PENNSYLVANIA

PUBLIC UTILITY COMMISSION

Harrisburg, PA 17105-3265

 Public Meeting held September 1, 2016

Commissioners Present:

Gladys M. Brown, Chairman, Joint Statement

Andrew G. Place, Vice Chairman, Joint Statement

John F. Coleman, Jr.

Robert F. Powelson, Statement, dissent

David W. Sweet, Statement

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**

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**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Rehearing and Reconsideration (Reconsideration Petition) filed by Uber Technologies, Inc., Gegen, LLC, Rasier LLC, and Rasier-PA, LLC[[1]](#footnote-1) on May 25, 2016, seeking reconsideration of our Opinion and Order entered on May 10, 2016 (*May 2016 Order*), relative to the above-captioned proceeding. Also before the Commission is the Petition for Supersedeas filed by Uber on May 25, 2016, seeking a stay of the *May 2016 Order* pending resolution of the Reconsideration Petition, any subsequent appellate proceedings, and any required Commission proceedings on remand (Stay Petition). The Bureau of Investigation and Enforcement (I&E) filed Answers to both petitions on June 6, 2016. For the reasons stated below we shall deny the Reconsideration Petition and the Stay Petition.

# I. History of the Proceeding

On June 5, 2014, I&E filed a Formal Complaint (Complaint) against Uber alleging that the Petitioner 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.

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 Petitioner is acting as a broker of transportation in Pennsylvania without proper Commission authority.[[2]](#footnote-2) 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 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.[[3]](#footnote-3)

On June 16, 2014, I&E filed a Petition for Interim Emergency Order (Emergency Petition) at Docket No. P‑2014-2426846, seeking a Commission Order requiring Uber to immediately cease and desist from brokering transportation service for compensation between points within Pennsylvania. In its Emergency 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. Emergency 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 Emergency 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.[[4]](#footnote-4) Uber argued, in part, that if I&E’s Emergency 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. Emergency 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 Petitioner 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.

 A hearing on the Emergency Petition was held before ALJs Long and Watson on June 26, 2014. I&E presented the testimony of one witness and sponsored three exhibits.[[5]](#footnote-5) 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 Emergency 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.[[6]](#footnote-6)

 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 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 – wholly-owned subsidiaries of Uber – as additional respondents 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 permitted to continue settlement discussions and 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.

 Uber filed Exceptions on December 7, 2015. I&E filed both a Motion to Strike the Exceptions (Motion) and Replies to Exceptions on December 17, 2015. Uber filed an Answer to the Motion on January 6, 2016. In our *May 2016 Order* we denied the Motion, granted the Exceptions, in part, and denied them, in part, and modified the ALJs’ Initial Decision. Specifically, we reduced the civil penalty for Uber’s unauthorized provision of transportation service to $11,292,236. However, we adopted the ALJs’ imposition of an additional civil penalty of $72,500 for Uber’s discovery violations. Thus, we determined that Uber must pay a total civil penalty of $11,364,736. *May 2016 Order* at 72.[[7]](#footnote-7)

 As previously stated, Uber filed the Reconsideration Petition and the Stay Petition on May 25, 2016.[[8]](#footnote-8) I&E filed Answers to both petitions on June 6, 2016. By Order entered June 9, 2016 (*June 2016 Order*), we granted the Reconsideration Petition, pending further review of, and consideration on, the merits. Additionally, we considered a portion of the Stay Petition as a request to extend the deadline for the payment of the civil penalty in the *May 2016 Order* pursuant to 52 Pa. Code § 1.15. We extended the deadline for the payment of the civil penalty pending final disposition of the Reconsideration Petition. We also deferred the consideration of the remainder of the Stay Petition until we address the merits of the Reconsideration Petition. *June 2016 Order* at 3-4.

# II. Background[[9]](#footnote-9)

The Petitioner licenses its Uber app which is used to connect passengers and drivers in cities, including Pittsburgh in Allegheny County. A passenger who has 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]](#footnote-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]](#footnote-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.

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 – Reconsideration Petition

## A. Legal Standards

Before addressing the Reconsideration Petition, we note that any issue not specifically addressed shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pennsylvania Public Utility Commission,* 625 A.2d 741 (Pa. Cmwlth. 1993).

The Code establishes a party’s right to seek relief following the issuance of our final decisions pursuant to Subsections 703(f) and (g), 66 Pa. C.S. §§ 703(f)

and (g), relating to rehearings, as well as the rescission and amendment of orders. Such requests for relief must be consistent with Section 5.572 of our Regulations, 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision.

The standards for granting a petition for rehearing were set forth in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553 (1982) (*Duick*):

A petition for rehearing, under the provisions of 66 Pa. C.S.

§ 703(f), properly must seek the reopening of the record for the introduction of additional evidence of some sort. As grounds thereof it must allege newly discovered evidence, not discoverable through the exercise of due diligence prior to the close of the record.

*Duick,* 56 Pa. P.U.C. at 558.

Commission Regulations allow a party to petition to reopen the proceeding any time after the record is closed but before a final decision is issued for the purpose of taking additional evidence. 52 Pa. Code § 5.571(a); *see, e.g., Application of Kris Eckerl t/d/b/a Michael’s Moving and Storage*, Docket No. A-2014-2429336 (Order entered November 19, 2015). The burden is on the petitioner to show grounds for reopening the proceeding, including changes of fact or law that have occurred since the conclusion of the hearing. 52 Pa. Code § 5.571(b). The Commission may reopen the record after the presiding officer has issued a decision if there is reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, the reopening of the proceeding. 52 Pa. Code § 5.571(d).

 Also, *Duick* sets forth the standards for granting a petition for reconsideration:

A petition for reconsideration, under the provisions of

66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the court in the Pennsyl­vania Railroad Company case, wherein it was stated that “[p]arties . . . , cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them . . . .” What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considera­tions which appear to have been overlooked by the commission.

*Duick,* 56 Pa. P.U.C. at 559 (quoting *Pennsylvania Railroad Co. v. Pennsylvania Public Service Commission*, 179 A. 850, 854 (Pa. Super. 1935)).

## B. *May 2016 Order*

### Public Utility Code Violations

In the *May 2016 Order*, we referenced the *Rasier-PA Allegheny County Order* and our consideration of 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, we explained that in this proceeding it cannot be reasonably disputed that the Petitioner was offering and providing motor common carrier service to the public for compensation.

Uber claimed 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, we found the record to be clear that the Petitioner exercised active and significant oversight of its drivers and that its service was reasonably available to the general public for compensation.[[12]](#footnote-12) Moreover, we explained our previous determination 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, we concluded that 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 Petitioner violated Section 1101 of the Code by providing this common carrier service without authority from the Commission.

In its Exceptions, Uber also claimed that its service was only available to a special class of persons and thus was not open to the public pursuant to *Aroniminick Transportation Co. v. Pa. Service Comm’n*, 170 A. 375 (Pa. Super. 1934), and *Drexelbrook Associates v. Pa. PUC*, 418 Pa. 430, 212 A.2d 237 (1965). Specifically, Uber argued 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 Petitioner’s terms and conditions and provided valid payment information such as a credit card. We rejected this argument.

First, we explained that the vast number of rides provided by Uber from February 11, 2014, to August 20, 2014, belied the claim that its service was only available to an exclusive, limited customer base. During the approximately six month period of service, from February 11, 2014, until August 20, 2014, customers arranged 122,998 rides with Uber. Furthermore, we found that Uber’s argument rang 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 agreed 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 noted 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*.[[13]](#footnote-13) We stated that pursuant to Section 1103(a), Rasier-PA has waived any objection to its status as a motor common carrier. Thus, we agreed with I&E that Rasier-PA is prohibited from objecting to the Commission’s 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, we found that 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. We noted that 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 Petitioner 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).

### 2. Per Trip Civil Penalty

Regarding the assessment of civil penalties, we stated that the Commonwealth Court has interpreted Section 3301 of the Code[[14]](#footnote-14) 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, citing *Newcomer Trucking, Inc. v. Pa. PUC*, 531 A.2d 85, 87 (Pa. Cmwlth. 1987) (*Newcomer Trucking*), and *Kviatkovsky v. Pa. PUC*, 618 A.2d 1209, 1212 (Pa. Cmwlth. 1992) (*Kviatkovsky*). We noted that the ALJs in their Initial Decision, 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.

