and Assignment of Settlement Judge. Alternatively, Uber requested that the Commission hold this proceeding in abeyance following the issuance of the Initial Decision by deferring the exception and reply exception periods while a Commission-directed ALJ-facilitated settlement conference was held. On October 19, 2015, I&E filed a response opposing the motion. The ALJs reopened the record on October 27, 2015, to include the motion and the response into the record, and thereafter reclosed the record.

In their Initial Decision issued on November 17, 2015, the ALJs found that I&E sustained its burden of proving that Uber provided transportation for compensation

without authority in violation of the Code. The ALJs imposed a civil penalty of $49,852,300. Additionally, the ALJs determined that Uber violated numerous discovery orders which severely impeded I&E's ability to prepare its case and obstructed the orderly course of the litigated proceedings. As such, the ALJs imposed an additional civil penalty of $72,500 for a total civil penalty of $49,924,800. Furthermore, the Initial Decision denied Uber's second request for the assignment of a settlement judge and denied reconsideration of the ALJs' Interim Order pertaining to Uber's first request for the assignment of a settlement judge.

As previously indicated, Uber filed Exceptions on December 7, 2015. I&E filed both its Motion and the Replies to Exceptions on December 17, 2015. Uber filed an Answer to the Motion on January 6, 2016.[8]

II. Background[9]

The Respondent licenses its Uber app which is used to connect passengers and drivers in cities, including Pittsburgh in Allegheny County. A passenger who has

[8] In its Motion, I&E requests that we strike the Exceptions because they disregard the Commission's page limitation in 52 Pa. Code § 5.533(c) and that the corrected version of the Exceptions was untimely filed. Alternatively, I&E requests that portions of the Exceptions be stricken because they refer to failed settlement negotiations and contain extraneous matter. In its Answer, Uber, in part, submitted a reformatted version of the Exceptions as an attachment in a smaller font size but in apparent compliance with 52 Pa. Code § 1.32(a)(2), and the 40-page limit. There is no indication that I&E was unfairly prejudiced by Uber's filing or that it was prevented from presenting a full argument in its Replies to Exceptions. Thus, pursuant to Section 1.2(a) of our Regulations, 52 Pa. Code § 1.2(a), we shall accept the Exceptions as filed in order to ensure a just, speedy and inexpensive determination. However, we note that our decision herein does not rely upon any settlement negotiations that may have occurred or to any extraneous matter contained in the Exceptions. Accordingly, we shall deny the Motion.

[9] This summary is based on the Stipulations of Fact (Stipulations) provided by the Parties during the May 6, 2015, hearing.

downloaded the Uber app, established an account and provided payment information may use the Uber app to locate the nearest available driver. The Uber app connects the passenger with a driver who has registered with a subsidiary of Uber and has logged onto the Uber app in order to transport the passenger to the desired destination for compensation. When a passenger submits a transportation request by entering the desired destination, the Uber app discloses the applicable rates for the trip request and provides the passenger with the option of requesting an estimated fare. Drivers are alerted to a passenger's trip request through the Uber app. Stipulation at 1-2.

When a driver accepts the passenger's trip request through the Uber app, the passenger receives the driver's estimated time of arrival, a photo of the driver and a description of the driver's vehicle. Upon arrival at the destination, the transportation request through the Uber app is deemed completed and the fare is charged to the credit card or other form of payment provided by the passenger when establishing the account to use the Uber app. After the payment has been processed, the passenger receives an electronic receipt through the Uber app documenting the details of the completed trip. *Id.* at 2.

Gegen, Rasier and Rasier-PA, wholly owned subsidiaries of Uber Technologies, Inc., operate or have operated in Pennsylvania from February 2014 to the present. Gegen operates as a broker under a license issued by the Commission pursuant to the *Gegen Order* approving its application to arrange for the transportation of persons between points in Pennsylvania. The Commission issued the broker license to Gegen on March 1, 2013. *Id.* at 1.

On February 11, 2014, Rasier launched the Uber app in Allegheny County. From this launch date until August 21, 2014, Uber licensed the Uber app to Rasier for use in Allegheny County. On August 21, 2014, Rasier-PA began operating as a transportation network company (TNC) between points in Allegheny County under a

certificate of public convenience (Certificate) issued by the Commission.[10] Rasier-PA is currently operating as a TNC in Allegheny County and throughout areas of Pennsylvania pursuant to the Commission's Orders approving Rasier-PA's applications for experimental services authority.[11] Stipulations at 1.

From February 11, 2014, through August 20, 2014, neither Rasier, Uber nor any subsidiary of Uber held authority from the Commission to transport passengers in Allegheny County for compensation or for any other authority relative to Allegheny County. Additionally, from February 11, 2014, through August 20, 2014, Rasier licensed the Uber app and contracted with drivers operating their personal automobiles to provide the transportation requested by passengers in Allegheny County. *Id.* at 2.

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[10] The Commission granted Rasier-PA's *Application for Emergency Temporary Authority (ETA) in Application of Rasier-PA LLC, a Wholly Owned Subsidiary of Uber Technologies, Inc. for Emergency Temporary Authority to Operate an Experimental Ride-Sharing Network Service Between Points in Allegheny County, PA*, Docket No. A-2014-2429993 (Order entered July 24, 2014) (*ETA Order*). Pursuant to the ETA Order, Rasier-PA received authority to provide motor carrier transportation service subject to the satisfaction of various conditions. On August 21, 2014, after satisfaction of these conditions, the Commission issued the certificate of public convenience to Rasier-PA to operate under its ETA.

[11] See, *Application of Rasier-PA LLC for the right to begin to transport, by motor vehicle, persons in experimental service of shared-ride network passenger trips between points in Allegheny County*, Docket No. A-2014-2416127 (Order entered December 5, 2014) (*Rasier-PA Allegheny County Order*); and *Application of Rasier-PA LLC for the right to begin to transport, by motor vehicle, persons in experimental service of shared-ride network passenger trips between points in Pennsylvania, excluding those points which originate or terminate in Counties of Beaver, Clinton, Columbia, Crawford, Lawrence, Lycoming, Mercer, Northumberland and Union*, Docket No. A-2014-2424608 (Order entered December 5, 2014) (*Rasier-PA Statewide Order*). Recently, the Commonwealth Court in *Capital City Cab Service v. Pa. PUC*, Nos. 238 C.D. 2015, 240 C.D. 2015, and 253 C.D. 2015, 2016 WL 1566722 (Pa. Cmwlth. April 19, 2016), affirmed the *Rasier-PA Statewide Order* and our additional order denying a Petition for Reconsideration in that proceeding.

Gegen, Rasier, and Rasier-PA do not have employees, but use the employees of Uber Technologies, Inc. The drivers with whom Rasier contracted from February 11, 2014, through August 20, 2014, did not hold operating authority from the Commission. *Id.*

III. Discussion

A. Legal Standards

As the proponent of a rule or order, the Complainant in this proceeding, I&E, bears the burden of proof pursuant to Section 332(a) of the Code, 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that Uber is responsible or accountable for the problem described in the Amended Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied,* 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, by even the smallest amount, than that presented by the Company. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC,* 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by I&E of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the Complainant shifts to Uber. If the evidence presented by the Respondent is of co-equal value or "weight," the burden of proof has not been satisfied. The Complainant

now has to provide some additional evidence to rebut that of the Respondent. *Burleson v. Pa. PUC,* 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd,* 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC,* 768 A.2d 1217 (Pa. Cmwlth. 2001). Having filed the Complaint against Uber, I&E is obliged to carry the burden of proving that the Respondent has violated the Code, a Commission Regulation, or a Commission Order.

In their Initial Decision, the ALJs made thirty-six Findings of Fact and reached six Conclusions of Law. I.D. at 4-9, 53. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

Before addressing the Exceptions, we note that any issue or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. It is well-settled that the Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC,* 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, University of Pennsylvania v. Pa. PUC,* 485 A.2d 1217 (Pa. Cmwlth. 1984).

B. Public Utility Code Violations

1. Initial Decision

In their Initial Decision, the ALJs found that Uber met the definition of a common carrier and was required to have authority from the Commission in order to

operate pursuant to Section 1101 of the Code.[12] In support, the ALJs cited to the following definitions contained in Section 102 of the Code:

- A transportation public utility is "[a]ny person or corporation ... owning or operating in this Commonwealth equipment or facilities for ... transporting passengers ... as a common carrier."

- A "common carrier" is a person or corporation "holding out, offering or undertaking, directly or indirectly, service for compensation to the public for the transportation of passengers ...."

- A "common carrier by motor vehicle" is a common carrier which undertakes the transportation of passengers within the Commonwealth "by motor vehicle for compensation, whether or not the owner or operator of such motor vehicle, or who or which provides or furnishes the motor vehicle, with or without driver, for transportation or for use in transportation of persons ...."

66 Pa. C.S. § 102.

The ALJs determined that the transportation services offered by Uber fell into the category of offering transportation to the public for compensation, and therefore was public utility service subject to regulation by the Commission. The ALJs described the method in which a passenger could download and utilize the Uber app in order to locate an available Uber driver, obtain a ride from the Uber driver and pay for the transportation through the passenger's Uber account. Moreover, the ALJs rejected Uber's argument that this process simply involved partnering drivers with people who requested rides through the Uber app. The ALJs described Uber's active role in providing the transportation services and found that Uber was not simply a disinterested, invisible entity in the background. I.D. at 13-14.

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[12] "Upon the application of any proposed public utility and the approval of such application by the commission evidenced by its certificate of public convenience first had and obtained, it shall be lawful for any such proposed public utility to begin to offer, render, furnish, or supply service within this Commonwealth." 66 Pa. C.S. § 1101.

First, the ALJs referenced the following driver oversight factors: Uber required drivers to apply to become drivers on its platform and to meet minimum criteria established by Uber; from the period of time between Uber's launch to the time it obtained experimental authority, Uber required its drivers to use company-owned smartphones in order to use the Uber app; and a driver could be deactivated from using the app for violating any of Uber's policies or failing to deliver transportation according to Uber's quality controls. Additionally, the ALJs noted Uber's touting of its insurance policy which it claimed would cover any accidents or injuries involving an Uber transportation transaction. I.D. at 14.

Second, the ALJs determined that Uber clearly held out its service to the public. As examples, the ALJs cited to the record evidence of how Officer Bowser received communications from Uber when he used the app and took his first ride. Also, the ALJs noted Uber's name or logo on the credit card receipt and confirmation notices in connection with Officer Bowser's Uber rides. *Id.*

In viewing these factors, the ALJs concluded that Uber offered or undertook, directly or indirectly, service for compensation to the public for the transportation of passengers and thereby met the definition of a common carrier. *Id.* at 15.

The ALJs noted Uber's argument that it is not a common carrier because its services are only available to a segment of the public. According to Uber, the only method by which a member of the public could use its transportation network services is to download the Uber app to a compatible mobile device or computer with an Internet browser, agree to Uber's terms and conditions and provide payment information. In Uber's view, these factors indicate that its service is not available to the general public; and, in support, Uber cited to *Aroniminick Transportation Co. v. Pa. Service Comm'n,*

170 A. 375 (Pa. Super. 1934) (*Aroniminick*),[13] and *Drexelbrook Associates v. Pa. PUC*, 418 Pa. 430, 212 A.2d 237 (1965) (*Drexelbrook*).[14] I.D. at 15.

The ALJs distinguished both *Aroniminick* and *Drexelbrook* and determined that Uber's reliance on them was misplaced. According to the ALJs, access to a mobile device or computer in order to secure transportation does not identify a special class of persons eligible to use Uber's service. Instead, the ALJs stated, the process simply defines Uber's method of hail and payment. Noting that each public utility is authorized to define its conditions of service and methods of payment through its tariff, the ALJs concluded that the restrictions do not render customers a special class rather than the indefinite public. I.D. at 16.[15]

Next, the ALJs addressed I&E's argument that Uber violated Section 2501 of the Code, 66 Pa. C.S. § 2501, pertaining to the brokerage of transportation service, by

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[13] In *Aroniminick*, the Superior Court considered whether a bus service offered by a landlord for the sole use of the landlord's tenants constituted common carriage which required the landlord to secure a certificate of public convenience. The court viewed the definition of a common carrier as one who undertakes for hire to carry "all persons indifferently who may apply for passage . . . ." 170 A. at 377. The court concluded that because the bus service was for the sole use of a particularly identified class of person, at special times, for no direct charge, it was not "common carriage" and no certificate of public convenience was required. *Id.*

[14] In *Drexelbrook*, a landlord proposed acquiring metering equipment to supply electricity and water to its tenants. Following the analysis of *Aroniminick*, the Supreme Court in *Drexelbrook*, concluded that the landlord was not proposing public utility service because only those individuals who had a landlord-tenant relationship with the landlord were eligible to receive service. Because service was only offered to this special class of people and not offered for the "indefinite public," the landlord was not a public utility. *Drexelbrook*, 212 A.2d at 240.

[15] The ALJs cited to *Keystone Warehousing Company v. Publ. Svc. Comm'n*, 161 A. 891 (Pa. Super. 1932), for the proposition that a carrier's requirement to have contracts with customers and to sometimes decline to contract with others did not mean that it did not hold itself out to the public generally to offer transportation service. I.D. at 16.

citing to the definition of broker under Section 2501(b). Additionally, the ALJs cited to the licensing requirement for brokers under Section 2505(a) of the Code:

> No person or corporation shall engage in the business of a broker in this Commonwealth unless such person holds a brokerage license issued by the commission. No such person or corporation, by virtue of a brokerage license, shall render service as a motor carrier unless he holds a certificate of public convenience or permit, as the case may be. *It shall be unlawful for any broker to employ any motor carrier who or which is not the lawful holder of an effective certificate of public convenience or permit.*

I.D. at 17 (quoting 66 Pa. C.S. § 2505(a)).

The ALJs determined that there was no dispute that the drivers who provided the transportation in this proceeding did not hold valid certificates of public convenience. Although noting Uber's claim that the broker license held by Gegen created "regulatory permissibility" to launch its service, the ALJs determined that Gegen's license did not provide authority to provide the transportation undertaken by Uber. I.D. at 16. Instead, the ALJs concluded, the transportation network service provided by Uber was prohibited by Section 2505(a) of the Code. I.D. at 17.

According to the ALJs, I&E had proved that Uber provided transportation for compensation from February 11, 2014, until August 20, 2014. During that time period, the ALJs stated, it was clear that both Uber and its drivers failed to have certificates of public convenience. As such, the ALJs found that Uber was operating in violation of Sections 1101 and 2505 of the Code.

2. Exceptions and Replies

In its second Exception, the Respondent argues that the ALJs erred in finding that Uber's services fell under the statutory definition of common carrier or broker. Uber claims that these statutory definitions do not describe the transportation network services offered by the Respondent and, therefore, Uber's activities did not require Commission authority. Exc. at 23.

Uber asserts that under the facts presented, it did not employ persons, own vehicles or transport passengers between points in Pennsylvania. Instead, Uber claims that its activities were limited to partnering with drivers who used their own personal vehicles to transport persons requesting service through the Uber app. Thus, Uber contends it was not operating as a common carrier. *Id.* at 24.

