



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

IN REPLY PLEASE
REFER TO OUR FILE
C-2014-2422723
P-2016-_____

June 6, 2016

Via Electronic filing

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

Re: Pennsylvania Public Utility Commission, Bureau of Investigation and
Enforcement v. Uber Technologies, Inc., *et al.*
Docket Nos. C-2014-2422723; P-2016-_____

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Bureau of Investigation and Enforcement's Answer to the Petition for Supersedeas of Uber Technologies, Inc., *et al.* in the above-referenced proceeding. Copies have been served on the parties of record in accordance with the Certificate of Service.

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

Sincerely,

A handwritten signature in blue ink, appearing to read "Step M", is written over a faint, larger version of the same signature.

Stephanie M. Wimer
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Prosecutor

Michael L. Swindler
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Enclosure

cc: As per Certificate of Service
Honorable Mary D. Long
Honorable Jeffrey A. Watson
ra-OSA@pa.gov

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement	:	
	:	
v.	:	Docket Nos. C-2014-2422723;
	:	P-2016-_____
Uber Technologies, Inc., Rasier-PA, LLC,	:	
Rasier, LLC and Gegen, LLC	:	

**ANSWER OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT
TO THE PETITION FOR SUPERSEDEAS
OF UBER TECHNOLOGIES, INC., *ET AL.***

The Bureau of Investigation and Enforcement (I&E) of the Pennsylvania Public Utility Commission (Commission or PUC) hereby submits this Answer to the Petition for Supersedeas of Uber Technologies, Inc., *et al.*¹ (Uber or Company) pursuant to 52 Pa. Code § 5.572(e). For the reasons stated herein, Uber’s Petition for Supersedeas does not meet the standard the Commission requires to issue a stay and therefore should be denied. Alternatively, should the Commission grant Uber’s Petition, it should require Uber to furnish security to stay enforcement of the Commission’s May 10, 2016 Opinion and Order (Order). By this Answer, I&E fully incorporates herein by reference the Answer I&E filed on June 6, 2016 to Uber’s Petition for Reconsideration and Rehearing. In support hereof, I&E avers as follows:

¹ The Respondents in this proceeding are Uber Technologies, Inc., Gegen, LLC (Gegen), Rasier, LLC (Rasier) and Raiser-PA, LLC (Rasier-PA). Unless otherwise noted, I&E collectively refers to the Respondents as “Uber” or “Company” throughout its Answer.

I. INTRODUCTION

1. The averments made in Paragraph 1 contain extra-record evidence that should be stricken or, alternatively, not considered by the Commission. Extra-record evidence cannot sustain an adjudication. *Kyu Son Yi, DVM v. State Bd. Of Veterinary Medicine*, 960 A.2d 864 (Pa. Cmwlth. 2008) (citing *Ohio Bell Telephone Co. v. Pub. Util. Comm'n of Ohio*, 57 S.Ct. 724, (U.S. 1937)); *See also Kelley v. Duquesne Light Company*, Docket No. C-20078502 (Order entered January 22, 2009) (finding that new matter attached to Exceptions consisted of extra-record evidence and may not be considered by the Commission in reaching its decision); *See also* 52 Pa. Code § 5.431 (relating to the close of the record). To the extent that a response is deemed necessary, Uber's interpretation of the language of the letter is denied. The letter speaks for itself.

2. Denied. Uber's vague and unsubstantiated claims are not supported by financial documentation demonstrating that Uber would experience any adverse financial impact in paying the \$11.4 million civil penalty.²

3. Denied. For reasons that are fully addressed below, it is denied that Uber has met the standard of supersedeas relief because it is unlikely that Uber will prevail on the merits of its reconsideration and rehearing request that is pending before the Commission or on any appeal that may be brought forth to Commonwealth Court. Likewise, Uber presented no concrete evidence to show that it will suffer irreparable injury if not granted a stay. Additionally, Uber has not demonstrated that the

² The exact civil penalty amount imposed by the Commission is eleven million three hundred sixty-four thousand seven hundred thirty-six dollars (\$11,364,736.00). Order at 72; Ordering Paragraph No. 5.

Commission's enforcement responsibility will not be impaired or that the public interest will not be adversely affected by granting a stay of Uber's payment of the civil penalty.

II. UBER DOES NOT MEET THE STANDARD FOR GRANT OF SUPERSEDEAS

4. The averment states a conclusion of law to which no response is required.

By way of further answer, the specific standard to grant supersedeas or a stay of a Final Order is well established by the Commonwealth Court as follows:

When application is made to an intermediate appellate court seeking the stay of an order pending appeal, the party seeking the stay must make the following showing:

1. That they are likely to prevail on the merits of their appeal;
2. That they will suffer irreparable injury if they are not granted a stay;
3. That the issuance of a stay will not substantially harm other interested parties in the proceedings; and
4. That the issuance of a stay will not adversely affect the public interest.