 Specifically, we agreed with the ALJs’ explanation that the Commission has applied a per-trip penalty on other carriers found to have provided unauthorized transportation in violation of the Code. In referencing *Newcomer Trucking,* the ALJs noted that the 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 this restriction 184 times on 128 separate days. As a result, 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 Commonwealth Court soundly rejected the argument of Newcomer Trucking.

 The ALJs explained the Commonwealth Court’s analysis of referring to Section 1930 of the Statutory Construction Act (Act), 1 Pa. C.S. § 1930, [[15]](#footnote-15) 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, [[[16]](#footnote-16)] 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*.

 Furthermore, the ALJs highlighted the Commonwealth Court’s rejection of the argument by Newcomer Trucking that the Code required the Commission to impose 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) [[17]](#footnote-17) 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, we noted the ALJs’ citation to the Commonwealth Court’s decision in *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.[[18]](#footnote-18)

We found that the Commission has consistently applied a per-trip penalty on other carriers which have provided unauthorized transportation in violation of the Code. Thus, we agreed with the ALJs’ reasoning that each trip provided by Uber without a certificate from the Commission constituted a distinct, identifiable and separate violation of the Code.

In its Exceptions, Uber argued 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 Petitioner claimed that the ALJs inappropriately focused on individual passenger trips rather than the launch of the app. We disagreed.

As discussed above, we found that Uber provided transportation to the public for compensation in violation of the Code. We rejected the Petitioner’s claim that it was simply a disinterested invisible entity partnering drivers with passengers through the Uber app. We found that Uber’s contentions regarding the civil penalty – that the launch of the app was the only possible violation of the Code – was simply a rehash of its prior argument that it was not acting as a common carrier by motor vehicle. In our disposition, we explained that the record supported a finding of the Petitioner playing 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 was clear that each ride could be feasibly documented as a separate rather than a continuing violation.

In its Exceptions, the Petitioner also cited 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 noted 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, we found that I&E correctly explained, that three of the cases cited by Uber – *Pa. PUC v. J&E Transportation Service, LLC*, Docket No. A-00122121C0601 (Order entered September 19, 2006) (*J&E Transportation*); *Pa. PUC v. M&G Trucking, Inc.*, Docket Nos. A-00114371C0601 and A-00114371 (Order entered July 20, 2006) (*M&G Trucking*), and *Pa. PUC v. A-Apollo Transfer, Inc.,* Docket Nos. A-00098529C0501 and A-0098529 (Order entered October 7, 2005) (*A-Apollo Transfer*)– actually support the imposition of a civil penalty for each instance of uncertificated transportation. We explained that the fourth case, *Pa. PUC v. S.S. Sahib Cab Co.,* Docket No. A-00121184C0601 (Order entered March 6, 2007) (*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 argued 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*. We determined that Uber should have known at the time of the Uber launch in February 2014 that it was required to have Commission authority to provide its service. Moreover, in April 2014, we noted, Commission staff advised the Petitioner of the need to file an application to cover its operations. We considered it 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*, we found that Uber disregarded Section 3.10 of our Regulations, 52 Pa. Code § 3.10. Explaining that 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, we rejected Uber’s argument.

Finally, we acknowledged that a penalty assessed for each individual trip would result in a significant total penalty. However, we agreed with the conclusion of the ALJs that this result was due to the sheer number of violations which occurred.[[19]](#footnote-19)

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

In our *May 2016 Order*, we summarized the ALJs’ application of the ten factors of our policy statement under 52 Pa. Code § 69.1201.[[20]](#footnote-20) In the Initial Decision the ALJs concluded 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 period of Uber’s unauthorized service from February 11, 2014, until July 1, 2014 (the Launch Period) and Uber’s conduct from July 2, 2014, until August 20, 2014 (the Cease and Desist Period).

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. In light of Uber’s unilateral disclosure of the trip data, we shall reproduce the ALJs’ civil penalty analysis chart as follows:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Date |  | # of trips |  | Penalty per trip |  |
| 2/11/14-6/5/14 | Launch to filing of Complaint | 61,030 | Tr. at 87 | $100 | $6,103,000 |
| 6/6/14-7/1/14 | Complaint to cease & desist order | 20,243 | Tr. at 87 | $100 | $2,024,300 |
| 7/2/14-8/20/14 | Cease & desist order until certificate granted | 41,725 | Tr. at 87-88 | $1,000 | $41,725,000 |
| TOTAL |  | 122,998 | Tr. at 89 |  | $49,852,300 |

I.D. at Appendix A.

In our *May 2016 Order* we evaluated whether the following ten factors of our policy statement warranted the imposition of a civil penalty:

(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 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)

Upon review of the first and second factors, we agreed with the analysis of the ALJs that the Petitioner’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 Petitioner provided 122,998 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 considered 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.[[21]](#footnote-21)

In its Exception, Uber argued 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 stated that the transportation options in Allegheny County were inadequate and that the Commission recognized the need for its service by ultimately granting its ETA application. However, we explained that 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. We reasoned that in *Pa. PUC v. Israel*, 356 Pa. 400, 406, 52 A.2d 317, 321 (1947) (*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.[[22]](#footnote-22)

Additionally, the Petitioner posited 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 argued that it should have been allowed to self-regulate the propriety of its safety and insurance requirements. We rejected this assertion because the General Assembly requires the Commission and not individual motor carriers to evaluate and approve motor carrier safety requirements. Accordingly, we found that these factors supported a finding of a higher civil penalty.

Under the third factor, Uber admitted that its conduct was intentional but objected to some of the ALJs’ characterizations of its actions, such as the “flouting” of Commission authority. However, we noted that despite some of the strong language in the Initial Decision, the ALJs credited some of the actions by the Petitioner with respect to the Launch Period, such as the securing of Gegen’s broker license and the 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, we concluded that 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 agreed with the ALJs’ analysis of the third factor. Nonetheless, we modified 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 the maximum civil penalty, we instead found that the analysis supported a finding of a higher civil penalty under this factor when weighing all the factors.

In reviewing the fourth factor, we agreed 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, we recognized that 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, we reasoned that the Petitioner’s actions indicate that it is striving for continued compliance with the Commission. Such actions weighed in favor of a lower civil penalty when considering all the penalty factors.

Therefore, we granted Uber’s Exception in part as to this factor and modified the ALJs’ Initial Decision accordingly.

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

As to compliance history, we agreed with Uber that there have been no Commission fines imposed against Gegen related to the operation of its broker license. Additionally, we explained that 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.[[23]](#footnote-23) Thus, we found 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. Thus, we granted the Exception in part as to the sixth factor and modified the ALJs’ Initial Decision accordingly.

Under the seventh factor, we adopted 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, we stated, pertains to its refusal to provide the requested trip data until the date of the hearing. We determined that this issue was more properly addressed in the consideration of the discovery sanctions. Accordingly, we found that this factor did not weigh into the assessment of the civil penalty.

Regarding the eighth factor, we disagreed with Uber that our finding in *Pa. PUC v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Order entered December 3, 2015) (*HIKO Energy*) pertaining to deterrence was 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, we stated, there is the danger that other motor carriers may attempt to disregard the Regulations and directives of the Commission and thereby endanger the safety of the public. Thus, we determined that contrary to the Petitioner’s claim, the imposition of a civil penalty was critical to ensuring compliance by the entire industry, specifically other motor carriers or brokers. We, therefore, found that this factor weighed in favor of a higher civil penalty.

Under the ninth factor, evaluating past Commission decisions in similar situations, Uber argued that the ALJs improperly disregarded the settlement in *Pa. PUC v. Lyft, Inc.*, Docket No. C‑2014-2422713 (Order entered July 15, 2015) (*Lyft*). The Petitioner also contended that the ALJs’ recommended civil penalty was irrational in comparison to other settlements involving instances of death, personal injury and property damage. However, we explained that 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 noted our holding 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) (*Bell Telephone*). Although the public interest is considered in evaluating a settled case, there is not a fully developed record. Also, we explained that in a settled case, there may be a civil penalty even though a party 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. We found that 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 disagreed 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, we found, distinguishes this case from those matters and necessitates the need for an unprecedented civil penalty. [[24]](#footnote-24)

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 agreed with the ALJs. Nonetheless, upon evaluation and weighing of all the factors we found that the civil penalty should be adjusted.