Uber also argues that it does not fit within the definition of common carrier because its services are only available to a segment of the public, citing again to *Aroniminick* and *Drexelbrook*. The Respondent states that the ALJs mischaracterized its legal argument by stating "[a]ccess to a mobile device or computer in order to arrange transportation does not identify a special class of persons who may use the Uber service." Exc. at 24-25 (quoting I.D. at 16). Instead, Uber claims it argued that 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. The other three steps include the requirements that a potential rider download the Uber app, agree to the Respondent's terms and conditions and provide valid payment information such as a credit card. Uber contends that its services are only available to a segment of the public which completes all four criteria. According to the Respondent, the four criteria make the service private in nature and therefore the service does not require a certificate of public convenience. Exc. at 25.

Regarding the definition of broker, Uber argues that it was not engaged in selling, providing, furnishing, contracting or arranging transportation by a motor carrier. Instead, the Respondent asserts its actions were limited to partnering with drivers to operate on the Uber platform and to receive leads from potential riders through the Uber app. Furthermore, Uber contends that it did not contract for or arrange specific transportation for passengers. Rather, the Respondent states riders used the Uber app to obtain transportation after agreeing to the terms and conditions established by Uber. Uber claims that it did not arrange transportation but simply matched riders with drivers who were available and happened to be closest to the pick-up locations. *Id.* at 25-26.

In its Replies to Uber's second Exception, I&E explains that Rasier-PA, an Uber subsidiary and a named respondent in this proceeding, is currently arguing before the Commonwealth Court that the Commission properly determined that Rasier-PA is a common carrier by motor vehicle in granting Rasier-PA's application for experimental authority.[16] I&E asserts that in this proceeding, Uber is making an argument diametrically opposed to the argument being proffered in the Commonwealth Court proceeding involving Rasier-PA. I&E argues that Uber's argument that the type of service it provides through the Uber app does not constitute service as a common carrier by motor vehicle is barred by the doctrine of judicial estoppel. R. Exc. at 10-11 (citing *Newman Dev. Group v. Genuardi's Family Market*, 98 A.3d 645 (Pa. Super. 2014) (*Newman*)). In *Newman*, I&E states, the Superior Court held that a party to an action is estopped from assuming a position inconsistent with his or her assertion in a previous action, if the contention was successfully maintained. R. Exc. at 11.

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[16] I&E cites to *Capital City Cab Serv. v. Pa. PUC*, No. 238 C.D. 2015; *Keystone Cab Serv., Inc., et al. v. Pa. PUC*, No. 240 C.D. 2015; and *Executive Transp. Co., et al. v. Pa. PUC*, No. 253 C.D. 2015 (Rasier-PA Brief filed on August 19, 2015) at 11. According to I&E, Rasier-PA's brief is a publicly available document.

Additionally, I&E cites to Section 1103 of the Code which states in relevant part: "[a]ny holder of a certificate of public convenience, exercising the authority conferred by such certificate, shall be deemed to have waived any and all objections to the terms and conditions of such certificate." R. Exc. at 11 (citing 66 Pa. C.S. § 1103). Rasier-PA, I&E points out, holds a certificate of public convenience from the Commission to provide transportation service by connecting passengers to drivers through the Uber app. This is the same service it now argues is not subject to the Code. I&E argues that pursuant to Section 1103 of the Code, Rasier-PA is prohibited from objecting to the Commission's jurisdiction over its service. R. Exc. at 11.

Further, I&E argues that Uber's claim of its service being open to only a segment of the public defies logic. I&E proffers that any member of the public who downloads the Uber app, accepts the terms and conditions of the Uber app and provides payment information may receive transportation service from Uber. Also, I&E asserts that the sheer number of rides occurring during a six-month period in Allegheny County as provided by Uber's witness during the hearing is evidence that Uber's transportation service was open to the public. Moreover, I&E cites to Uber's purported reasoning for ignoring the Commission's cease and desist order as being the result of a tremendous need for the service. This argument, I&E contends, is incongruous with Uber's claim that its service is not open to the public. *Id.* at 12-13.

I&E argues that the ALJs properly determined that Uber's activities violated the Code as either an unlicensed broker, pursuant to 66 Pa. Code § 2505, or an uncertificated motor carrier, pursuant to 66 Pa. C.S. § 1101.

3. Disposition

In the *Rasier-PA Allegheny County Order*, we considered the application of Rasier-PA to operate as a motor common carrier of persons in experimental service.

Rasier-PA filed its application on April 14, 2014, during the time period in which Uber launched its service in Allegheny County. According to its application, Rasier-PA would use a digital platform to connect passengers to independent drivers with whom it would contract; drivers would use their personal, non-commercially licensed vehicles for providing transportation services; and Rasier-PA would license the technology from its parent, Uber, to generate leads from riders who need transportation services. In the *Rasier-PA Allegheny County Order*, we concluded that "[t]here is no legitimate question that Rasier-PA, utilizing the Uber software and back office functions, is offering and operating 'on demand' motor carrier service to the public." *Id.* at 31. Similarly, in this proceeding, it cannot be reasonably disputed that the Respondent was offering and providing motor common carrier service to the public for compensation.

Uber claims that it was not operating as a common carrier because its activities were limited to partnering with drivers who used their own personal vehicles to transport passengers via the Uber app. However, the record is clear that the Respondent exercised active and significant oversight of its drivers and that its service was reasonably available to the general public for compensation.[17] Moreover, we previously determined in the *Rasier-PA Allegheny County Order* that the Code clearly does not require the transportation network provider to own the vehicles in order to be a motor carrier. Rather, the definitions of transportation public utility, common carrier, and common carrier by motor vehicle convey the opposite position that the provision of transportation service can be offered indirectly and independently of actual ownership of a vehicle. *Id.* at 31. Thus, the ALJs correctly found that Uber satisfied the definition of a common carrier by motor vehicle, a category of public utility service under Section 102 of the Code, and that the Respondent violated Section 1101 of the Code by providing this common carrier service without authority from the Commission.

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[17] In fact, the Respondent exercised even more control during the time period in this proceeding than the service proposed in the *Rasier-PA Order* by requiring its drivers to use smart phones owned by Uber.

In its Exceptions, Uber also claims that its service was only available to a special class of persons and thus was not open to the public pursuant to *Aroniminick* and *Drexelbrook*. Specifically, Uber argues that its transportation service was limited to a definite class of individuals who owned a computer or smart phone, downloaded the Uber app, agreed to the Respondent's terms and conditions and provided valid payment information such as a credit card. We find this argument to be meritless.

First, the vast number of rides provided by Uber from February 11, 2014, to August 20, 2014, belies the claim that its service was only available to an exclusive, limited customer base. **[Begin Proprietary]** [redacted] **[End Proprietary]** Furthermore, Uber's argument rings hollow in the face of its persistent claim of an overwhelming demand and need for the service that required Uber to launch it without Commission authorization and to continue its operation despite two cease and desist orders. *See, e.g.*, Exc. at 10, 31, and 36-37. Additionally, we agree with the ALJs that the app-based process for accessing the service simply helps to define the method of hail and payment. It does not render the service private in nature.

Finally, we note that pursuant to Section 1103(a) of the Code, 66 Pa. C.S. § 1103(a), "[a]ny holder of a certificate of public convenience, exercising the authority conferred by such certificate, shall be deemed to have waived any and all objections to the terms and conditions of such certificate." Here, Rasier-PA received a certificate for public convenience for motor common carrier of persons in experimental service pursuant to the *Rasier-PA Allegheny County Order*.[18] Pursuant to Section 1103(a), Rasier-PA has waived any objection to its status as a motor common carrier. Thus, we agree with I&E that Rasier-PA is prohibited from objecting to the Commission's

[18] Rasier-PA also received a certificate of public convenience for motor carrier service pursuant to its statewide application in the *Rasier-PA Statewide Order*.

jurisdiction of its service. *Peoples Natural Gas Company v. Pa. PUC*, 523 Pa. 370, 567 A.2d 642 (1989).

Regarding Section 2501 of the Code, the ALJs appropriately determined that even if Uber were considered to be a broker, the arrangement of transportation using the Uber app violated Gegen's broker license. Under the plain language of Section 2505(a) of the Code, it is unlawful for any broker to employ any motor carrier without an effective certificate of public convenience. The record is clear that none of the Uber drivers who participated in the service held certificates of public convenience. Thus, there was no reasonable basis for the Respondent to believe it had any authority to operate its service under Gegen's broker license and the service provided by Uber was prohibited by Section 2505(a).

C. Civil Penalty for Public Utility Code Violations

1. Penalty Per Day or Penalty Per Trip

a. Initial Decision

The ALJs explained that I&E originally sought a civil penalty based on the number of days Uber provided transportation without authority from the Commission. Subsequently in its Amended Complaint, I&E revised the prayer for relief and sought a penalty based on each unauthorized trip rendered by Uber. I&E based the number of trips on a "proxy" number because Uber had not yet produced the requested trip data. On the day of the hearing, Uber finally provided the trip data through the testimony of Jon Feldman pursuant to a protective order. I.D. at 18.

The ALJs noted Uber's objection to a penalty calculated on a per-trip basis and the Respondent's argument that any penalty should be assessed on a per-day basis.

According to Uber, assessing the penalty on a per-trip basis would result in an excessive penalty. *Id.* at 19.

Here, the ALJs concluded that each trip provided by Uber without a certificate of public convenience from the Commission constituted a distinct, identifiable and separate violation of the Code. The ALJs cited to Section 3301 of the Code, 66 Pa. C.S. § 3301, which provides the Commission with the authority to assess a civil penalty for violations of the Code:

> If any public utility, or any other person or corporation subject to this part, shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect or refuse to perform any duty enjoined upon it by this part; or shall fail, omit, neglect or refuse to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the commission . . . or to comply with any final judgment, order or decree made by any court, such public utility, person or corporation *for such violation*, omission, failure, neglect, or refusal, shall forfeit and pay to the Commonwealth a sum not exceeding $1,000 . . . .

I.D. at 19 (emphasis added).

Additionally, the ALJs explained that the Commission consistently has applied a per-trip penalty on other carriers found to have provided unauthorized transportation in violation of the Code. The ALJs cited to *Newcomer Trucking, Inc. v. Pa. PUC*, 531 A.2d 85 (Pa. Cmwlth. 1987) (*Newcomer Trucking*), in which a motor carrier violated a Commission regulation prohibiting a certificate holder from transporting the goods of more than one consignor on one truck at any one time. Newcomer Trucking violated the certificate restriction 184 times on 128 separate days. The Commission assessed a civil penalty in the amount of $100 for each of the 184 events, for a total of $18,400, and suspended Newcomer's certificate of public

convenience for ninety days. On appeal to the Commonwealth Court, Newcomer Trucking argued even though it had violated the regulation 184 times, the Commission was only authorized to assess a total penalty in the amount of $1,000. The ALJs noted that the Commonwealth Court soundly rejected the argument of Newcomer Trucking. I.D. at 19-20.

The ALJs explained the Commonwealth Court's analysis of referring to Section 1930 of the Statutory Construction Act (Act), 1 Pa. C.S. § 1930, [19] which dictates a penalty for each violation of a statute, because there was no prior case law interpreting Section 3301 of the Code. The ALJs quoted the reasoning of the Commonwealth Court as follows:

> When [Section 1930 of the Act] is read in conjunction with Section 1922(1) of the Act, [20] it becomes obvious that Section 3301(a) of the Code permits the PUC to impose a fine of up to $1,000 for each and every discrete violation of the Code or PUC regulation, *regardless of the number of violations that occur*.

I.D. at 20 (quoting *Newcomer Trucking*, 531 A.2d at 87) (emphasis added). Thus, the Commonwealth Court held that Section 3301 authorized the Commission to assess a civil penalty of up to $1,000 for each of the 184 times that Newcomer Trucking violated the regulation. *Newcomer Trucking*, 531 A.2d at 87.

Furthermore, the ALJs highlighted the Commonwealth Court's rejection of the argument by Newcomer Trucking that the Code required the Commission to impose

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[19] "Whenever a penalty or forfeiture is provided for the violation of a statute, such penalty or forfeiture shall be construed to be for each such violation." 1 Pa. C.S. § 1930.

[20] Section 1922(1) of the Act states that a statute is to be interpreted to avoid an absurd or unreasonable result. 1 Pa. C.S. § 1922(1).

the monetary penalty on a per-day, not a per-violation, basis. Noting that Section 3301 of the Code does not explicitly provide this distinction – and also acknowledging the provision of Section 3301(b) which provides for the assessment of penalties for "continuing offenses" – the court found that a continuing offense was one which "is of an ongoing nature and cannot be feasibly segregated into discrete violations so as to impose separate penalties." I.D. at 20 (quoting *Newcomer Trucking*, 531 A.2d at 87). Furthermore, the ALJs cited the court's observation that each of the 184 separate shipments was identified and clearly constituted a discrete violation of the Code. I.D. at 20.

Additionally, the ALJs cited to the Commonwealth Court's decision in *Kviatkovsky v. Pa. PUC*, 618 A.2d 1209 (Pa. Cmwlth. 1992) (*Kviatkovsky*), which upheld the assessment of a $2,000 civil penalty for four distinct violations of the Code. The ALJs also cited to Commission decisions imposing a per-trip penalty for motor carrier violations of the Code. I.D. at 21.[21]

Here, the ALJs reasoned that each trip provided by Uber without a certificate of public convenience from the Commission constituted a distinct, identifiable and separate violation of the Code. According to the ALJs, the Commission has consistently applied this approach to other carriers which have provided unauthorized transportation in violation of the Code. Regarding the Respondent's argument that a penalty assessed for each unauthorized trip would result in an unprecedented civil penalty, the ALJs agreed. However, the ALJs concluded that the unprecedented penalty is "due solely to the sheer number of violations which occurred and does not preclude the application of a penalty on a per-trip basis." I.D. at 21-22.

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[21] The ALJs cited to *Blue & White Lines, Inc. v. Waddington*, Docket No. A-00108279C9301 (Order entered February 13, 1995) (*Blue & White Lines*), *aff'd*, *Pa. PUC v. Waddington*, 670 A.2d 199 (Pa. Cmwlth. 1995), *app. den.*, 544 Pa. 679, 678 A.2d 368 (1996); and *Pa. PUC v. Penn Harris Taxi Service Company, Inc.*, Docket No. A-00002450C9603 (Order entered March 12, 1998).

b. Exceptions and Replies

In its fourth Exception, the Respondent argues that the ALJs erred in determining that a per-trip violation is lawful and appropriate. Exc. at 43.

Uber posits that *Newcomer Trucking* 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 Respondent contends that the allegations in *Newcomer Trucking* did not involve unauthorized service or the need for the Commission to determine if authority to operate was necessary. According to Uber, the Commonwealth Court's decision was based on the finding of being able to feasibly segregate the 184 violations into discrete violations of the Code. Thus, the Respondent argues that *Newcomer Trucking* is distinguishable from this proceeding. Exc. at 44.