Thompson v. Workers' Compensation Appeal Board (Sacred Heart Medical Center), 729 A.2d 99, 101 (Pa. Cmwlth. 1999) (citing *Commonwealth v. Martorano*, 634 A.2d 1063 (Pa. 1993), stating the criteria set forth in *Pa. Pub. Util. Comm'n v. Process Gas Consumers Group*, 467 A.2d 805, 808-09 (Pa. 1983)). Uber must satisfy each element of this test in order to be granted a stay.

5. The averment states a conclusion of law to which no response is required.

To the extent a response is deemed necessary, any implication that Uber has made a substantial showing that it is likely to prevail on the merits is specifically denied.

6. The averment states a conclusion of law to which no response is required.

7. Denied. For reasons that are fully addressed herein, Uber's payment of the civil penalty should not be stayed.

Uber is Unlikely To Prevail On The Merits

8. Denied. By way of further answer, Uber must show that it is likely to prevail on the merits of its appeal. *Thompson*, 729 A.2d at 101. To prevail on appeal, Uber must show that the Commission's Order should be reversed under the Commonwealth Court's standard of review. The Commonwealth Court's "standard of review of a Commission order is limited to considering whether substantial evidence supports necessary factual findings, whether the PUC erred as a matter of law, and whether any constitutional rights were violated." *Lloyd v. Pa. Pub. Util. Comm'n*, 17 A.3d 425, 429 (Pa. Cmwlth. 2011). Commonwealth Court defers "to the PUC's interpretations of the [Public Utility] Code and its own regulations unless the PUC's interpretations are clearly erroneous." *Lloyd*, 17 A.3d at 429 (citing *Popowsky v. Pa. Pub. Util. Comm'n*, 706 A.2d 1197, 1203 (Pa. 1997)). Commonwealth Court may not "substitute its judgment for that of the PUC when substantial evidence supports the PUC's decision on a matter within the Commission's expertise." *Lloyd*, 17 A.3d at 429 (citing *Popowsky*, 706 A.2d at 1201). Uber's Petition for Supersedeas conveniently fails to address this high appellate burden. Likewise, Uber's Petition for Supersedeas also fails to address the Commission's stringent standards for granting reconsideration. To be granted reconsideration, Uber must show that the arguments it raises now are "new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission." *Duick v. Pa. Gas and Water Co.*, 56

Pa. PUC 553, 559 (1982). All of the arguments Uber advances at this late stage have already been definitively decided against Uber or have been waived.

9. Denied. For reasons that are more fully explained in I&E's Answer to Uber's Petition for Rehearing and Reconsideration, Uber's arguments will fail because: (i) Uber waived the right to challenge the Commission's civil penalty on constitutional grounds, including such arguments that the civil penalty violates the excessive fines and due process clauses of the U.S. and Pennsylvania Constitutions, because Uber failed to raise such claims earlier in the proceeding when the civil penalty amounts that it faced were much larger; (ii) Uber's argument that a civil penalty be based on the number of days it unlawfully operated as opposed to the number of trips it provided has been expressly considered and rejected by the Commission; (iii) Uber's deplorable conduct set itself apart from its competitor; (iv) the "per trip" civil penalty imposed by the Commission is lawful and consistent with precedent; (v) the Commission impartially and objectively reviewed the record in this proceeding and arrived at an independent judgment; (vi) Uber waived any challenges related to the Commission's authority to issue a cease and desist order by repeatedly failing to raise such a challenge earlier and, if the Commission finds that waiver did not occur, its authority to grant a cease a desist order is clear; and (vii) substantial evidence supports the Commission's civil penalty for Uber's 122,998 proven violations of the Public Utility Code and Uber benefitted from the Commission's consideration of mitigating factors when it reduced the civil penalty that was imposed by the presiding Administrative Law Judges (ALJs).

10. The averment states a conclusion of law to which no response is required. To the extent a response is deemed necessary, Uber has not made a substantial case that it will prevail on the merits and even if it did, it would have to demonstrate that the other three remaining factors strongly favor interim relief. *See Process Gas*, 467 A.2d at 809 (stating that “[A] court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits.”)

11. Denied. Uber’s Petition for Rehearing and Reconsideration provides no “new” evidence that was previously unavailable, contains extra-record material, raises the same arguments that have been definitively decided against it, and brings forth challenges that were not raised below and are now waived.