Consistent with the analysis outlined by the ALJs, we found 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 Period. As a threshold for calculating the civil penalty, we looked to the record. I&E proved that Uber provided unauthorized service on fourteen occasions from March 31, 2014, through July 11, 2014. Tr. at 18-21, 63-64; I&E Exhs. 2, 4. Uber received fares ranging from $5 to $12 for these trips. Taking the average cost of these trips, we concluded that Uber earned approximately $7 per ride. Extrapolating this average over the total number of admitted unauthorized trips of 122,998, we concluded that Uber earned a total of $860,986 for both the Launch Period and the Cease and Desist Period. Although we acknowledged that the total amount earned over the six-month period was a rough calculation, we found that it was a reasonable starting point for imposing a civil penalty, particularly during the Launch and Cease and Desist Periods for a base penalty of $860,986 (122,998 x $7 = $860,986).[[25]](#footnote-25)

Additionally, we found that Uber’s intentional disregard of the *July 1, 2014 Order* and the *July 24, 2014 Order* necessitated an added penalty. We reasoned that imposing an additional civil penalty of $250 for each trip provided during the Cease and Desist Period (41,725) would result in a civil penalty of $10,431,250 (41,725 x $250 = $10,431,250). Adding the additional civil penalty of $10,431,250 to the base penalty of $7 per trip or $860,986 would result in a total civil penalty of $11,292,236. We explained that this penalty was significantly lower than the maximum penalty of $1,000 per trip recommended by the ALJs for the Cease and Desist Period and the total recommended civil penalty of $49,852,300.

Upon weighing all the factors, including the importance of deterring future unauthorized activity within the motor carrier industry, we found that a civil penalty of $11,292,236 was appropriate under the circumstances and supported by the record. We reasoned that this civil penalty, which is a substantial reduction from the ALJs’ recommended penalty, took 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. It also acknowledged that the Petitioner 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 agreed that Uber was 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. We also emphasized that the civil penalty being adopted was a substantial reduction from the recommendations of the ALJs, and was 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, we noted, demonstrated that the Commission is more than willing to compromise in order to achieve outcomes that serve the public interest.

 However, we explained that 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, which far exceeded any prior case involving the Commission. A record number of proven violations we asserted should be expected to result in a record setting fine.

Additionally, we noted that the provision of public utility service without a certificate 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, we stated thatthe 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.[[26]](#footnote-26) However, there was 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 declined to order a refund or credit as an additional remedy for the unlawful service provided during the Launch and Cease and Desist Periods. We concluded that the adopted civil penalty was sufficient for the proven violations.

### 4. Discovery Violations

 In our *May 2016 Order*, we explained that 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 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.[[27]](#footnote-27)

 I&E requested additional civil penalties as a sanction for the Petitioner’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.

 In their Initial Decision, the ALJs found that it was appropriate to assess a civil penalty for the discovery violations referencing the rationale in their prior Interim Orders.[[28]](#footnote-28) 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 Petitioner’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.

In our *May 2016 Order*, we found that the failure to produce the discovery responses 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 agreed with I&E that the claims of confidentiality and the amount of time needed to redact the information appeared 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.[[29]](#footnote-29) Moreover, I&E was not obligated to request an inspection of Uber’s records at the Petitioner’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, we explained that 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 Petitioner for those trips. These actions, we stated, prevented the Commission from precisely determining an accurate monetary basis upon which to calculate an appropriate civil penalty. For example, we determined that the evidence presented by I&E of the fourteen unauthorized trips resulted in an average cost of $7 per trip. Additionally, we explained that the figure was, necessarily, a rough calculation of the average cost when considering the number of unauthorized trips provided by Uber. However, we noted that it was the only measure, based on the substantial evidence adduced at the hearing, upon which to impose an initial threshold measure for the civil penalty.

Upon review, we found that the ALJs properly imposed an additional civil penalty of $72,500. Accordingly, we denied the Petitioner’s fifth Exception. [[30]](#footnote-30)

## C. Reconsideration Petition, Answer and Disposition

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### 1. Reopening the Record

The Petitioner requests that the Commission grant reconsideration and reopen the record on a limited basis to hear additional evidence related to Uber’s business operations in Pennsylvania. Attached to the Reconsideration Petition is an affidavit of Mr. Feldman, a general manager for Uber who previously testified for the Petitioner during the Initial Hearing. Reconsideration Petition at App. A. According to the Petitioner, the grounds justifying a reopening of the record include the importance of the Commission’s understanding of the full impact of the payment of an $11.3 million civil penalty on the Petitioners’ Pennsylvania operations, the traveling public, drivers and the technology economy. Uber contends that because of the unprecedented size of the civil penalty imposed by the Commission, the Petitioners could not have been aware of the need to present evidence of this nature during the evidentiary hearing. Also, Uber alleges that much of this information is recent and was not available prior to the close of the record. Reconsideration Petition at 21-23.

In addition, the Petitioner proffers that the receipt of additional evidence is warranted due to the Commission’s focus on the total number of trips arranged through the Uber app from February 11, 2014, through August 20, 2014, and its imposition of a substantial civil penalty for each trip, which it claims constituted a departure from past practices where fines were based on the number of days of unauthorized service and did not exceed $1,000 per day. Specifically, Uber contends that the information about free trips and the amount of revenue earned by the Petitioner are now relevant to this proceeding. In addition, the Petitioner advises that it is now publicly disclosing the total number of trips that were provided during the relevant time periods. *Id.*

Also, the Petitioner alleges that the Commission relied heavily on the potential for harm resulting to the public from the Petitioner’s unauthorized operations, which justifies a reopening of the record to describe the efforts of the Commission’s enforcement officers to date, as well as the results of those efforts. As a result of the Commission’s findings of Rasier-PA’s propensity to operate safely in connection with the grant of its experimental authority in the *Rasier-PA Statewide Order* and the evidentiary record developed in this proceeding, Uber states that it was not aware that the Commission would assert serious concerns now about the safety of its operations two years ago. *Id.* at 24-25.

Lastly, the Petitioner asserts that new evidence is available demonstrating the benefits of Uber’s presence in Pennsylvania, which should be viewed as additional mitigating factors driving down the size of the civil penalty. *Id.* at 25-26.

 In response to the request to reopen the record, I&E argues that the Petitioner has not raised any factual matter or legal argument that is relevant to the proceeding which could not have been raised below. I&E asserts that the purpose of a rehearing is to take additional testimony or evidence not offered at the original hearing because it was not available or that even by the exercise of ordinary diligence it could not have been presented at the hearing. I&E also contends that the test for the consideration of after-discovered evidence is whether the outcome of the litigation might be different if that evidence had been admitted into the record. Answer to Reconsideration Petition at 10-11 (citing *Powell v. Sonntag*, 48 A.2d 62, 66 (Pa. Super. 1946), *Schach v. Hazle Brook Coal Co.*, 198 A. 464 (Pa. Super. 1938), and *Reading Co. v. Pa. PUC*, 333 A.2d 525, 527 (Pa. Cmwlth. 1975)).

 I&E argues that Uber’s purportedly new evidence related to its trip data – including the revenue it received from its unlawful enterprise, the fares it charged for unauthorized trips and the number of paying customers who took Uber rides – was either available to the Petitioner or obtainable by it through the exercise of ordinary diligence and could have been presented at the evidentiary hearing. Moreover, I&E contends that the other new information pertaining to the alleged public benefits of its service would not result in a different outcome. In support, I&E references our prior determination that the higher goal of public safety outweighed any perceived benefit of Uber’s unlawful transportation service. *Id.* at 11.

