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May 25, 2016

**VIA E-FILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120

Re: Bureau of Investigation and Enforcement v. Uber Technologies, Inc., *et al.*  
Docket No. C-2014-2422723; P-2016-\_\_\_\_\_

Dear Secretary Chiavetta:

On behalf of Uber Technologies, Inc., et al., enclosed for electronic filing is the Petition for Supersedeas, in the above-captioned matter.

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

Sincerely,



Karen O. Moury

KOM/bb  
Enclosure  
cc: Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>PENNSYLVANIA PUBLIC UTILITY</b>	:	
<b>COMMISSION, BUREAU OF</b>	:	
<b>INVESTIGATION AND ENFORCEMENT</b>	:	
	:	<b>Docket No. C-2014-2422723</b>
v.	:	<b>P-2016-</b>
	:	
<b>UBER TECHNOLOGIES, INC., ET AL.</b>	:	

**PETITION FOR SUPERSEDEAS**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

Uber Technologies, Inc., et al. (“Respondents”), by and through its counsel, Karen O. Moury and Buchanan Ingersoll & Rooney PC, hereby file this Petition for Supersedeas pursuant to Section 5.572 of the regulations of the Pennsylvania Public Utility Commission (“Commission”), 52 Pa. Code §§ 5.572, and Pa. R.A.P. 1781. By this Petition, Respondents respectfully request that the Commission stay the effectiveness of its Order entered on May 10, 2016 (“Order”) pending resolution of the Petition for Rehearing and Reconsideration (“Reconsideration Petition”) filed by Respondents on May 25, 2016 and any subsequent appellate proceedings, as well as any required Commission proceedings on remand. As payment of the civil penalty is due on June 9, 2016, Respondents request that the Commission grant this relief sufficiently prior to that time to make a filing with Commonwealth Court unnecessary.

Respondents request a stay of the Commission’s \$11.3 million civil penalty order while they seek reconsideration of this unprecedented penalty. This relief is warranted because of the excessive civil penalty imposed by the Commission’s Order and the crippling effect that payment of that civil penalty would have on Respondents’ Pennsylvania operations, particularly

since Respondents' major Transportation Network Company ("TNC") competitor Lyft, Inc. ("Lyft") is subjected to only a \$250,000 fine for the same conduct. By this Petition, Respondents fully incorporate herein by reference the Reconsideration Petition filed on May 25, 2016, including the Affidavit of Jonathan J. Feldman, Manager-Uber Pennsylvania ("Feldman Affidavit"). In support hereof, Respondents aver as follows.

## **I. INTRODUCTION**

1. By letter dated May 3, 2016, Governor Tom Wolf, Allegheny County Executive Rich Fitzgerald and Pittsburgh Mayor William Peduto recognized the hundreds of millions of dollars that Respondents are investing in the Commonwealth of Pennsylvania, in noting that the civil penalty imposed by the Commission "constitutes a civil penalty on innovation, threatening the company's ability to harness new technologies and create the jobs of tomorrow."<sup>1</sup> Further, these political leaders observed that the TNC services offered by Respondents have "brought widespread benefit to the entire Commonwealth in the form of improved transportation and new job opportunities for thousands." As aptly noted by Governor Wolf, County Executive Fitzgerald and Mayor Peduto, requiring payment of a civil penalty of \$11.3 million puts Respondents' investments in Pennsylvania's 21<sup>st</sup> century economy in real jeopardy.

2. Particularly while Respondents seek reconsideration and appellate review of the Commission's Order, the Commission should stay the effectiveness of the Order so that Respondents can preserve their ability to continue investing in Pennsylvania, sustain the present level of operations upon which Pennsylvanians have come to rely both as members of the traveling public and as drivers operating on Respondents' platform, and expand their services and products to reach a greater number of Pennsylvanians.

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<sup>1</sup> <http://www.puc.pa.gov/pcdocs/1437240.pdf>.

3. As shown below, Respondents have met each of the prongs necessary to obtain a stay of the effective date for payment of an \$11.3 million civil penalty. Specifically, Respondents have made a strong showing of their likelihood to prevail on the merits; have shown that Respondents, the traveling public and drivers operating on the platform will be irreparably harmed if this Petition is denied; have demonstrated that no parties will be harmed by a granting of this Petition; and have shown that the public will not be adversely affected by a stay in the effectiveness of the Order.

## II. APPLICABLE LEGAL STANDARDS

4. The Commission must grant a supersedeas or stay of its Final Order pending an appeal when a petitioner: (i) makes a strong showing that they are likely to prevail on the merits; (ii) shows that without the requested stay, they will suffer irreparable injury; (iii) the issuance of a stay will not substantially harm interested parties in the proceeding; and (iv) the issuance of a stay will not adversely affect the public interest. *Pa. Pub. Util. Comm'n v. Process Gas Cons. Grp.*, 502 Pa. 545, 467 A.2d 805 (Pa. 1983), citing *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C.Cir. 1958).