Uber Will Not Suffer Irreparable Harm

12. Denied. Uber’s contention that it will suffer irreparable harm is premised upon its unsupported claim that it will incur economic loss. However, the Commonwealth Court has held that “economic harm alone will not establish irreparable harm.” *Nationwide Mutual Insurance Co., et al. v. Commonwealth of Pennsylvania, Insurance Department, et al.*, 522 A.2d 1167, 1171 (Pa. Cmwlth. 1987) (finding that irreparable harm occurred because more was present than the mere loss of economic stability; the petitioners presented evidence that billing, collection and other clerical functions would be disrupted if appropriate relief was not entered).

13. The averments made in Paragraph 13 contain extra-record evidence that should be stricken or, alternatively, not considered by the Commission. By way of

further answer, Uber’s unsubstantiated claim of “financial distress” should be viewed by the Commission with utmost suspicion as Uber has been reported to be valued at over \$60 billion.

14. Denied. Uber’s vague, unsupported and speculative assertions of “irreparable harm” are premised upon claims of economic loss, which is not an appropriate ground to grant a stay. By way of further answer, it is specifically denied that Uber’s deplorable conduct mirrored that of its competitor.

15. Denied. Uber’s vague, unsupported and speculative assertions of “irreparable harm” are premised upon claims of economic loss, which is not an appropriate ground to grant a stay.

16. Denied. Uber’s vague, unsupported and speculative assertions of “irreparable harm” are premised upon claims of economic loss, which is not an appropriate ground to grant a stay. By way of further answer, Uber cites to no legal provision, and none exists, to challenge the alleged adverse impact of a civil penalty on businesses unrelated to the entity on which the penalty was assessed.

17. Denied. Uber’s vague, unsupported and speculative assertions of “irreparable harm” are premised upon claims of economic loss, which is not an appropriate ground to grant a stay.

The Issuance Of A Stay Will Substantially Harm Enforcement

18. Denied. The Commission ordered Uber to pay a civil penalty for committing 122,889 discrete violations of the Public Utility Code for its actions in providing uncertificated transportation. An objective of paying a civil penalty is to deter

future misconduct not only of the affected entity, but also of the industry.³ Allowing Uber to defer payment of the civil penalty as it allocates resources to preserving its business interests diminishes the punitive purpose of a civil penalty and provides no incentive to deter future misconduct. Accordingly, staying payment of the civil penalty weakens the Commission's ability to enforce the Public Utility Code and its own regulations.

The Issuance of A Stay Will Adversely Affect The Public Interest

19. Denied. As mentioned above, staying payment of the civil penalty weakens the Commission's enforcement duties in that such a stay would permit the entity that broke the law to divert financial resources away from the penalty in order to bolster its own business interests. Uber must be held accountable for threatening the public's safety by its defiant refusal to submit to the Commission's oversight. Indeed, the public was harmed by Uber's conduct in that nine motor vehicle accidents occurred during its provision of unauthorized transportation that were serious enough to warrant the filing of an insurance claim.⁴ The civil penalty is the appropriate response to Uber's 122,998 proven violations of the Public Utility Code and sends the correct message that the Commission will fulfill its duty to protect public safety by regulating transportation and harshly penalizing companies that deliberately evade the Commission's authority.

³ *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Order entered December 3, 2015) at 44.

⁴ (May 6, N.T. 168).

20. Denied. I&E hereby incorporates its response to Paragraph 19. By way of further answer, the entirety of Uber's bald assertions advanced in Paragraph 20 are unsubstantiated by any concrete evidence, including financial documentation.

III. SHOULD UBER'S PETITION FOR SUPERSEDEAS BE GRANTED, THE COMMISSION SHOULD DIRECT UBER TO FURNISH A BOND

21. Should the Commission determine to grant Uber's Petition for Supersedeas, which it should not for the reasons articulated above, the Commission should require Uber to post a bond in the amount of 120% of the \$11.4 million civil penalty, pursuant to Pa. R.A.P. 1731 (providing for appropriate security in the amount of 120% of the amount found due by the lower court and remaining unpaid).

WHEREFORE, the Bureau of Investigation and Enforcement requests that the Commission deny the Petition for Supersedeas of Uber Technologies, Inc., *et al.* Alternatively, if not denied, I&E requests that the Commission direct Uber to furnish security to stay enforcement of the Commission's May 10, 2016 Opinion and Order.

Respectfully submitted,



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Dated: June 6, 2016

Pennsylvania Public Utility
Commission, Bureau of Investigation
and Enforcement

v.

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

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Docket Nos. C-2014-2422723;
P-2016-_____

CERTIFICATE OF SERVICE

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

Service by First Class Mail and Electronic Mail:

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Dated: June 6, 2016