 Upon review we find that Uber has not satisfied the requirements for reopening the record under Section 703(f) of the Code, 66 Pa. C.S. § 703(f), or pursuant to Section 5.571 of our Regulations, 52 Pa. Code § 5.571. Here, Uber claims that it could not have been aware of the need to present additional evidence about its business operations until after the issuance of an unprecedented civil penalty. However, it is clear from the Amended Complaint that I&E was seeking a civil penalty of $19 million based on per-trip violations. Moreover, as discussed in the *May 2016 Order*, Section 3301(a) of the Code as well as the Commonwealth Court’s decision in *Newcomer Trucking* authorizes the imposition of a civil penalty of up to $1,000 per violation. Further, at least as early as the filing of the original Complaint, Uber was placed on notice of the potential for up to a $1,000 civil penalty per violation of the Code. For example, the original Complaint requested a civil penalty of $1,000 for each of the unauthorized rides obtained by I&E’s motor carrier enforcement officers and attached to the Complaint was a cease and desist letter to Uber dated July 6, 2012, which indicated that continued operation in violation of the Code carries a possible civil penalty of $1,000 per violation. Complaint at 3, Exh. 1. Under these circumstances, a reasonably prudent respondent would have appreciated its potential exposure to a significant civil penalty and would have presented all of its available evidence at the time of the hearing in an attempt to rebut or diminish the level of civil penalty that could be imposed.

 Additionally, during oral argument on I&E’s second Motion for Sanctions held on February 18, 2015, Uber’s counsel objected to having to assist I&E by providing trip data which may result in a substantially higher penalty than the penalty sought in the original Complaint. Uber’s counsel indicated that the trip data was not relevant as to whether the Petitioner’s operations were in violation of the Code, but was potentially relevant for the penalty phase. Tr. of February 18, 2015, at 21-22. The ALJs summarized the Petitioner’s contentions as follows: “[i]n Uber’s view, the parties can make the legal argument regarding the provision of a penalty on a ‘per trip’ or a ‘per day’ basis after an evidentiary hearing without Uber providing the actual trip data in discovery.” *Interim Order IV* at 5. Uber’s arguments indicate a further understanding of the importance of presenting available evidence at the time of the evidentiary hearing given its potential impact on any civil penalty.

 Uber now requests the reopening of the record to present a variety of evidence related to its business operations including its revenue earned during the Cease and Desist Period. Under the exercise of due diligence, all of this purported evidence appears to have been available prior to the close of the record but the Petitioner chose not to present it. The Petitioner does not assert a change of law or fact since that time. Moreover, we do not believe that the public interest requires the reopening of the record to present evidence previously available at the time of the hearing. As set forth in our analysis of the Policy Statement under 52 Pa. Code § 69.1201, we carefully weighed all of the factors to arrive at a civil penalty that was vastly lower than both the $49.8 million civil penalty recommended by the ALJs or the $19 million civil penalty requested by I&E. Specifically, we already gave consideration to the public benefits provided by Uber’s transportation network services and explained that the reduction achieved the outcome of serving the public interest. We therefore decline to exercise our discretion to reopen the record to consider this information about its business operations.

 Furthermore, we find Uber’s argument that it was not aware that the Commission would assert serious concerns about the safety of its operations during the period of its unlawful service to be without merit. In our *July 24, 2014 Order* affirming the first cease and desist order in this proceeding, we specifically stated that the Commission had no information related to Uber’s vehicle safety inspections, driver histories, criminal background checks of drivers, or insurance certifications on vehicles. We concluded that the Petitioner’s “failure to submit to the Commission’s oversight and the lack of information related to the Uber drivers and their vehicles constitutes an immediate safety risk for the general public.” *July 24, 2014 Order* at 18. Given the express directives of the cease and desist orders in this proceeding, Uber was placed on notice that issues related to safety during the Launch and Cease and Desist Periods would be addressed during the evidentiary hearing and the subsequent rulings of the Commission. Uber could have presented evidence related to its purported claims of delays in requesting safety related information at the evidentiary hearing but failed to do so. Thus, we decline to exercise our discretion to reopen the record at this time to consider this additional information.

 Regarding Uber’s additional information which it claims was only recently made available, pertaining to driving under the influence studies and examples of Uber’s involvement in local community activities, we also decline to exercise our discretion to open the record to consider this additional material. In our *May 2016 Order* we rejected Uber’s contention that the positive aspects of its service outweighed its actions in launching its service, attempting to evade the authority of the Commission and jeopardizing the safety of the public. Similarly, we reject Uber’s latest invitation to consider these new assertions noting our prior finding that any additional material reduction of the civil penalty in this case would jeopardize the future regulation of TNCs in Pennsylvania. Accordingly, we shall deny the Petitioner’s request to grant reconsideration for the purpose of reopening the record.

### Excessive Fines Clause

The Petitioner argues that the $11.3 million civil penalty violates the Excessive Fines Clause in Article I, Section 13 of the Pennsylvania Constitution (Excessive Fines Clause), and the corresponding provision in the Eighth Amendment to the United States Constitution (Eighth Amendment).[[31]](#footnote-31) Uber also contends that the penalty violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution (Fourteenth Amendment) claiming that it is wholly disproportionate to the offense and unreasonable.

Uber contends that the prohibition against excessive fines applies to a civil penalty if the penalty is designed, at least in part, to serve “either retributive or deterrent purposes.” Reconsideration Petition at 30 (quoting *Austin v. United States*, 509 U.S. 602, 610 (1993)). According to the Petitioner, the “dispositive inquiry in determining whether a mandatory fine is violative of Article I, Section 13 of the Pennsylvania Constitution revolves solely around the question of whether, under the circumstances, the fine is ‘irrational or unreasonable.’” Reconsideration Petition at 31 (quoting *Commonwealth v. Gipple*, 613 A.2d 600 (Pa. Super. 1992)). Similarly, Uber notes that under the Eighth Amendment, a fine “violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offense.” *Id.* (quoting *United States v. Bajakajian*, 524 U.S. 321, 337 (1998)).

The Petitioner also cites to *Commonwealth of Pa. v. Eisenberg*, 626 Pa. 512, 98 A.3d 1268 (Pa. 2014) (*Eisenberg*), in which the Pennsylvania Supreme Court invalidated a fine imposed under the Gaming Act, 4 Pa. C.S. § 1518(b), holding that it violated the Excessive Fines Clause because it was grossly disproportionate to the severity or gravity of the offense. Uber contends that the court relied on the proportionality test applied by the U.S. Supreme Court in *Solem v. Helm*, 463 U.S. 277 (1983), which requires a comparison of the magnitude of the fine to the gravity of the offense, to the treatment of other offenders in the same jurisdiction, and to the treatment of the same offense in other jurisdictions. Reconsideration Petition at 31 (citing *Eisenberg*, 626 Pa. at 536).

The Petitioner criticizes our comment in the *May 2016 Order* in which we stated: “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.” Reconsideration Petition at 31-32. According to Uber, this claim was unsubstantiated, demonstrates that the civil penalty bears no rational connection to the relevant factors in this proceeding and is grossly disproportionate to the conduct it is intended to address. Uber also asserts that we should have viewed its conduct from the perspective of “no harm, no foul.” *Id.* at 32. Instead, the Petitioner argues that we improperly structured a penalty designed to extract massive payments that bear no resemblance to the alleged violations. Uber claims that the harshness of the penalty vastly exceeds the gravity of the offense thereby rendering it unconstitutionally excessive. *Id.*

According to Uber, other offenders have engaged in more serious conduct involving physical harm and substantial property damage. Also, the Petitioner states that the Commission has addressed many situations in which motor carriers have been charged with unauthorized operations on multiple occasions and have continued to operate, sometimes even after their certificates were cancelled. *Id.* at 33 (citing *Pa. PUC v. Daniel and Darlene Applegate t/a Independent Security Cab*, Docket No. C-2015-2451749 (Final Order entered May 23, 2016) (*Applegate*), and *Brungard*). Uber claims that the Commission has a long history involving scenarios similar to those raised in this proceeding, belying the argument that the events here are unprecedented. *Id.* at 33 (citing *Israel*).