In contrast, Uber asserts, this proceeding involves allegations of unauthorized service and the issue to be decided is whether Commission authority is necessary to utilize a digital platform to facilitate the transportation of passengers. Additionally, the Respondent claims that our *July 24, 2014 Order* affirming the cease and desist order of the ALJs did not focus on individual passenger trips but rather addressed the use of the Uber app by non-certificated drivers. Uber also argues that I&E's Amended Complaint focused on the launch of the Uber app as the activity it sought to enjoin. Thus, Uber contends that the question should be whether the use of its digital platform violated the Code and if it did, whether the continued operation after that determination would be considered a continuing offense. According to Uber, penalties involving a continuing offense should be assessed on a per-day basis. Exc. at 44-45.

Additionally, Uber claims that it did not know the Commission viewed the use of the Uber app to facilitate transportation of passengers as requiring Commission authority until the issuance of the *July 24, 2014 Order*. Therefore, Uber argues that any

civil penalty should address only the operations after the *July 24, 2014 Order* and until August 20, 2014. Exc. at 45.

Alternatively, the Respondent asserts that the Commission should refrain from issuing a per-trip civil penalty because I&E's original Complaint sought a per-day civil penalty but changed the structure of the penalty request seven months later. According to Uber, I&E offered no explanation or rationale for the change to a per-trip violation request. Further, Uber argues that I&E's actions in changing its civil penalty demand over four months after Rasier-PA had received a certificate to provide transportation network services was inappropriate and should not be endorsed by the Commission. *Id.*

Additionally, Uber avers that the Commission has applied a per-day civil penalty approach in prior cases and that I&E's attempt to seek a per-trip civil penalty is inconsistent and arbitrary. *Id.* at 46 (citing *Pa. PUC v. S.S. Sahib Cab Co.*, Docket No. A-00121184C0601 (Order entered March 6, 2007) (*S.S. Sahib Cab*); *Pa. PUC v. J&E Transportation Service, LLC*, Docket No. A-00122121C0601 (Order entered September 19, 2006) (*J&E Transportation*); and *Pa. PUC v. M&G Trucking, Inc.*, Docket Nos. A-00114371C0601 and A-00114371 (Order entered July 20, 2006) (*M&G Trucking*)). Moreover, Uber argues, when civil penalties have been imposed on a per-trip basis, they have been lower compared with assessments made on a continuing per-day basis. Exc. at 46 (citing *Pa. PUC v. A-Apollo Transfer, Inc.*, Docket Nos. A-00098529C0501 and A-0098529 (Order entered October 7, 2005) (*A-Apollo Transfer*)).

Uber claims that there are additional compelling reasons weighing against a per-trip civil penalty, including the Respondent's belief that it had authority to provide its services at the time it launched the Uber app in Allegheny County. Also, Uber contends its services have filled a void in Allegheny County's transportation infrastructure. Finally, the Respondent asserts that the record is devoid of any evidence of public safety

concerns or gaps in liability insurance coverage in connection with the services that were provided. Exc. at 46-47.

In its replies, I&E argues that Uber makes a meritless claim that Section 3301 of the Code does not authorize a per-trip civil penalty. I&E contends that the ALJs properly applied the seminal case of *Newcomer Trucking* which interpreted Section 3301 as authorizing a civil penalty of up to $1,000 for each discrete violation regardless of the number of violations. R. Exc. at 16-17.

I&E also contends that Uber's argument that a civil penalty should be limited to a per-day civil penalty basis starting on July 24, 2014, is disingenuous. According to I&E, Uber's argument is contrary to the law because interim emergency orders become effective upon issuance by a presiding officer pursuant to 52 Pa. Code § 3.10. Thus, I&E asserts, the *July 1, 2014 Order* directing Uber to immediately cease and desist the use of the Uber app to facilitate the Respondent's transportation service became effective on July 1, 2014. Furthermore, I&E proffers that Uber admitted as early as April 2014 that Commission staff advised the Respondent of the need to file an application for authority to cover its operations. R. Exc. at 18.

Regarding Uber's contention that I&E improperly changed its proposed civil penalty from a per-day to a per-trip calculation, I&E argues that Section 1.81 of our Regulations, 52 Pa. Code § 1.81, permitted such an amendment.[22] Moreover, I&E avers that the revision to a per-trip penalty was legally supported by *Newcomer Trucking*. I&E contends it was also justified because of Uber's continued operation after the issuance of both cease and desist orders and because of the Respondent's delay until the evidentiary hearing to provide the requested trip data. R. Exc. at 18-19.

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[22] "An amendment to a submittal or pleading may be tendered for filing at any time and will be deemed filed in accordance with § 1.11 (relating to date of filing) unless the Commission otherwise orders." 52 Pa. Code § 1.81(a).

I&E also argues that the Commission routinely imposes a per-trip civil penalty analysis in "jitney cases." *Id.* at 19 (citing *Pa. PUC v. Corey Transport, LLC*, Docket No. C-2010-2155103 (Order entered March 22, 2012) (*Corey Transport*)).[23] I&E contends that the cases cited by Uber actually support a per-trip civil penalty of $1,000 for each instance of uncertificated transportation. For example, I&E contends that in *A-Apollo Transfer* the Commission imposed a $10,000 civil penalty based on ten separate instances of a carrier transporting household goods without authority. In *J&E Transportation*, the Commission fined a motor carrier in the amount of $2,000 relating to transportation of persons without authority on two separate trips. In *M&G Trucking*, I&E explains, the Commission imposed a $3,000 civil penalty based on findings that the motor carrier transported property without authority on three separate occasions. R. Exc. at 19.

As to Uber's reliance on *S.S. Sahib Cab*, I&E argues that it is distinguishable from this proceeding. The motor carrier in *S.S. Sahib Cab* held a certificate and did not operate in defiance of a cease and desist order. Furthermore, I&E argues, the enforcement bureau alleged that the motor carrier was under suspension for failure to maintain evidence of insurance, to complete trip log sheets, and to retain completed log sheets for two years. I&E contends that in *S.S. Sahib Cab*, unlike this proceeding, it was not feasible to segregate the violations. Thus, I&E avers that the Commission imposed a civil penalty that was based, in part, on the number of days that the motor carrier operated while under suspension. R. Exc. at 20.

Responding to Uber's argument that I&E presented no evidence of safety concerns to support a per-trip civil penalty, I&E cited to the testimony of its witness Officer Bowser. According to I&E, "[c]ommon sense dictates that each trip in a motor

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[23] In *Corey Transport*, the Commission sustained a complaint requesting a $1,000 civil penalty for each instance of providing or holding itself out to provide passenger transportation service without a certificate.

vehicle can result in an accident and none of the trips Uber provided between February 11, 2014 through August 20, 2014 were subject to the Commission's oversight, which is designed to protect public safety." *Id.* I&E argues that the ALJs correctly determined that it was not required to prove that the public safety concerns resulted in actual events or injuries. Rather, I&E contends, the General Assembly's declaration of conduct as being unlawful is tantamount in law to calling it injurious to the public. *Id.* at 20-21 (citing *Pa. PUC v. Israel*, 356 Pa. 400, 406, 52 A.2d 317, 321 (1947) (*Israel*)).

c. Disposition

The Commonwealth Court has interpreted Section 3301 of the Code to authorize the Commission to impose a fine of up to $1,000 for each and every discrete violation of the Code regardless of the number of violations that occur. *Newcomer Trucking*, 531 A.2d at 87; and *Kviatkovsky*, 618 A.2d at 1212. In their Initial Decision, the ALJs fully explained our authority to impose a fine for each violation of the Code and our consistent implementation of the penalty provision in cases involving motor carrier violations on a per-trip basis. I.D. at 19-21.

Further, the Commonwealth Court explained that a per-day violation applies to "continuing violations" under Section 3301(b) of the Code.[24] *Newcomer Trucking*, 531 A.2d at 87. According to the court, continuing offenses are "proscribed

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[24] Continuing offenses.--Each and every day's continuance in the violation of any regulation or final direction, requirement, determination, or order of the commission, or of any order of the commission prescribing temporary rates in any rate proceeding, or of any final judgment, order or decree made by any court, shall be a separate and distinct offense....

66 Pa. C.S. § 3301(b).

activities that are of an ongoing nature and cannot be feasibly segregated into discrete violations so as to impose separate penalties." *Id.*

Here, Uber argues that the focus of the civil penalty should be on whether the launch of the Uber app violated the Code and if it did, whether the continued operation would be a continuing offense assessed on a per-day basis. The Respondent claims that the ALJs inappropriately focused on individual passenger trips rather than the launch of the app. We disagree.

As discussed above, we found that Uber provided transportation to the public for compensation in violation of the Code. We rejected the Respondent's claim that it was simply a disinterested invisible entity partnering drivers with passengers through the Uber app. Uber's contentions regarding the civil penalty – that the launch of the app was the only possible violation of the Code – is simply a rehash of its prior argument that it was not acting as a common carrier by motor vehicle. The record is clear that the Respondent played an active role in providing the unauthorized transportation services.

In their Stipulations, the Parties detailed how each ride arranged through the Uber app has a distinct starting point and end point. Each trip can be segregated and documented as an individual ride with a corresponding payment transaction. For example, upon arrival at the destination, the transportation request through the Uber app is deemed completed and the fare is charged to the credit card or other form of payment provided by the passenger when establishing the account to use the Uber app. After the payment has been processed, the passenger receives an electronic receipt through the Uber app documenting the details of the completed trip. *See* Stipulations at 2. Thus, it is clear that each ride can be feasibly documented as a separate rather than a continuing violation.

In its Exceptions, the Respondent cites to four prior Commission cases for the proposition that we have applied a per-day civil penalty and that application of a per-trip civil penalty would be inconsistent and arbitrary. Preliminarily, we note that each of those cases involved default judgments in which we did not have the benefit of a full hearing and a developed record. Furthermore, I&E correctly explains, that three of the cases cited by Uber – *J&E Transportation*, *M&G Trucking*, and *A-Apollo Transfer* – actually support the imposition of a civil penalty for each instance of uncertificated transportation. The fourth case, *S.S. Sahib Cab*, involved violations that could not be feasibly segregated into separate violations. Thus, it was appropriate under the circumstances of that case to apply a per-day violation.

Furthermore, Uber argues that it did not know the Commission viewed the use of the Uber app to facilitate transportation of passengers as requiring Commission authority until the issuance of the *July 24, 2014 Order*. As will be discussed further below, Uber should have known that at the time of the Uber launch in February 2014, it was required to have Commission authority to provide its service. Moreover, in April 2014, Commission staff advised the Respondent of the need to file an application to cover its operations. It is undisputable, however, that as of July 1, 2014, Uber was ordered to cease and desist its operations because it lacked Commission authority to operate. In making its claim that the cease and desist order did not become effective until the issuance of the *July 24, 2014 Order*, Uber disregards Section 3.10 of our Regulations, 52 Pa. Code § 3.10. Clearly, Section 3.10 provides that orders granting interim emergency relief are effective immediately and do not provide for a stay pending review by the Commission. Uber's argument to the contrary is entirely without merit.

Finally, we acknowledge that a penalty assessed for each individual trip will result in a significant total penalty. However, we agree with the conclusion of the ALJs that this result is due to the sheer number of violations which occurred.[25]

2. Evaluation of the Civil Penalty under 52 Pa. Code § 69.1201

a. Initial Decision

The ALJs set forth the ten factors of our policy statement warranting consideration of an appropriate civil penalty as follows:

> (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.
>
> (2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.
>
> (3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.
>
> (4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at

[25] Uber's additional arguments, such as its belief that the service was covered under the Gegen broker license, the service filled a void in transportation, and the lack of actual safety incidents are irrelevant to an evaluation of whether a per trip or a per-day violation should be imposed. These arguments are more appropriately addressed in the next section pertaining to the evaluation of our policy statement.

issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

(5) The number of customers affected and the duration of the violation.

(6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

52 Pa. Code § 69.1201(c).

In their analysis of these factors, the ALJs found that Uber's conduct and the consequences of the conduct under the first and second factors constituted a serious violation of the Code. Specifically, the ALJs concluded that Uber's refusal to submit to the Commission's oversight prevented the Commission from enforcing safety regulations of motor carriers and from helping to prevent potentially catastrophic accidents involving injury or death. I.D. at 24 (citing the *July 24, 2014 Order* at 21).

Relying on our *July 24, 2014 Order*, the ALJs explained that under the delegated authority of the General Assembly, the Commission has the responsibility to ensure that the travelling public is transported safely. However, the ALJs explained, the record evidence showed that as a result of Uber's actions, the Commission was unable to fulfill its duties relating to the safety of the travelling public. The Commission could not inspect the vehicles of the Uber drivers, review the driving and criminal history records of the Uber drivers, or ensure that the Uber drivers maintained adequate insurance coverage. According to the ALJs, Uber's perception that the public needed its transportation service did not outweigh the Commission's mandate to ensure the travelling public is transported safely. Thus, the ALJs reasoned, the risk to the public safety as a consequence of the violation merited a higher penalty. I.D. at 22-24.

Additionally, under the first factor, the ALJs reasoned that although I&E did not present evidence of actual harm to any individuals, Uber's actions did not negate the seriousness of the violation. The ALJs explained that the Commission's Regulations related to public safety do not guarantee the prevention of any damage to property or personal injury. Rather, Commission oversight is designed to minimize the potential for damage to property or personal injury. Thus, the ALJs concluded that I&E was not required to prove that actual incidents supported its public safety concerns. *Id.* at 24.

Finally, the ALJs cited to evidence that there were at least nine accidents involving Uber drivers that could lead to an insurance claim. The ALJs explained that these incidents, although relatively small in number, highlighted the need for Commission oversight to protect the public. *Id.* at 24-25.

In addressing the third factor, pertaining to the intentional nature of the Respondent's actions, the ALJs found that Uber's conduct from February 11, 2014, until July 1, 2014, was intentional because it knew or should have known that it was providing transportation which required authority from the Commission. Nonetheless, the ALJs

concluded that the circumstances of the unauthorized service from February 11, 2014, until July 1, 2014 (the Launch Period), merited a lower penalty. However, the ALJs determined that Uber's conduct from July 2, 2014, until August 20, 2014 (the Cease and Desist Period), was deliberate and calculated and, thus, merited the maximum penalty. I.D. at 29.

As to the Launch Period, the ALJs explained that Uber, as a sophisticated company, should have been aware that arranging transportation with uncertificated drivers was not permitted under Gegen's broker license because the limits of the authority are clearly defined under Section 2505 of the Code, 66 Pa. C.S. § 2505. Further, the ALJs noted that Uber was communicating with the Commission during this period because the Respondent decided to file an application for experimental service authority in April 2014.[26] According to the ALJs, any claim by the Respondent that it operated in "good faith ignorance" of the law is disingenuous and does not permit the exoneration of the penalties. However, the ALJs credited Uber's action in securing some authority from the Commission in the form of Gegen's broker license and its discussions with the Commission regarding the proper type of authority the Respondent needed to lawfully conduct its transportation service. Accordingly, the ALJs determined that a lower penalty for the Launch Period was appropriate. I.D. at 26.