5. In *Process Gas*, the Pennsylvania Supreme Court also acknowledged that demonstration of the first factor, success on the merits, usually involves review of a dispute that has already been fully considered in an adversarial proceeding before the same body now considering the request for a stay. In this instance, the Court concluded that it is essential that the petitioner make a strong case under the criteria, and when facing a case in which the other three factors strongly favor interim relief, discretion may be exercised to grant a stay where the petitioner has made a substantial case on the merits even though the reviewing tribunal may disagree with the result advocated. *Process Gas*, 502 Pa. at 553-54, 467 A.2d at 809, quoting

*Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

6. In applying the *Process Gas* principles, the Commission has said that they “require the balancing of all interests, including the public.” *Pa. PUC v. HIKO Energy, LLC*, Docket Nos. P-2015-2519419 and C-2014-2431410 (Order entered January 28, 2016) at 11.

7. When each of these factors is applied to the evidentiary record in this proceeding, and all interests are balanced, especially those of the public, it is clear that the effective date for payment of a civil penalty should be stayed pending the resolution of the Reconsideration Petition and any subsequent appellate proceedings. *See HIKO Energy, LLC v. Pa. PUC*, No. 5 C.D. 2016 (Slip Opinion filed February 12, 2016) (payment of \$1.8 million civil penalty was stayed pending resolution of the appeal).

### **III. RESPONDENTS MEET THE STANDARDS FOR GRANT OF SUPERSEDEAS**

#### **A. Respondents Are Likely To Prevail On the Merits**

8. Through the Reconsideration Petition filed on May 25, 2016 in this proceeding, Respondents have made a strong showing that they are likely to prevail on the merits. Since the Respondents have fully incorporated the Reconsideration Petition herein by reference, Respondents will not reiterate those arguments here. For ease of reference, however, Respondent will identify those issues in summary fashion in this Petition, in the paragraph below.

9. The key legal issues raised by the Reconsideration Petition are that: (i) the \$11.3 million civil penalty imposed by the Commission violates the Excessive Fines Clause of the Pennsylvania Constitution and the U.S. Constitution because it is grossly disproportionate to the gravity and severity of the conduct it is intended to address; (ii) the Commission’s civil penalty is

arbitrary and capricious because it bears no rational relation to the conduct at issue and was determined on the basis of unreasonably vague criteria that were subjectively interpreted and applied to the conduct; (iii) the penalty exceeds the Commission's statutory authority as Respondents' conduct amounted to, at most, a "continuing offense" for which civil penalties must be calculated on a per day basis, rather than a per trip basis; (iv) interpreting the Commission's statutory authority to allow per-trip penalties for continuing offenses like those alleged here would violate the Due Process clause; (v) the civil penalty conflicts with a long line of transportation cases in which civil penalties were imposed without any consideration of how many *total* trips were provided in violation of the Code or Commission regulations or order, and is grossly disproportionate when compared to the \$250,000 fine imposed on Lyft last year for identical activities, including continued operation after the issuance of the cease and desist order; (vi) the Order is unlawful as the Commission failed to conduct the required *de novo* review of the record and legal arguments, but instead started from the presumption that it must justify any departures from the ALJs' Initial Decision, thereby depriving Respondents of an objective and impartial approach to the civil penalty determination; (vii) imposing a higher civil penalty for trips facilitated after the issuance of a cease and desist order is unlawful because the Commission (and the ALJs) lacked statutory authority to grant injunctive relief; and (viii) the civil penalty is not based on substantial evidence and ignores the evidence in the record including many mitigating factors regarding Respondents' safe business practices, the lack of actual harm to the public arising from the unauthorized operations and consumer demand for Respondents' services.

10. Even if the Commission does not agree with the merits of Respondents' position, that determination is not a controlling factor in reviewing this Petition. In fact, the Commission

need not agree with the merits of Respondents' position. *Process Gas*, 467 A.2d at 809 n. 8 (“[T]here are ample instances where the lower tribunal could find that the applicant has presented a substantial case on the merits even though it disagrees.”).

11. Regardless of the Commission's views of the issues raised by Respondents' Reconsideration Petition, a grant of this Petition is appropriate because Respondents raise significant legal issues and present a substantial case on the merits. Presenting numerous challenges to the Commission's Order, Respondents have identified a myriad of complex issues including matters involving constitutional rights, due process principles, statutory interpretation and the Commission's subject matter jurisdiction. Given the likelihood that the Commonwealth Court would find these challenges as significant and substantial, Respondents urge the Commission to stay the effect of the Order.

B. Respondents, Riders and Drivers Will Be Irreparably Harmed

12. Economic loss can satisfy the element of irreparable harm in the context of a request for an emergency order. *See, e.g., Commonwealth Bd. of Fin. And Revenue v. Rosetta Oil, Inc.*, 535 Pa. 33, 348, 635 A.2d 139, 142 (1993) (finding that the grant of stay was appropriate where petitioner would have faced the threat of going out of business). Here, if this Petition is not granted but Respondents later prevail on reconsideration or on appeal, Respondents' Pennsylvania operations would have already been significantly impacted by payment of the \$11.3 million civil penalty.