The Petitioner also alleges that the civil penalty is excessive when compared with offenses and violations in the natural gas industry, referencing *Pa. PUC v. UGI Penn Natural Gas, Inc.*, Docket No. M-2013-2338981 (Order entered September 26, 2013) (*UGI Penn Natural Gas*). Reconsideration Petition at 34. Furthermore, Uber claims that the highest civil penalty that the Commission has ever imposed for unlawful business practices that caused fatalities is $500,000, citing *Pa. PUC v. UGI Utilities, Inc.-Gas Division*, Docket No. C-2012-2308997 (Order entered February 19, 2013) (*UGI Utilities, Inc.-Gas Division*). According to the Petitioner, in three separate proceedings against electric and natural gas companies for violations involving eight fatalities, the Commission imposed a total civil penalty of $1.3 million on three companies. Reconsideration Petition at 37 (citing *Pa. PUC v. PPL Electric Utilities Corp*., Docket No. M-2008-2057562 (Order entered March 31, 2009) (*PPL Electric Utilities Corp*.), *UGI Utilities, Inc.-Gas Division*, and *Pa. PUC v. Philadelphia Gas Works*, Docket No. C-2011-2278312 (Order entered July 26, 2013) (*Philadelphia Gas Works*). Uber asserts that this total amount represents less than one-eighth of the civil penalty that the Commission imposed in this proceeding for conduct that did not involve any fatalities or any property damage, and did not lead to even a single consumer complaint. *Id.* at 37-38.

 Uber also argues that Section 3301(c) of the Code, 66 Pa. C.S.

§ 3301(c), relating to gas pipeline safety violations, authorizes the Commission to impose civil penalties not to exceed $200,000 for each day that a violation exists and sets a maximum civil penalty of $2 million for any related series of violations. Here, the Petitioner argues that the Commission imposed a civil penalty that is nearly six times the maximum level of Section 3301(c) to address unauthorized passenger transportation services that resulted in no harm to the public. Because the General Assembly found it prudent to cap the Commission’s statutory authority in the gas industry that has the most potential for catastrophic losses resulting from violations, Uber contends that it is impossible to reconcile the $11.3 million civil penalty imposed here with that statutory cap for gas pipeline safety violations. Reconsideration Petition at 35-36.

The Petitioner also asserts that the civil penalty herein is grossly disproportionate to the prior record-setting civil penalty of $1.8 million in *Pa. PUC v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Order entered December 3, 2015) (*HIKO Energy*). Uber contends that the behavior in *HIKO Energy* involved more egregious violations of law, including an executive level decision to intentionally overcharge customers, than what occurred in this proceeding. Also, the Petitioner notes that the Commission justified a civil penalty of $125 for each violation by referencing the $124 overcharges to each of the customers. Here, Uber claims that the Commission assessed an average civil penalty of over $90 per trip, nearly thirteen times more than an average trip fare of $7 and that such a penalty is inconsistent with the overcharge determined in *HIKO Energy*.[[32]](#footnote-32) Reconsideration Petition at 36-37.

Next, Uber cites to the decision in *Lyft,* which approved a civil penalty settlement of $250,000 for alleged violations involving identical activities, geographic regions and time periods. According to the Petitioner, the civil penalty in this proceeding is over forty-five times greater than the settlement in *Lyft* and this disparity unequivocally shows the lack of intra-Pennsylvania proportionality that the Pennsylvania Supreme Court described as an imperative in *Eisenberg.* Reconsideration Petition at 38. Furthermore, the Petitioner contends that even though the civil penalty resulted from a settlement, the Commission was required to determine if the public interest supports a $250,000 civil penalty. If the public interest supports a civil penalty in *Lyft* for $250,000, Uber proffers, it cannot also support an $11.3 million civil penalty against the Petitioners for the same conduct. *Id.*[[33]](#footnote-33)

Lastly, Uber argues that the civil penalty also violates the Due Process Clause claiming that it is wholly disproportionate to the offense and obviously unreasonable. *Id.* at 39. Accordingly, the Petitioner urges the Commission to reduce the civil penalty. *Id.* at 39-40.[[34]](#footnote-34)

 In response, I&E argues that Uber waived any constitutional challenges to the Commission’s civil penalty because the Petitioner failed to raise them prior to this stage of the proceeding. In support, I&E cites to our recent decision in *Ruth Matieu-Alce v. Philadelphia Gas Works*, Docket No. F-2015-2473661 (Order entered April 7, 2016) (*Matieu-Alce*) at 10, in which we stated: “in the interest of judicial economy, the Commission will not grant exceptions or reconsideration when the party failed to raise an argument earlier in the proceeding.” Answer to Reconsideration Petition at 12. I&E further contends that matters not raised below may not be considered in a post-hearing proceeding or at a later appeal. *Id.* (citing *Tripps Park Civic Ass’n v. Pa. PUC*, 415 A.2d 967, 969 (Pa. Cmwlth. 1980)).

 I&E explains that the civil penalty set forth in the *May 2016 Order* is lower than both the $19 million civil penalty requested in I&E’s Amended Complaint filed on January 9, 2015, and the $49,852,300 civil penalty in the Initial Decision issued on November 17, 2015. According to I&E, Uber’s Answer to the Amended Complaint, its Main Brief and Exceptions are absolutely silent about constitutional challenges related to the civil penalty and are therefore unequivocally waived. Answer to Reconsideration Petition at 12-13.

 Regarding the substance of the Petitioner’s constitutional claims, I&E argues that Uber’s 122,998 admitted violations of the Code as well as its decision to defy the cease and desist orders and multiple interim orders of the ALJs support the Commission’s determination that this proceeding is unprecedented. Moreover, I&E asserts that the Commission previously rejected Uber’s claim that public demand justified its unlawful conduct by determining that the higher goal of public safety outweighed any perceived benefit of Uber’s unauthorized transportation. I&E also countered Uber’s claim that no one was harmed by the Petitioner’s operations by citing record evidence of at least nine accidents occurring over a six-month period serious enough to warrant the filing of an insurance claim and that more could have gone unreported. According to I&E, because the Petitioner failed to submit to our Regulation requiring the filing of accident reports under 52 Pa. Code § 29.44, the Commission will never know the exact number of accidents that occurred during the period of Uber’s unlawful service. *Id.* at 38-39.

 Regarding Uber’s citation to *Applegate* and *Brungard*, I&E contends that those cases are not analogous to Uber’s widespread, unlawful transportation that occurred on 122,998 discrete occasions. For example, I&E states that in *Applegate* one individual demonstrated a pattern of violations by providing or offering uncertificated transportation service. In *Brungard*, the Commission imposed a $1,000 civil penalty for a single occurrence of providing transportation for compensation without holding a certificate and a $10 per day civil penalty for 918 days wherein the respondents held themselves out to provide uncertificated transportation service. In each case, I&E notes, the number of unauthorized trips actually taken by passengers were far less than Uber’s. Answer to Reconsideration Petition at 39.

 In response to the Petitioner’s reliance on the cases pertaining to gas and electric safety – *UGI Penn Natural Gas*, *UGI Utilities, Inc.-Gas Division, PPL Electric Utilities Corp*., and *Philadelphia Gas Works* – I&E proffers that each involved a settlement agreement and that it is inappropriate to consider a settlement, which is intended as an amicable resolution of disputed claims, as precedent in any subsequent proceeding. Answer to Reconsideration Petition at 40, 42 (citing *Bell Telephone*). Furthermore, I&E notes that matters pertaining to gas safety violations are subject to a civil penalty range under 66 Pa. C.S. § 3301(c) that is completely inapplicable to civil penalties in TNC matters. Thus, I&E argues that they do not constitute similar situations for purposes of the Commission’s evaluation of civil penalties under 52 Pa. Code

§ 69.1201(c)(9). Answer to Reconsideration Petition at 40.

 Regarding Uber’s reliance on *HIKO Energy*, I&E contends that the case, which dealt with an electric generation supplier billing an amount in excess of the price it guaranteed, bears no relevance to this proceeding. According to I&E, *HIKO Energy* did not involve an adverse effect, or a potentially adverse effect, to public safety such as the provision of uncertificated passenger transportation occurring in this proceeding. Answer to Reconsideration Petition at 41.

 As to the Petitioner’s reliance on the settlement in *Lyft*, I&E contends that the civil penalty imposed on Uber is justifiable when compared with the violations in *Lyft* which I&E claims were smaller in number. Further, I&E states that the respondent in *Lyft* was compliant with I&E’s investigation by furnishing discoverable information, and abiding by the interim orders of the presiding ALJs. In contrast, I&E claims that Uber impeded I&E’s investigation when, among other things, it disabled the Uber app associated with the mobile phone of one of I&E’s motor carrier enforcement officers. *Id.* at 3, 42 (citing Tr. at 61).