In contrast, the ALJs determined that there was no excuse for Uber's continued operation during the Cease and Desist Period. The ALJs considered Uber's actions to operate during this period to be a defiant and calculated business decision. Additionally, the ALJs criticized Uber's argument that it was justified in continuing to operate because it believed the *July 1, 2014 Order* was subject to review by the Commission. The ALJs cited to Section 3.10 of our Regulations, 52 Pa. Code § 3.10,

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[26] The ALJs cited to *Blue & White Lines*, in which we held that arranging for unauthorized trips following submission of an application is a deliberate disregard for the Commission's jurisdiction and assessed the maximum penalty for each trip arranged.

which explicitly provides that an order granting interim emergency relief is immediately effective upon issuance and does not provide for a stay pending Commission review. Next, the ALJs discounted Uber's claim that the *July 1, 2014 Order* was rendered without a full record identifying the functions being provided by the Respondent. Although the ALJs recognized that Uber's service may have been novel, they explained that the Respondent elected to not present any witnesses or exhibits at the Petition hearing. I.D. at 26-27.

The ALJs concluded that there was no excuse for Uber's continued operation during the Cease and Desist Period and that the decision to operate was intentional on the part of Uber's management. Thus, the ALJs found a maximum penalty for each of the trips during the Cease and Desist Period was appropriate. *Id.* at 27-29.[27]

The fourth factor considered by the ALJs reviews efforts made by the Respondent to modify internal practices and procedures in order to prevent the conduct in question from recurring. The ALJs noted that after the Respondent was granted authority to operate in August 2014, it appears to have complied with the technical directives of the Commission regarding its transportation network service. However, the ALJs explained that this compliance occurred well after Uber was aware that its service was being provided without proper authorization from the Commission. Thus, the ALJs concluded that although Uber's actions after securing proper authority may offer some mitigation of a penalty, it is only a small measure. I.D. at 29-30 (quoting 52 Pa. Code § 69.1201(c)(4),

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[27] The ALJs cited to prior decisions in which the Commission has assessed a maximum penalty in similar situations. *See Blue & White Lines*; *Pa. PUC v. Brungard*, Docket No. A-00113098C0101 (Order entered June 3, 2002) (*Brungard*); and *Pa. PUC v. Classic Coach, Ltd.*, Docket No. A-00107689C0303 (Order entered May 15, 2007). The ALJs also distinguished *Pa. PUC v. Greer*, Docket No. C-2011-2207151 (Order entered January 4, 2012) (*Greer*) (Commission declined to impose maximum penalty because the respondent appeared genuinely contrite and the likelihood of future unauthorized activity seemed remote). Unlike in *Greer*, the ALJs reasoned, Uber continued to defy the Commission's authority. I.D. at 28-29.

"The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.").

The fifth factor considers the impact of Uber's conduct with respect to the number of customers affected during the duration of the violation. The ALJs stated that Uber provided a substantial number of trips without Commission authority and without Commission oversight. Citing to the testimony of Officer Bowser, the ALJs found that each of the unauthorized trips impacted not just the driver and the passenger involved, but other motorists and pedestrians as well. The ALJs reasoned that although Commission oversight does not guarantee public safety, a substantial number of people were put at risk which merited a higher penalty. I.D. at 30.

Under the sixth factor, the ALJs considered Uber's compliance history to determine whether or not the violations at issue were isolated. The ALJs determined that this factor merited neither mitigation nor magnification of the civil penalty. Explaining that this factor focuses on a respondent's historical behavior at the Commission, not the conduct which formed the basis for the enforcement action in the first place, the ALJs noted Uber did not have a prior history with the Commission. The ALJs found that there was no evidence in the record that the Commission was required to take enforcement action (other than the pending Amended Complaint) against Gegen, which has held a broker license since 2013. Thus, the ALJs held that Uber's compliance history does not impact the imposition of a civil penalty in this proceeding. I.D. at 31.

The ALJs reasoned that the seventh factor, whether Uber cooperated with the Commission's investigation, does not impact the assessment of a civil penalty. Initially, the ALJs explained that Uber's conduct during the litigation of this proceeding has been obstructive, citing to the Respondent's failure to answer discovery, to comply with the ALJs' orders and to respond to the Secretarial Letter dated July 28, 2014. However, the ALJs noted Uber's argument that, in litigated proceedings, a respondent is

not required to cooperate with I&E. The ALJs further stated that neither Uber nor I&E provided any case law explaining the meaning of a "Commission investigation" as opposed to a Commission prosecution for the purposes of evaluating an appropriate civil penalty. Here, the ALJs explained that the factors provide guidance in the assessment of a civil penalty and a penalty need not be based on every factor. Furthermore, the ALJs indicated that the issue of Uber's conduct during the litigation is addressed later in the Initial Decision relating to the assessment of a civil penalty as a sanction for failing to comply with the discovery requests of the trip data. As such, the ALJs found that the issue of cooperation did not factor into the assessment of a civil penalty. I.D. at 32.

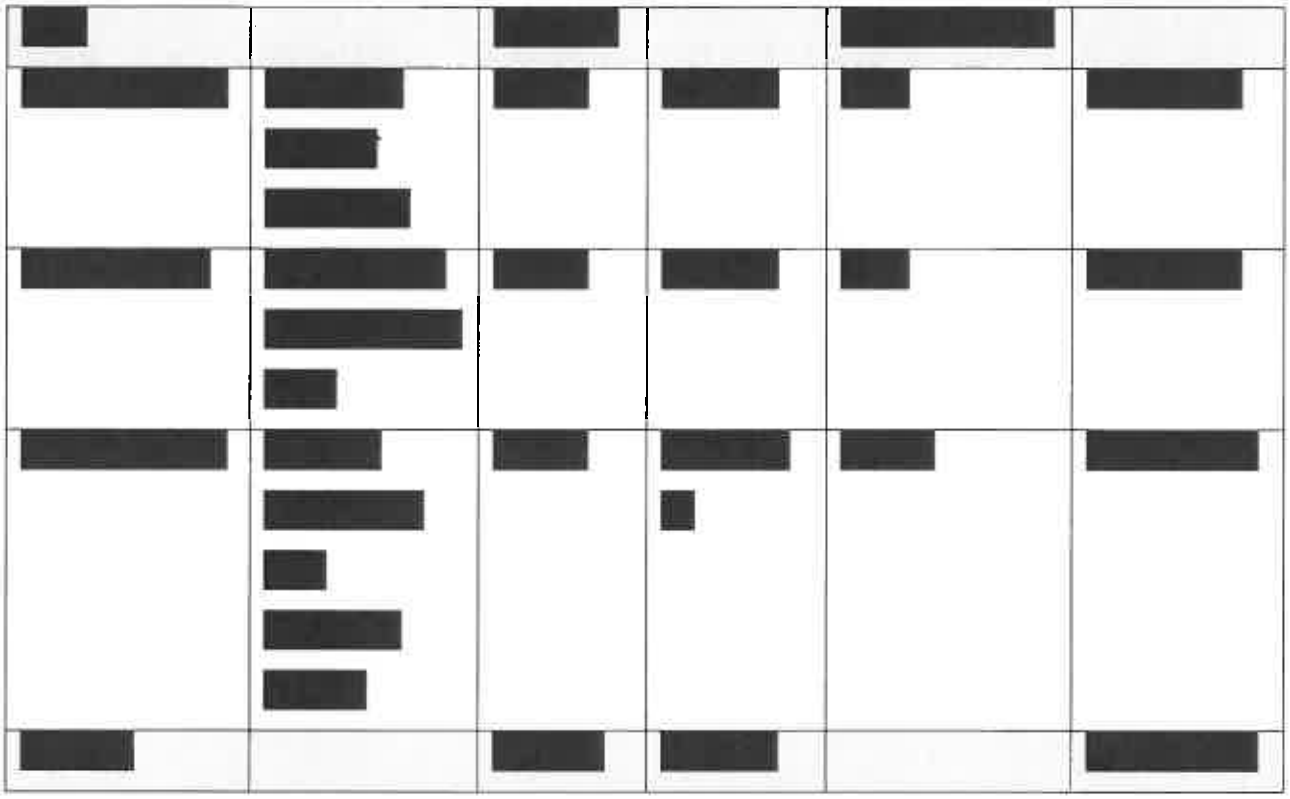
Under the eighth factor pertaining to deterrence of future violations, the ALJs stated that penalty assessments served to deter both the violator and others from violating the Code. Here, the ALJs reasoned that a significant penalty is necessary to not just deter Uber, but also serves a wider public purpose of deterring other entities who may wish to launch a utility service without Commission approval. Accordingly, the ALJs found that this factor weighs heavily in support of a substantial civil penalty, particularly for the Cease and Desist Period. I.D. at 33-34.

In consideration of the ninth factor, the ALJs cited to the prior decisions in *Brungard* and *Blue & White Lines* in which the Commission assessed a civil penalty of $1,000 for each unauthorized trip. According to the ALJs, these cases provide guidance for the determination of a civil penalty on a per-trip basis in this proceeding. Moreover, the ALJs rejected Uber's argument that *Pa. PUC v. Lyft, Inc.*, Docket No. C-2014-2422713 (Order entered July 15, 2015) (*Lyft*), should be considered when assessing a civil penalty in this proceeding. The ALJs noted that in *Lyft* the parties negotiated a full settlement. Thus, the ALJs concluded the settlement amount is irrelevant to the consideration of an appropriate penalty in a fully litigated case. I.D. at 34.

Under the final factor, the catchall "other relevant factors," the ALJs considered Uber's argument that it provided significant benefits to the public by providing an additional transportation service need identified by the Commission. According to the Respondent, this fact should mitigate or exonerate any civil penalty. In response, the ALJs explained that they were not unmindful of the public benefits provided by Uber's transportation network services. However, the ALJs determined that Uber's actions in choosing to launch its service and to evade Commission oversight until August 20, 2014, placed the public at risk and impeded the Commission's mandate to enforce the requirements of the Code. Upon weighing all the factors, the ALJs imposed a total civil penalty of $49,852,300 for the violations of the Code during the Launch Period and the Cease and Desist Period. I.D. at 35.

The ALJs set forth the calculation of the civil penalty in the Proprietary Version of the Initial Decision. They applied a per-trip civil penalty based on the number of trips provided by Uber during the Launch Period and a maximum civil penalty per trip during the Cease and Desist Period as follows:

[Begin Proprietary]



[End Proprietary] I.D. at Appendix A.

b. Exceptions and Replies

In its third Exception, Uber argues that the ALJs erred in applying the civil penalty factors under 52 Pa. Code § 69.1201(c). The Respondent contends that each factor supports the imposition of no civil penalty or a low civil penalty.[28]

[28] Within the third Exception, Uber filed eight sub-Exceptions with similar arguments contained in its first Exception. In its first Exception, Uber argues that the Initial Decision recommends a civil penalty which is arbitrary and capricious and contains numerous factual and legal errors. Because the arguments are generally duplicative of the arguments in the third Exception, we will address them in the third Exception. Moreover, the objections to the civil penalty are more properly addressed in reference to our policy statement.

Regarding the first factor, Uber asserts that its conduct was not of a serious nature for the following reasons: (1) when it launched the Uber app in February 2014, it believed that the Gegen brokerage license covered the operations; (2) the Commission did not determine that the Respondent needed authority to operate until Uber's operations were well underway; and (3) during the time that the Commission determined that Uber needed authority to operate, the Commission also conditionally granted an application for emergency temporary authority (ETA) to Rasier-PA finding an inadequacy of the existing transportation services in Allegheny County and a substantial benefit for authorizing the competitive service.[29] Exc. at 27.

Additionally, Uber claims that its behavior was not of a serious nature because the record is devoid of any evidence that the public safety was ever in jeopardy. In support of its argument, the Respondent argues that because it has a compelling business reason to ensure driver safety and integrity, it follows standard business practices for criminal background checks, driver history checks and vehicle inspections, and holds a $1 million liability insurance policy for its drivers. *Id.* at 28.

Uber also contends that the ALJs mischaracterized Mr. Feldman's testimony. According to Uber, Mr. Feldman testified that there were "only" nine accidents or incidents – as opposed to "at least" nine as stated by the ALJs. Additionally, the Respondent asserts, Mr. Feldman testified that to his knowledge there were no other accidents or incidents and no accidents involving fatalities or serious bodily injury. *Id.* at 29.

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[29] The Commission granted Rasier-PA's Application for ETA in the *ETA Order*. Pursuant to the *ETA Order*, Rasier-PA received authority to operate subject to the satisfaction of various conditions. On August 21, 2014, after satisfaction of these conditions, the Commission issued a certificate of public convenience to Rasier-PA to operate under its ETA.

As to the second factor, Uber states that the ALJs improperly relied on conjecture about the potential for the serious consequences of its conduct. The Respondent argues that because there was no evidence of actual harm, the Commission is prevented from relying on potential harm in determining a civil penalty amount. Although Uber admits that the Commission has considered the potential for catastrophic loss and injury in analyzing the seriousness of consequences, the Respondent avers that those determinations were based on systemic evidence of widespread and ongoing improper safety practices in which one accident could affect masses of customers. *Id.* at 29-30 (citing *Pa. PUC v. Peoples Natural Gas Co.*, Docket No. M-2009-2086651 (Order entered May 6, 2010)). In other instances, Uber argues, the Commission has found the consequences to be not serious if they did not involve personal injury and property damage. I.D. at 30.[30]

In its replies, I&E argues that for both factors one and two, Uber's conduct in providing unauthorized transportation was of a serious nature and posed a risk to public safety. According to I&E, the ALJs properly determined that I&E need not present evidence of actual harm because unlawful conduct is *per se* injurious to the public. I&E also distinguished the cases cited by Uber regarding the consequences of conduct. According to I&E, Uber's cited cases are inapplicable to this proceeding because they do not involve allegations of a company refusing to submit to the Commission's authority and then continuing to operate in defiance of cease and desist orders. Additionally, I&E argues that Uber's own witness testified that accidents occurred while Uber was operating without authority but was not certain about the specifics of the accidents. Thus, I&E asserts that it was feasible for accidents involving personal injury and property damage to have occurred without the Commission's

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[30] In support, Uber cites to *Pa. PUC v. Duquesne Light Co.*, Docket No. M-2014-2165364 (Order entered October 2, 2014); and *Pa. PUC v. Scott A. Dechert t/a Distinctive Limousine Service*, Docket No. C-2012-2334904 (Order entered October 17, 2013).

knowledge because of Uber's refusal to submit to the Commission's oversight. R. Exc. at 13-14.

Regarding the third factor and the intentional nature of the conduct, Uber admits that the decision to operate after July 1, 2014, was intentional. However, the Respondent disputes that its actions were taken in "deliberate disregard of the Commission's authority." I.D. at 31. Instead, it contends that the decision to continue operating was based on the following factors: (1) Uber's belief that its operations were lawful; (2) Uber had already been operating for five months and filling a tremendous need for its service; and (3) its drivers were relying on the income from operating under the Uber app and Uber did not want to abruptly end the service when there was such a need. *Id.*

Moreover, the Respondent objects to the ALJs' description of Uber as "flouting the Commission's authority." *Id.* Uber argues that such a label is unwarranted because it obtained a brokerage license through Gegen before launching the Uber app; filed an ETA application immediately following the *July 1, 2014 Order*; and promptly complied with the Commission's conditions in approving the ETA application which resulted in the issuance of a certificate on August 21, 2014. *Id.* at 31-32.