13. A payment of this magnitude, which is more than 110 times greater than Respondents' revenues for the period from July 2, 2014 through August 20, 2014 in Allegheny

County, would cause financial distress to Rasier-PA, LLC's operations and threaten the continued provision of Respondents' TNC services in Pennsylvania.<sup>2</sup>

14. At the very minimum, if Respondents are required to pay an \$11.3 million civil penalty for unauthorized TNC operations that occurred two years ago in Allegheny County, Respondents will be forced to divert funds that would otherwise be available to provide additional benefits to the traveling public through the introduction of new and innovative services and products to serve greater numbers of Pennsylvanians. Such measures would deprive Respondents of the ability to compete on a level playing field with other transportation providers including TNCs, most notably Lyft, whose activities mirrored those of Respondents in 2014 and who was only subjected to a \$250,000 fine.<sup>3</sup>

15. Because payment of an \$11.3 million civil penalty would result in a diversion of valuable resources away from Respondents' Pennsylvania operations, irreparable harm would be suffered by Respondents, the traveling public and drivers operating on Rasier-PA, LLC's platform. Over 677,000 Pennsylvanians have come to rely on Respondents' TNC services and 18,000 drivers are dependent on the income they earn from operating their own small businesses. Whether those operations need to be eliminated, scaled back or merely maintained at current levels, Respondents will be irreparably harmed because their competitors will have opportunities to expand and offer new and innovative products while Respondents' Pennsylvania operations decline or remain stagnant. Also, the traveling public will be irreparably harmed if they are unable to access Respondents' TNC services or to realize the benefits of new and innovative services and products. In addition, drivers who rely on Respondents' TNC services will be

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<sup>2</sup> Feldman Affidavit ¶ 4.

<sup>3</sup> Feldman Affidavit ¶ 5.



irreparably harmed if they are not able to start and grow their own small businesses to earn money they need to pay their monthly bills or support their families.

16. In addition, in the absence of a stay, Respondents' continued support of the technology ("tech") economy in Pennsylvania will be affected. Respondents have chosen Pittsburgh, Pennsylvania to be the hub for testing of self-driven vehicles and their worldwide headquarters for advanced technology, offering significant benefits to Pittsburgh's economy.

17. A stay of the penalty payment obligation will ensure that Respondents can continue to provide reliable, affordable and safe TNC services throughout the Commonwealth, while further expanding these services to reach a greater number of Pennsylvanians and continuing to support the tech economy. Such a stay will also permit the public to continue accessing TNC services and allow the drivers operating on the platform to earn money and grow their businesses.

C. Interested Parties Will Not Be Substantially Harmed

18. The only other party in this proceeding is the Bureau of Investigation and Enforcement ("I&E"), which will not be harmed in any way by a stay of Respondents' obligation to pay a civil penalty. Particularly since the civil penalty is the only relief ordered by the Commission, and it is payable to the Commonwealth's General Fund, a stay pending reconsideration and appeal will have no effect on I&E.

D. Public Interest Will Not Be Adversely Affected

19. The public interest will not be adversely affected by a grant of this Petition. In fact, the Commission has not explained how this excessive civil penalty actually serves the public interest. As noted in the Reconsideration Petition, this civil penalty imposed by the Commission is grossly disproportionate to the conduct it sought to address, which was the

provision of TNC services demanded by the public in Allegheny County over a brief period two years ago. The services caused no harm to the public – financial or otherwise. By all accounts, riders who used the services received exactly what they requested.

20. Further, as explained above, the public will be adversely affected if this Petition is denied. If Respondents are required to pay the \$11.3 million civil penalty pending reconsideration and any appellate review, the public’s access to Respondents’ TNC services will be jeopardized and their ability to realize the benefits of new and innovative services and products will be inhibited. Also, a stay is necessary to allow Respondents to continue increasing their support of the tech economy in Pennsylvania.

**IV. CONCLUSION**

For the foregoing reasons, Uber Technologies, Inc., *et al.* respectfully requests that the Commission grant this Petition for Supersedeas and grant a stay of the Order entered on May 10, 2016, pending resolution of the Petition for Rehearing and Reconsideration, as well as any appellate review and required proceedings on remand.

Respectfully submitted,

May 25, 2016



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*Attorneys for Uber Technologies, Inc., et al.*

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PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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<b>COMMISSION, BUREAU OF</b>	:	
<b>INVESTIGATION AND ENFORCEMENT</b>	:	
	:	<b>Docket No. C-2014-2422723</b>
v.	:	
	:	
<b>UBER TECHNOLOGIES, INC.</b>	:	

CERTIFICATE OF SERVICE


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

**Via Email and First Class Mail**

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Dated this 25<sup>th</sup> day of May, 2016.

  
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Karen O. Moury, Esq.