 We note that in its brief filed with the ALJs, Uber argued that I&E’s requested civil penalty was excessive, arbitrary and capricious and demonstrated a lack of fundamental fairness and objectivity. Petitioner’s Brief at 30-33. Thereafter, in its Exceptions, the Petitioner raised similar arguments. However, the Petitioner did not cite to any constitutional principles in support of those prior arguments set forth in its brief or in its Exceptions. Here, Uber again claims the level of civil penalty is excessive and now cites to the Excessive Fines Clause, the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. We agree with I&E that Uber has waived these arguments by failing to assert them at an earlier stage of the proceeding.

 The Pennsylvania Supreme Court explained the waiver doctrine in *DeMarco v. Jones & Laughlin Steel Corp.*, noting that issues not raised or presented at the trial stage will not be considered on appellate review. 513 Pa. 526, 530-31, 522 A.2d 26, 28 (citing [*Dilliplaine v. Lehigh Trust Co.,* 457 Pa. 255, 322 A.2d 114 (1974)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974101564&pubNum=162&originatingDoc=Ifd584b7534d911d98b61a35269fc5f88&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (*Dilliplaine*), and [*Commonwealth v. Clair,* 458 Pa. 418, 326 A.2d 272 (1974)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974102433&pubNum=162&originatingDoc=Ifd584b7534d911d98b61a35269fc5f88&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (*Clair*)).

 Appellate court consideration of issues not raised in the trial court results in the trial becoming merely a dress rehearsal. This process removes the professional necessity for trial counsel to be prepared to litigate the case fully at trial and to create a record adequate for appellate review. The ill-prepared advocate's hope is that an appellate court will come to his aid after the fact and afford him relief despite his failure at trial to object to an alleged error. The diligent and prepared trial lawyer-and his client-are penalized when an entire case is retried because an appellate court reverses on the  basis of an error opposing counsel failed to call to the trial court's attention.

*Dilliplaine*, [457 Pa. at 257, 322 A.2d at 116](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974101564&pubNum=162&originatingDoc=Ifd584b7534d911d98b61a35269fc5f88&refType=RP&fi=co_pp_sp_162_116&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_162_116).

 The Supreme Court further explained that the waiver doctrine applies to administrative proceedings. *DeMarco*, 513 Pa. at 531, 522 A.2d at 29 (citing [*Wing v. Unemployment Compensation Board of Review,* 496 Pa. 113, 436 A.2d 179 (1981)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981145716&pubNum=162&originatingDoc=Ifd584b7534d911d98b61a35269fc5f88&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (*Wing*)).

The *Dilliplaine* and *Clair* rationales are perfectly apposite in administrative law cases as well: the administrative law tribunal must be given the opportunity to correct its errors *as early as possible;* diligent preparation and effective advocacy before the tribunal must be encouraged by requiring the parties to develop complete records and advance all legal theories; and the finality of the lower tribunals' determinations must not be eroded by treating each determination as part of a sequence of piecemeal adjudications.

[*Wing,* 496 Pa. at 117, 436 A.2d at 180-81 (1981)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981145716&pubNum=162&originatingDoc=Ifd584b7534d911d98b61a35269fc5f88&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (emphasis added).

 The Commission has also applied the principle of waiver when a party has failed to raise an argument earlier in a proceeding*. See, Petition of PPL Electric Utilities Corporation for Approval of a Distribution System Improvement Charge*, Docket Nos. P-2012-2325034, *et al.* (Order entered October 1, 2015) (*Petition of PPL Electric Utilities*), and *Matieu-Alce*. Similarly, we find that Uber has waived its constitutional arguments pertaining to the alleged excessiveness of the civil penalty by failing to raise the issues earlier in the proceeding. The Petitioner could have raised its constitutional claims in its briefs to the ALJs and within its Exceptions but declined to do so. Uber’s last minute attempt to add constitutional arguments to its previous legal theory of excessiveness strikes us as the type of piecemeal advocacy the waiver doctrine was intended to prevent.[[35]](#footnote-35)

### Per Trip vs. Per Day Civil Penalty

The Petitioner argues that it was not aware of the Commission’s intent to impose a per-trip civil penalty, as opposed to a per-day civil penalty, and that this lack of notice violated the Due Process Clause. Additionally, Uber makes the related claim that interpreting the Commission’s statutory authority to allow per-trip penalties for its alleged continuing offenses would violate the Due Process Clause. Even if the interpretation of a per-trip civil penalty were permissible, the Petitioner contends that the civil penalty in the *May 2016 Order* conflicts with a long line of transportation cases in which civil penalties were imposed without any consideration of the total number of trips provided in violation of the Code or the Commission’s Regulations or Orders. Reconsideration Petition at 17.

The Petitioner asserts that, consistent with *Newcomer Trucking*, its actions were of an ongoing nature that could not be feasibly segregated into discrete violations so as to impose separate penalties. Thus, it argues that its actions constituted continuing offenses but that the Commission incorrectly determined that its actions involved a series of independent violations. Any civil penalty, Uber proffers, should have been limited to $1,000 per day pursuant to Section 3301 of the Code. *Id.* at 43-44.

Taking this argument further, Uber contends that we previously found that our authority to impose a civil penalty is capped by Sections 3301(a) and (b) of the Code at a total of $1,000 per day for all violations. *Id.* at 44-46 (citing *Rosi v. Bell-Atlantic – Pennsylvania, Inc., and Sprint Communications, L.P.*, Docket No. C-00992409 (Order entered March 16, 2000) and *Applegate*). The Petitioner states that in *Newcomer* and other relevant decisions involving motor carriers, total civil penalties have not exceeded $1,000 per day. Uber argues that even though we fined the property carrier in *Newcomer* on a per-incident rather than per-day basis, the civil penalty imposed was $100 per violation and far below the purported statutory cap of $1,000 per day. Reconsideration Petition at 46.

Moreover, Uber asserts that I&E’s original Complaint supports a per-day civil penalty for ongoing violations. The Petitioner notes that I&E first sought the imposition of a civil penalty for each day that Uber held itself out as a broker of transportation and requested a civil penalty for each specific trip alleged in the Complaint that was obtained by I&E’s enforcement staff. According to Uber, if the Commission were to use the specific trips alleged in the original Complaint and proven by I&E at the hearing, the total civil penalty should not exceed $198,000. If the additional three trips alleged in the Amended Complaint and proven by I&E were used, Uber contends that the potential civil penalty should only rise to $201,000. *Id.* at 47.[[36]](#footnote-36)

Uber notes that I&E’s Amended Complaint which sought a per-trip civil penalty based on the total number of trips was filed on January 9, 2015, nearly six months after issuance of the cease and desist order and almost five months after the Petitioner was authorized to provide TNC services in Allegheny County. With its filing of the Amended Complaint, Uber argues, I&E retroactively sought to have a per-trip civil penalty assessed against Respondents based on the total number of trips. *Id.*

Under these circumstances, the Petitioner contends that applying Section 3301 of the Code to allow per-trip penalties would violate its due process rights. Uber argues that it only received notice and an opportunity to be heard on the proposed structure of a civil penalty after it conducted its activities and that such notice is not meaningful due process. *Id.* at 47-48 (citing *Pocono Water Co. v. Pa. PUC*, 630 A.2d 971 (Pa. Cmwlth. 1993)).

Uber claims that a reasonable person reading the language in 66 Pa. C.S. § 3301(b) would have concluded that the potential penalties that accompany noncompliance in operating a digital platform would have consisted of a maximum per day penalty of $1,000. It further argues that there are no discernible standards for ascertaining when the Commission would apply a per-day versus a per-trip civil penalty, and this lack of information about the penalty structure violates due process. Reconsideration Petition at 48.

According to the Petitioner, in the context of regulatory penalties, the Due Process Clause requires parties to be on reasonable notice of the conduct that will constitute a violation and of the magnitude of the penalty that will accrue for a violation. *Id*. Here, the Petitioner asserts that upon launching its service it was not on notice that operating a digital platform would have required any authority beyond Gegen’s brokerage license and I&E did not announce its interpretation until the filing of the Complaint in June 2014. Therefore, penalizing Uber during the Launch Period constitutes a due process violation, the Petitioner states. By the time of the filing of the Complaint, the Petitioner asserts that it had been operating for three months and Allegheny County residents had come to rely on its service. Reconsideration Petition at 49.