In reply, I&E proffers that Uber's admission that its conduct was intentional but necessary arrogantly placed the Respondent in the position of decision maker. I&E contends that, in issuing the cease and desist order, the Commission rejected Uber's argument of public need and concluded that the higher goal of public safety outweighed the limitations of transportation options. R. Exc. at 14.

Under the fourth factor pertaining to modification of internal practices, Uber objects to the determination that the Respondent's actions permit only a small measure of mitigation. Uber contends that it has done far more than simply comply with

the technical directives of the Commission as suggested in the Initial Decision. In support, Uber states that Rasier-PA filed its Quarterly Compliance Plan Report on April 30, 2015, showing full and ongoing compliance with our Order granting Rasier-PA's application for experimental authority.[31] The Respondent explains that the Quarterly Report evidences compliance with a number of substantive directives related to primary liability insurance coverage, driver integrity measures, vehicle safety standards, and recordkeeping, reporting and auditing requirements. Further, the Respondent argues that it has filed new applications for authority from the Commission and that Rasier-PA's compliance with the *ETA Order* was timely under the circumstances. According to Uber, its level of activity with the Commission is indicative of a company striving for compliance. Exc. at 33.

Additionally, Uber contends that it is customary for modifications to internal practices to occur after the filing of a complaint and after adjudication of the matter. Here, Uber asserts, it made modifications during the pendency of the proceeding to ensure compliance with the Commission's requirements, and thus, its actions should weigh heavily in mitigating any civil penalty. *Id.* at 34-35.

I&E responds that if Uber had wished to modify internal practices and procedures during the period at issue in the Amended Complaint, it would have ceased providing unauthorized transportation services. Instead, I&E points out that Uber provided months of unauthorized service. R. Exc. at 14.

Next, Uber objects to the ALJs' application of factor five regarding the number of customers affected. According to Uber, there is no support in the record for any finding about the number of customers who were adversely affected by the provision of Uber's service or about the potential for adversely affecting the public. In support, the

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[31] See *Rasier-PA Allegheny County Order* and *Rasier-PA Statewide Order*.

Respondent reiterates its arguments pertaining to the first factor and the seriousness of the conduct. Exc. at 35-36.

In addition, Uber avers that no customers complained about the services they received through the Uber app and that there was overwhelming support for Rasier-PA's ETA application. *Id.* at 37.

In its replies, I&E argues that the ALJs properly credited Officer Bowser's testimony that each unauthorized trip impacted the drivers, passengers, and the general public, such as other motorists and pedestrians, due to the Commission's inability to oversee the safety of the operations. R. Exc. at 14-15.

Regarding the sixth factor, compliance history, Uber contends that Gegen has an unblemished compliance history with the Commission and that this factor mitigates any civil penalty that may be imposed on the Respondent. Further, the Respondent argues that its compliance history over the past year of adhering to all of the conditions imposed on Rasier-PA in connection with its ETA and its experimental service authority should be considered as a mitigating factor. *Id.* at 37-38.

I&E responds that the ALJs correctly gave no weight to the compliance history of Uber because of the absence of any historical behavior at the Commission. R. Exc. at 15.

As to the seventh factor pertaining to cooperation with the investigation, Uber objects to the perceived suggestion in the Initial Decision that the Respondent failed to cooperate with the Commission. The Respondent also argues that this factor is not relevant to litigated proceedings such as this case. Moreover, the Respondent asserts that it, in fact, cooperated with I&E by agreeing to numerous factual stipulations and by

easing I&E's burden of proof through the offering of a detailed explanation of the roles played by its subsidiaries in operating the digital platform. *Id.* at 38-39.

According to I&E, Uber's arguments pertaining to cooperation are irrational. I&E states that Uber simultaneously argues that the factor does not apply to litigated proceedings and that it should apply here because the Respondent cooperated with I&E during the litigation. I&E argues that if the Commission determines that the factor applies, it should be deemed an aggravating factor because of Uber's discovery violations. R. Exc. at 15, 21-25.

Under the eighth factor, the Respondent argues that deterrence is not relevant to the evaluation of a civil penalty in this proceeding. According to Uber, the ALJs ignored the fact that Rasier-PA has already obtained authority and continues to operate under its experimental authority certificate. Additionally, Uber asserts that it has demonstrated its commitment to compliance with Commission requirements by filing compliance plans, new applications for the approval of service and industry-wide reports. The Respondent also contends that it has gone to great lengths to cooperate with I&E on routine compliance matters, investigations involving individual consumers and information requests. Exc. at 39-41.

Furthermore, Uber proffers that the deterrence rationale set forth in our decision in *Pa. PUC v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Order entered December 3, 2015) (*HIKO Energy*), is inapplicable to this proceeding. The Respondent argues that in *HIKO Energy* the Commission was interpreting regulations applicable to an electric generation supplier (EGS) and seeking to ensure that all EGSs participating in the market were aware of the importance of compliance requirements. Uber asserts that, in this proceeding, the only other known entity providing transportation network services in Pennsylvania, Lyft, Inc., has already obtained a certificate of public convenience from the

Commission. According to Uber, it serves no purpose to send a message to unknown entities that might in the future launch a new and innovative service. Exc. at 40-41.

In its replies, I&E argues that the ALJs correctly concluded that deterrence serves a wider public purpose of deterring other entities from unlawful behavior. Furthermore, I&E explains that the Initial Decision in *HIKO Energy* was overturned by the Commission on the narrow principle that deterrence is intended to have industry-wide application and is not limited to a specific utility. R. Exc. at 15.

In response to the application of the ninth factor, past Commission decisions in similar situations, Uber claims that the ALJs committed a fundamental error in disregarding the $250,000 civil penalty approved by the Commission in *Lyft*. The Respondent contends that Lyft provided identical transportation network services during the exact time period and within the same geographic area as Uber. Because *Lyft* involved an identical proceeding, Uber states that it is incumbent upon the Commission to use that civil penalty as a basis upon which to impose a civil penalty in this proceeding. Exc. at 10-11, 41-42.

Uber acknowledges that in settled cases the factors will not be applied in as strict a fashion as in a litigated proceeding. However, the Respondent argues that the policy statement still requires the use of the factors to determine if a settlement is in the public interest. Here, Uber contends that the ALJs improperly determined that the settlement in *Lyft* had no value to this litigated proceeding. *Id.* at 42.[32]

[32] Moreover, Uber claims that it made numerous good faith efforts to resolve this matter through a settlement comparable with *Lyft* only to be repeatedly rebuffed by I&E. The Respondent claims it would be wholly inappropriate and unfair to impose a civil penalty in this case that does not resemble the civil penalty amount in *Lyft*. Exc. at 10-11.

Uber also argues that the civil penalty is excessive when compared with other recent decisions approving settlements and imposing civil penalties involving allegations of unsafe or inadequate business practices jeopardizing public safety or resulting in fatalities, serious bodily injury and significant property damage. The Respondent cited to several settlements assessing civil penalties ranging from $96,000 to $1,000,000.[33] Although the Respondent recognized that these settlements did not establish legal precedent, it stated that they are offered to demonstrate the irrationality of the recommended civil penalty in this proceeding which did not involve identified instances of harm or damage or occasions in which the public safety has been jeopardized. Uber highlighted the *UGI Order* stating that it imposed a $1,000,000 civil penalty on a natural gas company after five years of repeated safety violations of gas regulations that resulted in multiple deaths and property damage. In contrast, the Respondent argues that the civil penalty here is fifty times higher "despite the fact that the record is devoid of any evidence of unsafe inadequate business practices jeopardizing public safety or any harm resulting to the public." Exc. at 12-14.

Additionally, Uber states that the ALJs relied upon cases involving entities providing traditional transportation services that were clearly regulated by the Commission. The Respondent argues that these cases are distinguishable from this proceeding. *Id.* at 43 (citing *Brungard* and *Blue & White Lines*).

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[33] Uber cited to the following cases: *Pa. PUC v. UGI Utilities, Inc. - Gas Division*, Docket No. M-2013-2313375 (Order entered April 23, 2014); *Pa. PUC v. Columbia Gas of Pennsylvania, Inc.*, Docket No. M-2014-2306076 (Order entered September 11, 2014); *Pa. PUC v. UGI Utilities, Inc. - Gas Division*, Docket No. C-2012-2295974 (Order entered May 9, 2013); *Pa. PUC v. Pennsylvania Electric Company*, Docket No. M-2008-2027681 (Order entered March 16, 2009); *Pa. PUC v. PPL Electric Utilities Corp.*, Docket No. M-2008-2057562 (Order entered March 31, 2009); *Pa. PUC v. UGI Utilities, Inc. - Gas Division*, Docket No. C-2012-2308997 (Order entered February 19, 2013); *Pa. PUC v. Philadelphia Gas Works*, Docket No. C-2011-2278312 (Order entered July 26, 2013); and *Pa. PUC v. UGI Penn Natural Gas, Inc.*, Docket No. M-2013-2338981 (Order entered September 26, 2013) (UGI Order).

Lastly, Uber cites to the decisions in *HIKO Energy*, involving a $1.8 million civil penalty imposed on an EGS, and in *Pa. PUC v. West Penn Power Co.*, Docket No. C-2014-2417325 (Order entered August 22, 2014), involving a $1.3 million settlement related to alleged violations of Act 129 electric consumption reduction requirements. According to the Respondent, these decisions further illustrate the arbitrary and capricious nature of the recommended civil penalty in this proceeding. Exc. at 15-16.

I&E responds that settlements are not similar to litigated proceedings. According to I&E, settlements are often incomparable because they involve the compromise of positions, substantially different evidence and no admission of wrongdoing. I&E also states that the cases cited by Uber are not analogous to this case because they involve fixed utilities and different facts and entities subject to a different statutory civil penalty scheme. R. Exc. at 5-6 (citing 66 Pa. C.S. § 3301(c) involving a maximum cap on civil penalties pertaining to pipeline safety violations). Additionally, I&E contends that a comparison with the settlement in *Lyft* is inappropriate because Lyft's actions in complying with the provision of trip data were entirely different than Uber's outright defiance in ignoring discovery orders. Moreover, I&E proffers that the ALJs correctly considered cases involving traditional transportation services because Uber is a motor carrier. Thus, I&E concludes that the ALJs' analysis of all the factors supports the penalty that was imposed. R. Exc. at 5-6, 15-16.

c. Disposition

In this section we shall evaluate whether a civil penalty should be imposed pursuant to 52 Pa. Code § 69.1201.

Upon review of the first and second factors, we agree with the analysis of the ALJs that the Respondent's conduct was of a serious nature and that its conduct

presented the potential for serious consequences. As explained in our *July 24, 2014 Order*, Uber's actions in refusing to submit to the Commission oversight of its common carrier service prevented the Commission from fulfilling its statutory duty to protect the safety of the travelling public. The Commission's motor carrier enforcement officers were unable to inspect the automobiles of Uber drivers, review and inspect criminal history and driving records of Uber drivers, or ensure that adequate liability insurance covered the vehicles of the Uber drivers. During the Launch and Cease and Desist Periods, the Respondent provided **[Begin Proprietary]** [redacted] **[End Proprietary]** trips without Commission authority or verification that Uber satisfied the Commission's standards for driver integrity, vehicle safety, or insurance adequacy requirements. Considering the vast number of unlawful trips, we consider Uber's actions to be of a most serious nature which presented a significant risk to the safety of the Uber passengers and drivers and to other travelers and pedestrians.[34]

In its Exception, Uber argues that there was no evidence of personal injury or serious property damage and that the ALJs' concerns about the consequences of its conduct were conjecture. Uber also states that the transportation options in Allegheny

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[34] In our *Final Policy Statement for Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations*, Docket No. M-00051875 (Order entered November 30, 2007) at 9, we noted that under the second factor, the "Commission will evaluate the actual harm sustained rather than engaging in any amount of speculation about the potential for harm." However, policy statements are not binding norms, but are announcements of the Commission's tentative intentions for the future. See, *Pa. Human Relations Comm'n v. Norristown Sch. Dist.*, 473 Pa. 334, 349-350, 374 A.2d 671, 679 (1977). In more recent cases, the Commission has considered the potential for harm under the second factor when evaluating appropriate civil penalties. See e.g., *Pa. PUC v. Columbia Gas of Pa.*, Docket No. M-2014-2306076 (Order entered September 11, 2014) (although there were no actual personal injuries or property damage, the Commission considered the consequence of the actions which put the public at greater risk of injury); *Pa. PUC v. WGL Energy Services, Inc.*, Docket No. M-2015-2401964 (Order entered January 28, 2016) (Commission considered the criminal activity of an agent conducting sales on behalf of a company as a serious incident with the potential for significant harm to a consumer).

County were inadequate and that the Commission recognized the need for its service by ultimately granting its ETA application. However, as discussed above, Rasier-PA was not authorized to provide common carrier service until it fulfilled the conditions of the *ETA Order* and was issued a certificate of public convenience. This did not occur until August 21, 2014; and Uber's service prior to that date constituted unlawful service. Additionally, I&E was not required to present evidence of actual injury or harm because the unlawful conduct by its nature was injurious to the public. In *Israel,* the Pennsylvania Supreme Court rejected a similar claim that a violation of the law can be a benefit to the public. "When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such conduct constitutes irreparable injury." *Israel*, 52 A.2d at 321.[35]

Additionally, the Respondent posits that it has a compelling business reason to ensure the protection of the public and has put in place appropriate driver safety and insurance protections. Essentially, Uber argues that it should have been allowed to self-regulate the propriety of its safety and insurance requirements. We reject this assertion because the General Assembly requires the Commission and not individual motor carriers to evaluate and approve motor carrier safety requirements. Accordingly, these factors support a finding that a higher civil penalty is warranted.

Under the third factor, Uber admits that its conduct was intentional but objects to some of the ALJs' characterizations of its actions, such as the "flouting" of Commission authority. However, we note that despite some of the strong language in the Initial Decision, the ALJs credited some of the actions by the Respondent with respect to the Launch Period, such as the securing of Gegen's broker license and the

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[35] Moreover, we note that accidents or incidents involving Uber drivers did occur during the Launch and Cease and Desist Periods. Uber's witness testified that he was aware of nine such occurrences involving Uber drivers that led to insurance claims but that not every incident or accident leads to an insurance claim. Tr. at 168-169.

communication with Commission staff about the proper type of authority required for its service. In response, the ALJs determined that a lower penalty should be imposed for the trips provided during the Launch period. Upon review of the record, however, it is difficult to construe Uber's actions of continuing to operate after two cease and desist orders as being anything but a deliberate disregard of the Commission's authority.

Overall, we agree with the ALJs' analysis of the third factor. Nonetheless, we shall modify the Initial Decision with respect to the determination that a "maximum civil penalty" for each of the trips provided during the Cease and Desist Period was appropriate. Rather than directing a maximum civil penalty, we instead find that the analysis supports a finding of a higher civil penalty under this factor when weighing all the factors.