Even after the filing of the Complaint, Uber argues that the Commission still did not place the Petitioner on notice that continuing to operate would expose it to per trip penalties for alltrips facilitated by the platform. Instead, Uber states it believed the proposed civil penalty would entail a $1,000 per-trip penalty for the specific instances alleged in the Complaint and an additional $1,000 per day for each day it continued to operate. Thus, Uber states that it made its decision to continue to operate after the filing of the Complaint based on its perceived maximum exposure of $1,000 per day. After issuance of the cease and desist orders, the Petitioner proffers that it considered the maximum liability to remain the same (*e.g.*, $1,000 per day). Uber proclaims that if it had known of the potential consequences of being fined on a per-trip basis it “would have undertaken a very different risk assessment and very well may have ceased operations.” *Id.* at 50.

 Additionally, Uber asserts that by retroactively imposing a civil penalty on the basis of every trip that occurred during the Launch and Cease and Desist Periods, the Commission is effectively penalizing Uber for being successful. *Id*. at 51.

In addition, Uber argues that the Commission abused its discretion by imposing a per-trip civil penalty and overlooking prior civil penalty assessments in other transportation cases. The Petitioner contends that in the past the Commission has levied fines for unauthorized service on the basis of the number of days on which the carrier was operating without authority. For those cases in which the Commission imposed civil penalties based on the number unauthorized trips, Uber states, the trips were provided on different dates. Further, Uber contends that there is no Commission precedent for imposing a civil penalty based on the total number of unauthorized trips using data provided by a respondent, including trips that are not alleged in a complaint. According to the Petitioner, the Commission has never inquired into the total number of trips in prior cases. *Id.* at 51-52 (citing *Kviatkovsky*).

Uber repeats its argument set forth in its Exceptions that the Commission has in the past applied a per-day civil penalty and that the application of a per-trip civil penalty would be inconsistent and arbitrary. In doing so, the Petitioner cites to cases previously set forth in its Exceptions, *S.S. Sahib Cab, J&E Transportation,* and *M&G Trucking*, and attempts to distinguish cases cited in our *May 2016 Order*. Additionally, Uber cites to a list of additional cases in support of its prior argument that the Commission has applied a per-day civil penalty. Reconsideration Petition at 54-55.[[37]](#footnote-37) Uber states that in *Penn Harris* the Commission assessed a civil penalty of $200 for each of the fifty-four unauthorized trips referenced in the formal complaint without any inquiry into the total number of trips that the respondent furnished without authority. The Petitioner also cites to cases in which it contends that the Commission imposed civil penalties for separate instances of unauthorized service that were specifically alleged in the complaint and which fell on different dates but without making any inquiry into the number of trips that the respondent may have provided on those dates or other dates. *Id.* at 57-58.[[38]](#footnote-38)

In other proceedings, Uber asserts that the Commission imposed civil penalties based on considerations other than the number of days of operation or the number of trips furnished. Reconsideration Petition at 58-59 (citing *Pa. PUC v. AVP Transport, Inc.*, Docket No. A-00114699C0701 (Order entered September 13, 2007) (*AVP Transport*); *Pa. PUC v. Kitchen,* Docket No. A-00117913C0601 (Order entered November 30, 2006) (*Kitchen*); and *Lyft*). Lastly, the Petitioner argues that the Commission has typically not inquired about the number of trips provided by a motor carrier for a violation of the Regulations pertaining to driver integrity standards, vehicle safety and liability insurance. Reconsideration Petition at 60-61.[[39]](#footnote-39)

The Petitioner concludes that the Commission improperly treated Uber’s conduct as a series of separate violations, as opposed to continuous and ongoing activity, and focused on the number of trips provided without authorization. In doing so, Uber claims that we exceeded our statutory authority and violated the Petitioner’s due process rights. Alternatively, Uber argues that we abused our discretion by ignoring settled precedent regarding the calculation of civil penalties for transportation services violations. The Petitioner requests that we recalculate the penalty on a per-day basis, or at the most on a per-day basis with a per-trip surcharge for the fourteen trips that were alleged in the pleadings and proven at the hearing. Reconsideration Petition at 61-62.

 In response, I&E argues that Uber waived any challenges to the civil penalty on the grounds that it is unconstitutional or violates due process because the Petitioner failed to raise these challenges below when the penalty amounts requested and imposed were much higher than the amount set forth in the *May 2016 Order*. I&E also denies that we acted beyond our statutory authority or that the statutory penalty authority is vague. According to I&E, it is well-settled that we are authorized to impose a civil penalty for each instance of unauthorized transportation because each unlawful trip constitutes a discrete violation of the Code. Here, I&E asserts that Uber’s unauthorized transportation is analogous to the conduct in *Newcomer Trucking*, which held that a civil penalty may be imposed for each unauthorized shipment that took place because each shipment equated to a discrete Code violation. Answer to Reconsideration Petition at 44-45.

 I&E also contends that Section 3301(a) of the Code explicitly provides for a penalty of $1,000 per violation and that Section 3301(b) of the Code permits a civil penalty of $1,000 for each day’s continuance of that same violation. Thus, I&E finds Uber’s interpretation of Section 3301 to be flawed and notes that the resulting permissible civil penalty would be far greater than the $11.3 million civil penalty ultimately imposed. Answer to Reconsideration Petition at 45.

 Regarding Uber’s claim that its actions constituted a continuous violation rather than discrete infractions, I&E explains that the presiding ALJs and the Commission have previously rejected the Petitioner’s argument that it merely made its digital platform available for the transportation of passengers and played no active role in providing the unauthorized transportation. Thus, I&E asserts that Uber’s argument is a request for a second review of a matter definitively decided against the Petitioner which is an impermissible ground for reconsideration. *Id.* at 45-46.

 I&E disputes the notion that Uber had no notice of the potential per-trip civil penalty determination. I&E argues that its original Complaint sought both a per-trip civil penalty for trips taken by its motor carrier enforcement officers and a pay-day civil penalty. Thereafter, I&E states its Amended Complaint included a per-trip penalty regardless of whether its enforcement officers requested the trip. Its Amended Complaint was permissible under 52 Pa. Code § 1.81, I&E notes, and the timing was due to Uber’s blatant refusal to provide ordered discovery. According to I&E, Uber’s actions unfairly hampered I&E’s ability to prosecute the case and caused it to use proxy trip data in order to formulate the basis of the violations in the Amended Complaint. Answer to Reconsideration Petition at 47.[[40]](#footnote-40)

 Additionally, I&E contends that Uber received notice and numerous opportunities to be heard regarding the issues it now raised related to the civil penalty and that both Section 3301 of the Code and *Newcomer Trucking* constitute sufficient notice that a per-trip civil penalty could be imposed. Moreover, I&E asserts that it did not owe a duty to the Petitioner to provide notice in advance of the unlawful conduct of the ramifications of the conduct. I&E proffers that it is the Petitioner’s obligation to exercise due diligence, including researching applicable law, before engaging in unlawful conduct. Here, I&E argues that there is nothing ambiguous in Section 3301 of the Code or in *Newcomer Trucking* and that each uncertificated trip constitutes a discrete violation of the Code. Answer to Reconsideration Petition at 48.

 I&E claims that Uber, through the exercise of reasonable diligence, should have discovered that its actions fall within the Commission’s jurisdiction. Furthermore, Commission staff advised the Petitioner, in April 2014, to file an application to cover its operations. Thus, I&E contends that Uber’s assertion of being unaware that its service was unlawful, until the filing of the Complaint in June 2014, is patently false. Additionally, the original Complaint notified Uber that it was subject to a per-trip civil penalty for each trip that occurred. I&E argues that the Petitioner knew the extent of its civil penalty exposure when it deactivated the Uber app registered under the mobile phone number of its motor carrier enforcement officer after I&E filed the original Complaint. I&E contends that this action prevented the officer from taking more trips. Also, I&E claims that the Petitioner unlawfully withheld discoverable trip data and only provided it during the hearing. *Id.* at 49-50.

 I&E asserts that Uber misconstrues the Commonwealth Court’s decision in *Kviatkovsky* which stands for the well-settled principle that the Commission is authorized to impose a fine of up to $1,000 for each discrete violation of the Code. Also, I&E contends that the Commission correctly distinguished *S.S. Sahib Cab* because the carrier’s violations in operating for thirty-seven days while its certificate was suspended for failing to maintain evidence of insurance could not be feasibly segregated into separate violations because the carrier failed to maintain trip log sheets. Answer to Reconsideration Petition at 52.