In reviewing the fourth factor, we agree with Uber that it has modified its internal practices by securing authority from the Commission pursuant to the *Rasier-PA Allegheny County Order* and the *Rasier-PA Statewide Order*. In addition, it has fulfilled the compliance requirements for securing Rasier-PA's certificates of compliance and has shown that it will continue to meet the Commission's directives through the filing of Quarterly Compliance Plan Reports. Thus, the Respondent's actions indicate that it is striving for continued compliance with the Commission. Such actions weigh in favor of a lower civil penalty when considering all the penalty factors.

Therefore, we shall grant Uber's Exception in part as to this factor and shall modify the ALJs' Initial Decision accordingly.

Under factor five, Uber provided no new arguments which we believe would alter the analysis of the ALJs pertaining to the number of customers affected. We adopt the reasoning of the ALJs as to this factor and find that it warrants the imposition of a higher penalty.

As to compliance history, we agree with Uber that there have been no Commission fines imposed against Gegen related to the operation of its broker license. Additionally, upon review, aside from the instant Complaint proceeding, there have been only somewhat minimal fines imposed upon Rasier-PA related to its operation under certificates of compliance.[36] Thus, we find that the absence of any significant compliance problems by Gegen or Rasier-PA since they have obtained their Certificates supports a lower civil penalty when evaluating all the factors. We shall grant the Respondent's Exception in part as to the sixth factor and shall modify the ALJs' Initial Decision accordingly.

Under the seventh factor, we shall adopt the ALJs' rationale with respect to Uber's conduct during the litigation. The heart of the objection related to Uber's conduct during the litigation pertains to its refusal to provide the requested trip data until the date of the hearing. This issue is more properly addressed in the consideration of the discovery sanctions. Accordingly, we find that this factor does not weigh into the assessment of the civil penalty.

Regarding the eighth factor, we disagree with Uber that our finding in *HIKO Energy* pertaining to deterrence is inapplicable to this proceeding. In *HIKO Energy*, we stated: "[t]hough we may more often craft penalties specific to the individual case and circumstances at hand, we have leeway to consider the impact of our actions as a deterrence to the industry as a whole." *HIKO Energy* at 44. Uber's actions in providing its motor carrier service without authority and in violation of cease and desist orders were well publicized. In the absence of a significant civil penalty, there is the danger that other motor carriers may attempt to disregard the Regulations and directives

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[36] Upon review, Rasier-PA has waived its right to a hearing in five complaint proceedings filed by I&E and has voluntarily paid a civil penalty in each of the cases. *See* Docket Nos. C-2015-2457172; C-2015-2474801; C-2015-2510625; C-2015-2510634; and C-2015-2510635. Four of the cases involved a civil penalty payment of $50 each and one involved a civil penalty payment of $500.

of the Commission and thereby endanger the safety of the public. Thus, contrary to the Respondent's claim, the imposition of a civil penalty is critical to ensuring compliance by the entire industry, specifically other motor carriers or brokers. We, therefore, find that this factor weighs in favor of a higher civil penalty.

Under the ninth factor, evaluating past Commission decisions in similar situations, Uber argues that the ALJs improperly disregarded the settlement in *Lyft*. The Respondent also contends that the ALJs' recommended civil penalty is irrational in comparison to other settlements involving instances of death, personal injury and property damage. However, settlements are not considered "similar situations" to litigated proceedings for purposes of evaluating 52 Pa. Code § 69.1201(c)(9).

"The parties in settled cases will be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest." 52 Pa. Code § 69.1201(b). We have held that it is inappropriate to consider a settlement, which is intended to be an amicable resolution of disputed claims, as precedent in any subsequent proceeding. *See Pa. PUC v. Bell Telephone Co. of Pa.*, 68 Pa. P.U.C. 430 (1988). Although the public interest is considered in evaluating a settled case, there is not a fully developed record. Also, in a settled case, there may be a civil penalty even though the respondent does not admit to any wrongdoing or any violations.

In our recent decision in *HIKO Energy*, we explained that the third policy factor, whether the conduct was intentional or negligent, is only considered in litigated cases. Thus, any civil penalty awarded in settled cases does not take into consideration the intentional nature of the conduct at issue in the underlying proceeding. *HIKO Energy* at 53. Here, we determined that Uber's conduct was intentional for purposes of evaluating the third factor. Any comparison of this proceeding with settled cases that do not involve a determination of intent, and do not include the development of a record,

would not involve an evaluation of proceedings involving similar situations for purposes of the ninth factor.

Moreover, we disagree with Uber that in comparison to the cases cited in its Exception to this factor, the civil penalty in this proceeding is arbitrary and capricious. The unprecedented number of unauthorized trips and violations of the Code and Commission directives distinguishes this case from those matters and necessitates the need for an unprecedented civil penalty.[37]

In considering "other relevant factors," the ALJs gave consideration to the public benefits provided by Uber's transportation network services. However, the ALJs concluded that Uber's actions in launching its service and attempting to evade the authority of the Commission placed the public at risk and prevented the Commission from exercising its delegated authority related to motor carrier safety. We agree. Nonetheless, upon evaluation and weighing of all the factors we find that the civil penalty should be adjusted.

Consistent with the analysis outlined by the ALJs, we find that there should be a distinction between the civil penalty for the unauthorized trips provided during the Launch Period and the civil penalty for the Cease and Desist Periods. **[Begin Proprietary]** [redacted]

[37] Additionally, Uber attempts to distinguish the Commission's decisions in *Blue & White Lines* and *Brungard*. Both of those cases imposed civil penalties on entities for the provision of transportation services without Commission authority for a relatively small number of violations. Unlike the present proceeding, however, those cases did not involve the willful disregard of two explicit Commission Orders directing the Respondent to cease and desist from continued operation of its transportation services. Thus, we find that *Blue & White Lines* and *Brungard* actually support the level of civil penalty recommended herein.

[redacted]

[redacted] **[End Proprietary]**

Upon weighing all the factors, including the importance of deterring future unauthorized activity within the motor carrier industry, we find that a civil penalty of $11,292,236 is appropriate under the circumstances and supported by the record. This civil penalty, which is a substantial reduction from the ALJs' recommended penalty, takes into consideration mitigating factors such as Uber's modification of its internal practices to comply with the Commission's imposed conditions on its current authority.

38 [redacted]

It also acknowledges that the Respondent and its affiliates have not demonstrated any significant compliance problems since the grant of the ETA and the applications for experimental authority.

In making this determination, we agree that Uber is entitled to some relief from the civil penalty recommended by the ALJs given its performance over the last year, and the relatively few complaints that have been filed with the Commission. The civil penalty being adopted is a substantial reduction from the recommendations of the ALJs, and is significantly less than the $1,000 per violation maximum that is often levied against smaller carriers for violations of the Code. *See, e.g., Blue & White Lines, A-Apollo Transfer,* and *M&G Trucking, supra.* This reduced penalty demonstrates that the Commission is more than willing to compromise in order to achieve outcomes that serve the public interest.

However, it must be recognized that Uber has deliberately engaged in the most unprecedented series of willful violations of Commission Orders and Regulations in the history of this agency. Although we cannot disclose the number of proven violations in the public version of this Opinion and Order, as this data is proprietary, this figure far exceeds any prior case involving the Commission. A record number of proven violations should be expected to result in a record setting fine.

We believe that any additional, material reduction of the civil penalty in this case would jeopardize the future regulation of TNCs in Pennsylvania. This resolve demonstrates to Uber and to others in the industry that future, unlawful operations will not be tolerated and thereby incentivizes them to fully comply with the laws of this Commonwealth.

Additionally, we note that the provision of public utility service without a certificate of public convenience is illegal under Pennsylvania law, and the Commission

has the authority to direct that refunds be issued for the rates charged for such uncertificated service. *See, Popowsky v. Pa. PUC*, 647 A.2d 302 (Pa. Cmwlth. 1994) (Public Utility Code has no provision allowing a utility company to charge for its services during the pendency of the application process); and *Petition of Skytop Lodge Corporation for a Declaratory Order*, Docket No. P-2013-2354659 (Order entered July 24, 2014). Here, the Parties were directed to address whether refunds or credits to customers would be an appropriate remedy for the service Uber provided in violation of the Code.[39] However, there is no indication in the record that the Parties addressed this issue and the ALJs did not consider this remedy in their Initial Decision.

Upon review of the totality of the evidentiary record and in consideration of the specific facts and circumstances of this case, we shall decline to order a refund or credit as an additional remedy for the unlawful service provided during the Launch and Cease and Desist Periods. We conclude that the adopted civil penalty is sufficient for the proven violations.

D. Discovery Violations

During the course of this litigation, I&E requested answers to interrogatories and requests for documents. I&E sought, in part, the number of trips provided during the Launch Period and the Cease and Desist Period, supporting documentation including invoices, receipts, e-mails and other documents related to those trips, and any licensing agreements with Uber's subsidiaries or affiliates. As discussed in the History of the Proceeding, Uber objected to the discovery requests and, when the

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[39] Specifically, *Interim Order IV* ordered: "[t]hat, consistent with the Secretarial Letter dated July 28, 2014, the parties shall be prepared to address whether transportation services rendered prior to the issuance of the certificate of public convenience to Rasier-PA, LLC constitute a violation of the [Code] and 'whether refunds or credits to customers would be an appropriate remedy.'"

discovery responses were not forthcoming, I&E filed various motions to compel and motions for sanctions. The ALJs issued several interim orders granting these motions.[40]

I&E requested additional civil penalties as a sanction for the Respondent's failure to answer the discovery in defiance of the interim orders directing their production. In *Interim Order IV*, the ALJs stated that a final ruling on the amount of any civil penalty payable as a sanction for failing to provide full and complete discovery responses would be held in abeyance until the ALJs issued the Initial Decision on the merits of the Amended Complaint.

1. Initial Decision

In their Initial Decision, the ALJs referenced Section 5.371(a) of our Regulations, 52 Pa. Code § 5.371(a), which provides:

> (a) The Commission or the presiding officer may, on motion, make an appropriate order if one of the following occurs:
>
> (1) A party fails to appear, answer, file sufficient answers, file objections, make a designation or otherwise respond to discovery requests, as required under this subchapter.

The ALJs further explained that under Section 5.372(a)(4), 52 Pa. Code § 5.372(a)(4), the Presiding Officer may impose appropriate sanctions upon a party found to be in violation of the obligations set forth in the Commission's Regulations, including the authority to issue "an order with regard to the failure to make discovery as is just." I.D. at 41.

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[40] For a summary of these motions and interim orders, *see* pages 35-39 of the Initial Decision.

According to the ALJs, I&E correctly argued that the Commission has previously imposed civil penalties as sanctions for violations of the Commission's regulations regarding practice and procedure. I.D. at 41 (citing *Raymond J. Smolsky v. Global Tel Link Corporation,* Docket No. C-20078119 (Order entered January 15, 2009) (*Smolsky*)). The ALJs explained that the presiding officer's assessment of a $5,650 civil penalty sanction for various violations of the Commission's Regulations governing practice and procedure was upheld by the Commission. Significantly, the ALJs noted, the Commission imposed a $500 civil penalty for each of the three failures by the company to provide discovery responses within twenty days, for a total of $1,500. The Commission in *Smolsky* further found that the company's actions were intentionally dilatory and warranted a serious penalty to deter future violations. I.D. at 41.

The ALJs also referenced *Application of K&F Medical Transport, LLC*, Docket No. A-2008-2020353 (Order entered July 8, 2008) (*K&F Medical*). I&E cited to *K&F Medical* for the proposition that in cases in which a party has litigated in bad faith the Commission is empowered to impose the sanction of a civil penalty. According to I&E, the ALJs directed Uber to produce the outstanding discovery in four separate Interim Orders, and therefore, it was already determined that the requested information was relevant, not unduly burdensome, not privileged and not otherwise protected from being discoverable. Additionally, I&E argued that unlike in *Smolsky*, Uber never provided responses to the discovery requests including the documentation of the trips and the licensing agreements. As a result, I&E contends it was never afforded the opportunity to verify the accuracy of the number of trips provided during the Launch and Cease and Desist Periods and the identity of the entity licensing the Uber app and performing the unauthorized transportation. I.D. at 44.

The ALJs discussed I&E's assertions that the continuing failure of Uber to produce the documents that were judicially determined to be discoverable constituted a violation of Section 333(d) of the Code, 66 Pa. C.S. § 333(d), and Section 5.342 of our

Regulations, 52 Pa. Code § 5.342. I&E requested a civil penalty of $1,000 for each discovery request per day until the production of the documents or until the close of the proceeding. According to I&E, the civil penalty would deter future abuses of the discovery process by other entities and would show that the Commission takes the integrity of the adjudicatory process seriously. I.D. at 44-45.

The ALJs also summarized Uber's arguments that no civil penalty is warranted in this proceeding related to the discovery requests because the request for documentation of the trip data was overly burdensome and would have required the production of scores of boxes. Additionally, the Respondent argued that the production of licensing agreements to identify the functions performed by its subsidiaries was unnecessary because it provided information about these functions through other discovery, the Stipulations and Mr. Feldman's testimony at the hearing. According to Uber, it would have served no additional purpose to provide these licensing agreements which the Respondent considered to be proprietary. Furthermore, Uber argued that discovery sanctions are not intended to be punitive and that the ALJs had alternate means of imposing sanctions related to the conduct of the hearing, such as factual inferences, prohibitions on introducing evidence and the striking of pleadings. In Uber's view, the outstanding discovery request was unnecessary for moving the case forward and did not impede I&E's prosecution. As such, the Respondent contended, no additional sanctions were warranted. I.D. at 45-46.

The ALJs rejected Uber's arguments and found that it was appropriate to assess a civil penalty for the discovery violations referencing the rationale in their prior Interim Orders. The ALJs previously addressed Uber's objections to the first set of interrogatories and document requests as follows:

> First, Uber takes the position that the trip information requested by [I&E] is not relevant and amounts to a fishing

expedition. Contrary to the position of Uber, the trip data sought by the July 28 Secretarial Letter and further by the discovery posed by [I&E] is clearly relevant to the enforcement proceeding. Although the complaint relies upon 11 trips documented by Officer Charles Bowser, [I&E] seeks civil penalties not only for those trips, but "for each and every day that Respondent continues to operate after the date of filing of this Complaint." Moreover, the extent of Uber's activities may be relevant to the amount of any civil penalties that may be imposed.

Second, trip data information sought by [I&E] is not confidential. Uber contends that this data is "highly proprietary and commercially sensitive." Therefore, according to Uber, the material is privileged. We disagree. The information that the Commission directed Uber to disclose and that [I&E] seeks in discovery is of the sort that all motor carriers are directed to submit to the Commission on a routine basis. These records are subject to inspection by the Commission. Uber's bald statement that trip data for transportation network companies is proprietary when it is clearly not for other motor carriers is not a sufficient reason to refuse to answer the discovery. Uber cited no Commission decision or order where a motor carrier was exempted from providing trip data because it was confidential. Indeed, Uber should expect to provide trip logs to the Commission if it wishes to continue operation in the Commonwealth in the future.

Third, even if trip data were proprietary, the proprietary nature of the material by itself is insufficient to shield it from discovery. Rather, the parties should negotiate an appropriate confidentiality agreement for the purposes of discovery or seek a protective order.

Lastly, the identity of the Uber affiliate that may have provided trip data is not confidential. It is well within [I&E]'s purview to explore whether Uber Technologies itself provided transportation or whether it directed a subsidiary under its control to provide transportation. The discovery sought by [I&E] is clearly related to the scope of the complaint.

Interim Order I at 5 (internal citations omitted).

Regarding Uber's objections to the second set of interrogatories and document requests on the basis that the information is irrelevant, privileged or unduly burdensome, the ALJs concluded that: "[t]he majority of the information sought is related to Uber's position regarding its role in the transportation, the identification of witnesses or is otherwise reasonabl[y] calculated to lead to admissible evidence that will be necessary for the evidentiary hearing on [I&E's] complaint. [I&E's] motion to compel is granted." *Interim Order II* at 6.

The ALJs evaluated the ten factors of our policy statement under 52 Pa. Code § 69.1201 to determine the appropriate level of the civil penalty. I.D. at 47-51. Based on their review, the ALJs found that Uber's actions in failing and refusing to provide responses to the discovery requests, were intentional and constituted a blatant defiance of the Commission and the Interim Orders. The ALJs reasoned that the Respondent's egregious conduct warranted a serious penalty to deter future violations. Accordingly, the ALJs imposed a $500 per-day civil penalty for the discovery violations calculated from the due date of December 12, 2014, set forth in *Interim Order III* through the conclusion of the evidentiary hearing on May 6, 2015, for a total of 145 days. The ALJs concluded that a civil penalty of $72,500 for the discovery violations was appropriate ($500 x 145 = $72,500). I.D. at 51.

2. Exceptions and Replies

In its fifth Exception, Uber argues that the ALJs erred by imposing a civil penalty to address the discovery issues and that an additional civil penalty would serve no purpose. The Respondent contends that only two discovery requests remain unanswered: the invoices, receipts, records and documents for the rides provided during the Launch and Cease and Desist Periods; and the copies of licensing agreements between Uber

Technologies, Inc. and its subsidiaries. According to Uber, neither of these outstanding requests was needed for this case to be prosecuted and adjudicated. The Respondent posits that it provided numerous other discovery requests and factual stipulations, including the launch date of its service and the identity of the subsidiary that provided the operations prior to Commission authorization. Additionally, Uber asserts that it provided the remaining relevant evidence at the hearing. Exc. at 47-48.

Because it provided the relevant trip data totals at the hearing, Uber contends that the only reason I&E wanted the underlying documentation was to verify the accuracy of the number of trips. Again, Uber states that it would have been unduly burdensome to produce this information in redacted form to prevent disclosure of private consumer information. The Respondent argues that the ALJs denied it the opportunity to present testimony supporting its claims related to the burdensome nature of the request. Moreover, the Respondent contends that I&E never requested the opportunity to examine the voluminous records at Uber's offices. Furthermore, if the Commission deems it necessary to verify the records it has the power to do so pursuant to 66 Pa. C.S § 506 (pertaining to inspection of facilities and records). Exc. at 49-50.

Regarding the copies of the licensing agreements, Uber argues that the necessary information was provided through other discovery responses, the Stipulations, and Mr. Feldman's testimony. Also, the Respondent notes that it provided a copy of an Affiliated Interest Agreement to the Commission as part of the Compliance Plan filing pursuant to the *Rasier-PA Allegheny County Order* and *Rasier-PA Statewide Order*. Exc. at 50.

Additionally, Uber proffers that discovery sanctions are not to be punitive but are intended to move the case to orderly disposition. In this proceeding, Uber states, the ALJs issued *Interim Order IV* on March 26, 2015, which imposed several sanctions including limitations on the Respondent's ability to defend the factual allegations in the

Amended Complaint through cross-examination or the introduction of evidence. In sum, Uber claims that no additional sanctions are appropriate because: (1) the outstanding discovery requests were not needed to move the case to prompt disposition and did not impede I&E's prosecution; and (2) sanctions have already been imposed. Exc. at 51.

Finally, Uber argues that the cases cited by the ALJs are distinguishable from this proceeding. The Respondent claims that *Smolsky* is inapplicable because it involved conduct that actually prevented the proceeding from moving forward. Moreover, Uber asserts that *K&F Medical* did not involve a discovery dispute. Exc. at 51-52.

In its Replies, I&E argues that the ALJs properly imposed the civil penalty as a sanction for the discovery violations. I&E contends that Uber's actions impeded the preparation of its case and that the ramifications of the Respondent's refusal to provide supporting documentation related to the unauthorized trips are serious. Specifically, I&E claims that it has been unable to verify the accuracy of the trip data and was coerced into accepting it at the hearing. Additionally, I&E states that Uber has deprived the Commission of any ability to verify the trip data for the purpose of creating a complete and accurate record. According to I&E, the Commission has been forced to blindly accept the Respondent's numbers at face value. Regarding Uber's claim that the supporting data was available at its offices for review, I&E states that it had no obligation to conduct a review at Uber's offices because the Respondent was directed to supply the information to I&E. R. Exc. at 21-23.

Furthermore, I&E argues that the Commission should ignore Uber's claim that it withheld the supporting documentation of the ride data because it contained private customer information. I&E explains that the ALJs permitted Uber to redact all confidential customer information. Moreover, the Parties were subject to a Protective

Order and would have been required to maintain the privacy of the information if the Respondent designated it as being confidential. *Id.* at 23.

I&E also asserts that Uber improperly placed itself in the role of decision-maker by determining that the remaining discovery responses were not needed for the adjudication of the case. According to I&E, it is not the Respondent's role to dictate what has already been judicially determined to be a relevant discovery request. Additionally, I&E argues that the ALJs properly relied on Commission precedent in exercising their discretion to impose a civil penalty sanction. *Id.* at 24.

Finally, I&E argues that Uber's conduct undermined the integrity of the adjudicatory process. I&E states that Uber wasted administrative resources and unilaterally delayed the holding of an evidentiary hearing, which had to be rescheduled several times because of the Respondent's refusal to respond to discovery. *Id.* at 24-25.

3. Disposition

Section 5.372(a)(4) of our Regulations provides discretion and authority to the Presiding Officer to impose a sanctions order "as is just" related to the failure to comply with a discovery order. In *Interim Order IV*, the ALJs imposed several sanctions addressing Uber's refusal to comply with the ALJs' prior orders granting I&E's motions to compel discovery. The sanctions included prohibitions on the presentation of evidence by Uber that would challenge the evidence presented by I&E regarding Uber's provision of unauthorized service including the dates, times, drivers, vehicles, number of rides taken and related facts. Additionally, because the Respondent refused to supply the discovery responses as previously ordered, the ALJs directed the payment of an additional $500 per day from December 12, 2014, to the day of the conclusion of the evidentiary hearing. *Interim Order IV* at 7-9. Given the repeated refusals of Uber to comply with the ALJs' prior discovery directives, the imposition of a civil penalty as set

forth in *Interim Order IV*, in addition to the other sanctions related to evidentiary defenses, were entirely appropriate at the time and within the discretion of the Presiding Officers.

Despite these sanctions, however, Uber continued its position of refusing to fully comply with the discovery orders. During the evidentiary hearing, Uber's counsel questioned Mr. Feldman about the trip data and proprietary nature of the data which, Uber contended, fell within the protections of the Proprietary Order signed by the ALJs on April 21, 2014. Tr. at 80-83. I&E had no objection to the designation of the trip data as being proprietary and the ALJs ruled that it fell within the protections of the Protective Order. *Id.* at 83. Thereafter, Mr. Feldman provided proprietary testimony about the trip data including the number of trips and the general date ranges for the service during the Launch and Cease and Desist Periods. *Id.* at 85-90. However, Uber refused to supply the documentation to support these trips. Specifically, the Respondent objected to the production of supporting documents such as e-mail receipts on the basis that the information would have no probative value and would be burdensome to produce. Tr. at 93-94. Uber's objection was overruled. Nonetheless, Uber did not provide the supporting data as ordered.

We find that the failure to produce this information despite repeated orders from the ALJs that the information was discoverable and subject to production impeded the ability of I&E to fully prosecute this matter. Specifically, I&E had no means to verify or confirm the numbers provided during the general testimony of Mr. Feldman. Uber's unilateral determination that the supporting data had no probative value prevented I&E from fully evaluating the evidence and inhibited the preparation of a complete record upon which the Commission could develop a disposition based on substantial evidence in the record. Furthermore, we agree with I&E that the claims of confidentiality and the amount of time needed to redact the information appear to be without merit. If the trip data fell within the parameters of the Protective Order, it would seem that the supporting

documentation for this data would also be protected. Thus, Uber could have requested a finding that the documentation was proprietary and subject to the protections of the Protective Order, thereby avoiding the need for excessive redaction of the materials.[41] Moreover, I&E was not obligated to request an inspection of Uber's records at the Respondent's offices because Uber was ordered to produce the information. Additionally, it appears that Uber first raised this alternative in its Exceptions and there is no indication in the record of which we are aware that Uber offered this option prior to the hearing.

Additionally, Uber's actions in refusing to provide supporting data and invoices at the hearing prevented the Commission from determining the actual amount of the cost per trip charged by the Respondent for those trips. These actions have prevented the Commission from precisely determining an accurate monetary basis upon which to calculate an appropriate civil penalty. **[Begin Proprietary]** [redacted] **[End Proprietary]**

Upon review, we find that the ALJs properly imposed an additional civil penalty of $72,500. Accordingly, we shall deny the Respondent's fifth Exception. Additionally, we note that the Parties did not file Exceptions related to the evaluation of

[41] Uber's additional argument, that the data is subject to verification pursuant to the Commission's authority to inspect records, is irrelevant for purposes of this proceeding. We refuse to countenance a party's refusal to comply with a discovery order on the basis that the Commission could later verify evidence after the close of the record in a litigated proceeding.

the amount of the civil penalty under our policy statement at 52 Pa. Code § 69.1201. We find the analysis of the ALJs to be well reasoned and shall adopt it.[42]

IV. Conclusion

Based on our review of the record and the applicable law, we shall deny the Motion; grant the Exceptions, in part, and deny them, in part; and adopt the ALJs' Initial Decision as modified; all consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Bureau of Investigation and Enforcement's Motion to Strike the Exceptions of Uber, filed on December 17, 2015, is denied.

2. That the Exceptions of Uber Technologies, Inc., Gegen, LLC, Rasier LLC, and Rasier-PA, LLC, filed on December 7, 2015, are granted, in part, and denied, in part.

3. That the Initial Decision of Administrative Law Judges Mary D. Long and Jeffrey A. Watson, issued on November 17, 2015, is adopted as modified by this Opinion and Order.

4. That the Amended Complaint filed by the Bureau of Investigation and Enforcement against Uber Technologies, Inc., Gegen, LLC, Rasier LLC, and Rasier-

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[42] Furthermore, we note that the amount of the civil penalty is appropriate due to the length of time and amount of orders it took for Uber to provide any information. Ultimately, Uber never fully complied with the orders. In addition, the Respondent improperly attempted to control what evidence was permissible and relevant at the evidentiary hearing.

PA, LLC, on January 29, 2015, at Docket No. C-2014-2422723 is sustained, in part, and denied, in part, consistent with this Opinion and Order.

5. That, in accordance with Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301, within thirty (30) days of entry of this Opinion and Order, Uber Technologies, Inc., Gegen, LLC, Rasier LLC, and Rasier-PA, LLC, shall pay a civil penalty in the amount of eleven million three hundred sixty-four thousand seven hundred thirty-six dollars ($11,364,736.00). Certified check or money order in that amount shall be made payable to "Commonwealth of Pennsylvania" and sent addressed as follows:

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

6. That Uber Technologies, Inc., Gegen, LLC, Rasier LLC, and Rasier-PA, LLC, shall cease and desist from further violations of the Public Utility Code and the Commission's Regulations.

7. That a copy of this Opinion and Order be served upon the Financial and Assessment Chief, Office of Administrative Services.

8. That the proceeding docketed at C-2014-2422723 be marked closed upon payment of the penalty described in Ordering Paragraph No. 5.

BY THE COMMISSION,

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: April 21, 2016

ORDER ENTERED: May 10, 2016

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
v.
Uber Technologies, Inc., Gegen, LLC,
Rasier, LLC, and Rasier-PA, LLC

Public Meeting – April 21, 2016
2422723 – OSA
Docket No. C-2014-2422723

STATEMENT OF COMMISSIONER PAMELA A. WITMER

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Uber Technologies, Inc., Gegen, LLC, Rasier, LLC and Rasier-PA, LLC (collectively, Uber or Company) on December 7, 2015, to the Initial Decision (I.D.) of Administrative Law Judges (ALJs) Mary D. Long and Jeffrey A. Watson, issued on November 17, 2015, in the above-captioned proceeding. Also before the Commission is the Motion to Strike the Exceptions of Uber (Motion) filed by the Commission's Bureau of Investigation and Enforcement (I&E) as well as I&E's Replies to Exceptions, both filed on December 17, 2015.

In the I.D., the ALJs determined the following: (1) Uber met the definition of a common carrier and was required to have authority from the Commission in order to operate pursuant to Section 1101 of the Public Utility Code (Code); (2) Uber clearly held out its service to the public; and (3) the drivers who provided the transportation did not hold valid certificates of public convenience. Next, the ALJs found that each trip provided by Uber without a certificate of public convenience constituted a distinct, identifiable and separate violation of the Code and that the Commission was authorized to assess a civil penalty of up to $1000 for each violation. The ALJs then set forth the ten factors of the Commission's policy statement, at 52 Pa. Code § 69.1201(c), warranting consideration of an appropriate civil penalty. While I do not believe it is necessary to discuss all of these factors at length, I agree at the outset that a per-trip penalty is warranted in this proceeding.

The entrance of Uber into the marketplace provided an immediate and substantial benefit to customers as a competitive alternative to traditional call and demand service. Uber provides wide ranging, fast and user-friendly transportation, often to underserved areas. As I have previously stated, this innovative use of the public space should be encouraged in a way that is consistent with the Commission's mission to protect the public interest, further economic development, and foster new technologies. As part of our mission and as new technologies develop, we are obligated to periodically review our regulations to determine whether or not they have kept pace with current industry standards and practices; this includes transportation.

Against this backdrop, I agree that Uber meets the definition of a common carrier and was obligated to obtain Commission authority to operate prior to offering transportation service in the Commonwealth. Admittedly, Uber's compliance with our prior orders and our regulations has been, at the very least, uneven. Providing transportation without requisite authorization from the Commission is

a serious violation of the Code and removes the Commission's ability to fulfill its responsibility of regulating the safety and reliability of common carriers. Similarly, Uber's decision to violate our July 1, 2014 Cease and Desist Order constitutes intentional conduct that ignored an explicit Commission directive. For these reasons, a substantial civil penalty is warranted.

However, this case also presents mitigating factors that should be considered and weighed in assessing a civil penalty. First, there is little evidence to demonstrate that Uber's actions resulted in actual harm. While nine accidents are documented during the time Uber was noncompliant with the Code and operating without a certificate of public convenience, none of these crashes involved bodily harm and no evidence was presented that any of the drivers were uninsured or that Uber refused any insurance claims relating to the accidents. Another mitigating factor to be considered in this case is the number of customers affected by Uber's conduct. From February 11, 2014, when Uber entered the marketplace and began offering transportation services until August 20, 2014, when the Commission granted Uber Emergency Temporary Authority, the Commission received not one customer complaint regarding Uber's services and the customers who used the platform sought out and willingly requested the service. Customers using Uber's application freely entered into a contract with the Company and agreed on both the terms of service and the price of the transportation services being offered. By all accounts customers received exactly the service they requested.

Finally, in considering additional relevant factors, I believe the recommended civil penalty is egregious, especially when compared to other cases in which the Commission has assessed substantial civil penalties for violations of the Code. Several Commission cases wherein we assessed substantial civil penalties involved incidents of serious bodily injury, fatalities, significant property damage, and/or patterns of unsafe business practices that jeopardized the public safety. I think these prior cases should instruct the civil penalty assessed in the instant case and guide us to a more measured and reasonable outcome. As one example, the largest civil penalty ever levied by the Commission was $1.8 million[1] against an electric generation supplier (EGS) for deceptive marketing practices of variable rate products, resulting in significant financial harm to customers. Although EGS and TNC cases are not directly analogous, the stark contrast in outcomes between these two cases is striking; particularly when considering that, in the EGS case, action was taken against the will of customers and resulted in actual harm. In the instant case, the Company was responding to market demand by providing a requested service about which the Commission received no consumer complaints. Yet, our action today levies a penalty several times higher than the largest fine assessed on a company whose conduct caused actual harm to customers. I cannot support such a grossly disproportionate outcome.

For these reasons, I respectfully dissent.

DATE: April 21, 2016

Pamela A. Witmer

PAMELA A. WITMER
COMMISSIONER

[1] *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Opinion and Order entered December 3, 2015) (*HIKO Order*).

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17120

Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement

v.

Uber Technologies, Inc., Gegen, LLC,
Rasier LLC, and Rasier-PA, LLC

Public Meeting held April 21, 2016
2422723-OSA
Docket No. C-2014-2422723

STATEMENT OF COMMISSIONER ROBERT F. POWELSON

Before the Commission today are the Exceptions filed by Uber Technologies, Inc., *et al.* (Uber)[1] to the November 17, 2015, Initial Decision in the above-captioned proceeding. The Initial Decision addressed a Complaint filed by the Pennsylvania Public Utility Commission's (PUC or Commission) independent Bureau of Investigation and Enforcement (I&E) on June 5, 2014, against Uber for providing motor carrier service to the public for compensation without proper Commission authority.

Uber's operations as a motor carrier without a license constitute a serious violation of the Public Utility Code that warrants a substantial civil penalty. However, when determining the penalty amount, the Commission cannot overlook the existence of several mitigating factors in this case, such as the minimal actual harm that resulted from Uber's operations, as well as Uber's current compliance with PUC orders and continuing willingness to meet Commission directives. Finally, it is important to consider the overall penalty amount in light of past Commission orders imposing penalties. After weighing all of the relevant factors, I believe an overall civil penalty of $2,500,000 is appropriate in this matter.

Background

Uber is a Transportation Network Company (TNC) that uses a mobile application (App) to connect passengers with drivers who use their own personal vehicles to provide transportation service for compensation. Uber began operating in Pennsylvania on February 11, 2014, despite that it did not have a Certificate of Public Convenience

[1] Gegen, LLC, Raiser LLC, and Raiser-PA, LLC are subsidiaries of Uber Technologies, Inc. In this Motion, I will collectively refer to these three parties as "Uber."

(Certificate) from the Commission. On June 6, 2014, I&E filed a complaint against Uber for operating as a motor carrier without a Certificate.

On July 1, 2014, the PUC's Bureau of Administrative Law Judges (ALJs) ordered Uber to cease and desist all operations in the Commonwealth. Uber disregarded this order and continued to operate until the Commission granted it Emergency Temporary Authority on August 20, 2014. At issue before us is whether Uber violated the Public Utility Code for operating from February 11, 2014, until August 20, 2014, without a Certificate from the PUC. On November 17, 2015, the ALJs issued an Initial Decision finding that Uber violated the Public Utility Code and imposing a civil penalty of $49,924,800.

PUC Jurisdiction & Uber's Violation of the Public Utility Code

I agree with the ALJs that Uber is a "common carrier" subject to regulation by the PUC,[2] and that by operating during that six month period in 2014, Uber violated the Public Utility Code (Code).

However, when Uber began operating, the service it provided did not neatly fall within any of the categories of motor carrier service in our regulations. That is why the Commission ultimately granted Uber a certificate for experimental authority, instead of categorizing Uber as call or demand service, or any other existing category of motor carrier service. This issue has since been resolved both because Uber voluntarily submitted to our jurisdiction and with this week's Commonwealth Court decision[3] finding that the Commission acted appropriately in exercising its jurisdiction over Uber. However, this does not change the fact that when Uber launched its operations in Pennsylvania, they were operating in a legally grey area. The Commission should take this into account when assessing a penalty.

Once the Commission issued the Cease and Desist Order, it was clear that Uber should not be operating in the Commonwealth. Therefore, I agree with the Initial Decision's ultimate finding that Uber meets the definition of common carrier and by continuing to operate despite a cease and desist order, Uber clearly violated the Public Utility Code.[4]

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[2] 66 Pa. C.S. § 102, "Public Utility" (1)(iii); "Common Carrier;" "Common Carrier by Motor Vehicle."
[3] *Capital City Cab Service, et al. v. Pa. Pub. Util. Comm'n*, 2016 Pa. Commw. LEXIS 172 (Comwlth. Ct. 2016).
[4] 66 Pa. C.S.§ 1101, 2501.

Penalty Factors

If a public utility fails to comply with Commission regulations, it must pay a civil penalty Pursuant to Section 3301 of the Code.[5] To implement this section, the Commission has adopted certain standards to consider when determining the amount of a civil penalty.[6] I&E argues that a majority of the penalty factors weigh in favor of issuing a higher penalty amount for Uber in this matter. While I agree that certain factors support a substantial penalty in this case, several other factors suggest mitigating the penalty amount.

Factors One and Two

Penalty factors one and two, although seemingly similar, are quite different and require individual consideration. Factor one requires the Commission to consider whether the conduct at issue was of a serious nature, while factor two requires the Commission to examine whether the *consequences* of the conduct are serious.

With respect to the first factor, Uber's conduct was undoubtedly serious in nature. The Commission takes its duty is to protect the traveling public very seriously and approaches the case of any motor carrier operating without a license as a weighty offense. Thus, the first factor certainly warrants a higher penalty.

The second penalty factor is different in that it requires the Commission to examine whether the *consequences* of the conduct are serious. In this case, there is very little evidence on the record demonstrating that Uber's actions caused any *actual* harm. This is relevant because in the Commission's Rulemaking that adopted the policy statement creating the penalty factors, the Commission clearly states that it is only proper to consider *actual harm* when analyzing whether this factor dictates a higher penalty amount.[7] Thus, it is legally incorrect to consider any potential harm to the traveling public as a result of Uber's operations.

Moreover, the penalty factor itself states that "personal injury and property damage" are examples of when the consequences are serious in nature.[8] In this case, the

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[5] 66 Pa. C.S. § 3301.
[6] 52 Pa. Code § 69.1201(c).
[7] "The Commission, however, declines to speculate about the possibility of potential, and not actual harm[.]" *Final Policy Statement for Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations,* M-00051875 (Opinion and Order issued December 22, 2007).
[8] 52 Pa. Code § 69.1201(c)(2).

actual harm documented includes nine accidents that occurred while Uber was operating without a Certificate. While these accidents certainly caused property damage, the number of accidents is extremely low considering the overall amount of rides during this period. Plus, record evidence demonstrates that none of the crashes involved bodily injury.[9] Nor is there any evidence that Uber or its drivers were uninsured during this time or refused any insurance claims relating to these accidents.

Moreover, when the Commission ultimately certificated Uber, we largely adopted that the same insurance limits and driver safety criteria that Uber already had in place prior to certification. Thus, it is unpersuasive to argue that there was an *actual* safety risk as a result of Uber's operations.

I&E argues that no evidence of actual injury or harm is necessary under this factor because Uber's unlawful conduct was by its nature injurious to the public. However, if this were true, the second penalty factor would be rendered unnecessary and any instances of uncertificated service would automatically warrant the maximum penalty without further consideration. Interpreting the penalty factors in a way that renders them useless cannot be an accurate interpretation. Therefore, I am not persuaded by I&E's argument. Rather, I find that the second penalty factor warrants reducing the final penalty amount because there is very little evidence of actual harm in this case.

Factor Five

The fifth penalty factor requires the Commission to consider the number of customers affected by Uber's conduct. While I&E speculates extensively about all of the harm that could have occurred as result of Uber operating without a Certificate, the Commission has clearly found that speculating about potential harm to third parties is inappropriate when assessing this factor.[10] Thus, any the potential harm to the traveling public that could have resulted from Uber's offense is irrelevant here.

Additionally, it cannot be overlooked that the customers who requested Uber's services during this period did so willingly. Given the news coverage of the issue, many of Uber's customers likely sought out the service despite knowing that Uber was operating illegally. These circumstances make it difficult to argue that any of Uber's

[9] Tr. 138 (May 6, 2015).
[10] *Final Policy Statement for Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations*, M-00051875 (issued December 22, 2007).

customers were harmed. Thus, this factor also weighs in favor of reducing the final penalty amount.

Factor Ten

The tenth penalty factor allows the Commission to consider any other relevant factors. Given the magnitude of the penalty recommended by the ALJs in this case, it is important to examine other situations where the Commission has issued substantial civil penalties for violations of the Public Utility Code. Doing so will allow the Commission to assess and compare the situations where these high penalty amounts are appropriate.

As Uber asserts in its Exceptions, many of the cases where the Commission imposed high monetary penalties involve serious bodily injury, fatalities, significant property damage, and/or a pattern of unsafe business practices that jeopardize the public safety.[11] In fact, the largest single penalty imposed by the Commission for a case involving a fatality was $500,000, where a natural gas explosion resulted in five deaths.[12]

Also relevant here is that highest penalty ever imposed by the Commission is $1.8 million.[13] In that case, the Commission penalized an Electric Generation Supplier (EGS) for enrolling customers in guaranteed savings plans and intentionally failing to honor its guarantees. Unlike here, this case involved a substantial amount of *actual* financial harm to a *large* number of customers resulting from an EGS's intentionally *deceptive* practices.

It is important to consider these previous cases to help determine a reasonable and appropriate civil penalty amount here. In this case, if the Commission imposed the maximum penalty amount on Uber based solely on the number of violations, it would be an extraordinarily high amount. However, it would be improper for the Commission to end its analysis there. Rather, the number of violations should be one element in determining the total fine. Equally as important is a reasonableness review of the total fine in comparison to past Commission decisions. After all, it is well-settled law that the "Commission retains broad discretion in determining a *total* civil penalty amount that is *reasonable* on an individual case basis."[14]

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[11] Uber Exceptions at p. 12.

[12] *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. UGI Utilities, Inc. – Gas Division*, Docket No. C-2012-2308997 (Opinion and Order entered February 19, 2013).

[13] *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Opinion and Order entered December 3, 2015) (*HIKO Order*).

[14] *Final Policy Statement for Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations*, M-00051875 (issued December 22, 2007)(emphasis added).

Thus, in considering other relevant factors, and in particular, other Commission decisions involving high penalties, tenth factor weighs in favor of reducing the penalty amount in this case.

Remaining Penalty Factors

In addition to the factors discussed above, two other factors support a reduced fine amount for Uber. Under factor four, Uber has modified its internal practices by securing authority from the Commission to operate on an experimental basis and has demonstrated a continuing willingness to comply with Commission directives.[15] Additionally, under factor six, there has been an absence of any significant compliance problems since Uber has obtained an experimental authority from the Commission.

In total, the five penalty factors discussed above support a reduced civil penalty amount. Two penalty factors – seven (the level of cooperation during the investigation)[16] and nine (past Commission decisions in similar situations)[17] – are neutral in their impact on the penalty amount. The remaining three factors weigh in favor of a higher civil penalty – factor one (seriousness of the conduct), factor three (whether the conduct was intentional or negligent), and eight (the penalty amount needed to deter similar conduct).

Penalty Amount

In determining a final penalty amount, the Commission must take into consideration all of the foregoing factors. Here, that means the penalty amount should take into account the seriousness of Uber's violations, the fact that the conduct was intentional, and should be high enough to deter future violations by both Uber and other motor carriers. At the same time, the penalty cannot be so high as to disregard the substantial mitigating factors weighing in favor of reducing the penalty in this case.

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[15] *See Rasier-PA LLC Compliance Plan*, Docket Nos. A-2014-2424608 and A-2014-2416127 (filed December 24, 2014, rev'd January 9, 2015). *See also Rasier-PA LLC Compliance Plan – Quarterly Reports*, Docket Nos. A-2014-2424608 and A-2014-2416127 (filed April 20, 2015; July 23, 2015; October 29, 2015; and January 29, 2016).

[16] The Staff Recommendation properly found that this issue is more properly addressed in the section considering discovery sanctions. Staff Recommendation at 55.

[17] The only other similar case involving a TNC operating without a license was the Lyft case, which was settled. *Pa. Pub. Utility Commission, Bureau of Investigation and Enforcement v. Lyft, Inc.*, Docket No. C-2014-2422713 (Initial Decision issued June 5, 2015; Final Order entered July 15, 2015). The Staff Recommendation properly concluded that settlements are not "similar situations" to litigated proceeding, and so the *Lyft* settlement is irrelevant to this case. Staff Recommendation at p. 56. *See also* 52 Pa. Code § 69.1201(c)(9).

In calculating a fine, I agree with the ALJs that it is appropriate to penalize Uber on a per trip basis, rather than per day, as Uber advocated. Each trip provided by Uber without a Certificate is a distinct, identifiable, and separate violation of the Code and the Commission has consistently applied this approach to other motor carriers who have provided unauthorized transportation service.[18]

Thus, based on the foregoing penalty factors, I believe that a civil penalty amount of $2,500,000 is appropriate.[19]

Robert F. Powelson

ROBERT F. POWELSON
COMMISSIONER

DATE: April 21, 2016

[18] *Newcomer Trucking, Inc. v. Pa. Pub. Util. Comm'n*, 531 A.2d 85 (Pa. Cmwlth. 1987); *Blue & White Lines, Inc. v. Waddington*, Docket No. A-00108279C9301 (Opinion and Order entered Feb. 13, 1995), *affirmed sub nom Publ. Utl., Comm'n Waddington*, 670 A.2d 199 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied*, 678 A.2d 368 (Pa. 1996); *Publ. Utl. Comm'n v. Penn Harris Taxi Service Co., Inc.*, Docket No. A-00002450C9603, F.2 (Opinion and Order entered March 12, 1998).

[19] This penalty does not include the $72,500 discovery sanction imposed by the Initial Decision, which I believe should be upheld.