 I&E states that Uber improperly relied on *Erie Yellow Cab*, *Big Time’s Night Train*, and *Lyft* because each case was the result of a settlement. I&E argues that the Commission has held that it is inappropriate to consider a settlement, which is intended as an amicable resolution of a disputed claim, as precedent in any subsequent proceeding. Answer to Reconsideration Petition at 52-53, 56 (citing *Bell Telephone*). Regarding the additional citations to cases applying a per-day civil penalty, I&E asserts that whether or not the Commission inquired into the total number of trips arranged by motor carriers in those cases does not preclude the Commission from making such an inquiry or from I&E conducting discovery regarding the extent of the unlawful service in this proceeding. Moreover, I&E contends that *M&G Trucking, J&E Transportation, Constanza’s Chaffeur, Neighboring Movers, Transit Aide, Same Day Delivery,* and *Sun Coach Lines* directly support the imposition of a per-trip civil penalty for motor carrier violation of the Code. *Id.* at 55.

 I&E also asserts that Uber misconstrues *AVP Transport* because the civil penalty therein did not reflect the number of vehicles in use and does not preclude the Commission from inquiring about the total number of trips in this proceeding. In response to Uber’s citation to *Kitchen*, I&E notes that the case involved a default judgment for which the Commission did not have the benefit of a full hearing and developed record in contrast to this proceeding. *Id.* at 55-56.

 Regarding Uber’s claim that the Commission does not typically inquire about the number of trips pertaining to violations of driver integrity, vehicle safety and liability insurance standards, I&E contends that the cited cases did not involve uncertificated transportation. Thus, I&E proffers that the cases do not constitute similar situations and are irrelevant for purposes of developing the civil penalty in this matter. *Id.* at 56.

 Additionally, I&E argues that the facts to which the Petitioner stipulated demonstrate that each trip can be segregated and documented as an individual ride with a corresponding payment transaction. As such, I&E claims that it is clear that each trip constituted a separate violation. *Id.* at 56-57.

 In its Reconsideration Petition, Uber repeats the following arguments which it previously raised in its Exceptions: (1) Uber’s actions were of an ongoing nature and a per-trip civil penalty was not appropriate; (2) the imposition of a per-trip penalty conflicts with prior Commission decisions; (3) I&E’s original Complaint only sought a per-day civil penalty; and (4) even if a per-trip civil penalty is permissible it is inappropriate to apply it in this proceeding. We addressed all of these arguments in our *May 2016 Order* and decline to revisit them again.

 Additionally, Uber alleges that the lack of notice that the Commission would impose a per-trip civil penalty in this proceeding violates the Due Process Clause and its due process rights. The Petitioner failed to raise these claims either in its brief to the ALJs or in its Exceptions. Consistent with our previous determination relating to the constitutional claims pertaining to the alleged excessiveness of the civil penalty, we consider Uber’s argument to be waived. *See*, *DeMarco*, *Petition of PPL Electric Utilities*, and *Matieu-Alce*, *supra*.

 Although we will not consider the Petitioner’s due process claims, one assertion under Uber’s lack of notice allegation is worth highlighting. The Petitioner states that if it “had received notice that their decisions not to shut down operations could expose them to a per trip fine on the basis of all trips facilitated by the App, [Uber] would have undertaken a very different risk assessment and very well may have ceased operations.” Reconsideration Petition at 50. This statement indicates that Uber’s decision to continue operating after notice by the Commission in April 2014, after the filing of the original Complaint and during the Cease and Desist Period was an intentional and calculated business decision. In our *May 2016 Order*, we found that it is well-settled that the Commission has the authority to issue up to a $1,000 civil penalty per violation pursuant to Section 3301(a) of the Code and the Commonwealth Court’s decisions in *Newcomer Trucking* and *Kviatkovsky.*  Based on this prevailing law, Uber’s decision did not appear to be a reasonable assessment of the risk under the circumstances. Moreover, these circumstances reinforce the importance of the Commission’s statutory authority to issue a per-trip civil penalty in order to effectively regulate and deter those respondents who would simply justify their continued unlawful operation as a cost of doing business.

 Thus, we shall deny Uber’s arguments as to these grounds.

### 4. Commission Authority to Issue Cease and Desist Orders

Uber argues that the imposition of a higher civil penalty for trips facilitated after the issuance of the cease and desist orders was unlawful because neither the Commission nor the ALJs have statutory authority to grant injunctive relief. The Petitioner claims that Section 502 of the Code, 66 Pa. C.S. § 502,[[41]](#footnote-41) makes clear that the Commission is obligated to initiate legal proceedings in a court of competent jurisdiction requesting the issuance of a cease and desist order. The lack of enforceability of the cease and desist orders, Uber contends, makes it inappropriate to factor noncompliance into the determination of a civil penalty. Reconsideration Petition at 62-64.

In its Replies, I&E argues that Uber waived any challenges to the Commission’s authority to issue cease and desist orders because the Petitioner previously and repeatedly failed to raise this issue. Alternatively, I&E asserts that Section 501 of the Code, 66 Pa. C.S. § 501, grants the Commission broad powers to enforce the law, supervise and regulate any public utilities doing business in Pennsylvania, and make regulations as may be necessary in the exercise of these powers. I&E states that the interim emergency order regulations under 52 Pa. Code §§ 3.6, *et seq.*, fit squarely within the Commission’s statutory authority. I&E also notes that these interim emergency relief regulations were promulgated under the Commission’s authority pursuant to Section 501 of the Code. Answer to Reconsideration Petition at 57.

Finally, I&E contends that the Commonwealth Court has upheld the Commission’s issuance of a cease and desist order in *In re Delaware Valley Transp. Co. v. Pa. PUC*, 400 A.2d 678 (Pa. Cmwlth. 1979). Answer to Reconsideration Petition at 57-58.

Again, Uber did not raise this allegation previously in the proceeding and we deem it to be waived. Even if we were to consider the claim, we would find it to be meritless. *See e.g., Burgit v. Pa. PUC*, 475 A.2d 1339 (Pa. Cmwlth. 1984) (*Burgit*). *Burgit* involved a claim that the Commission was acting beyond the scope of its authority in ordering a motor carrier to cease and desist from offering its limousine service on a non-exclusive basis and other activities. The court stated that it is evident that the legislature in enacting Section 501 of the Code, 66 Pa. C.S. § 501, pertaining to general powers of the Commission, specifically granted the Commission express powers including the authority to order the respondent to cease and desist the activities set forth in the cease and desist order. *Burgit*, 475 A.2d at 1343. Uber did not address *Burgit* in its Reconsideration Petition.

Accordingly, we shall deny Uber’s arguments.

### 5. Civil Penalty Discretion under 52 Pa. Code § 69.1201

Uber claims that the Commission’s Policy Statement at 52 Pa. Code

§ 69.1201 is vague and ambiguous and has led to an inconsistent and unfair civil penalty bearing no relation to the conduct being addressed. The Petitioner argues that the Commonwealth Court has vacated civil penalties as being unlawful if they strike at one’s conscience as being unreasonable or do not fit the statutory violation, citing *United States Steel Corp. v. Dept. of Environmental Resources*, 300 A.2d 508 (Pa. Cmwlth. 1973), and *Eureka Stone Quarry, Inc. v. Dept. of Environmental Protection*, 957 A.2d 337 (Pa. Cmwlth. 2008). Reconsideration Petition at 66.

 Although the Policy Statement is an effort to produce results that reasonably fit the violation and to avoid striking one’s conscience as being unreasonable, Uber argues that the application of the guidelines in this proceeding show that they do nothing to constrain the Commission’s calculation of civil penalties. The Petitioner asserts that the Policy Statement permits unfettered discretion to impose any penalty noting the $250,000 settlement in *Lyft* and the ALJs’ recommendation of a $49 million civil penalty in this proceeding. Uber believes that this range of potential penalties for what it views as essentially identical conduct raises due process concerns. *Id.* at 67.

 Uber also contends that penalties ranging from $1 to $1,000 per violation under Section 3301 of the Code, coupled with the lack of any penalty matrix or specific penalty guidelines, indicate that the Commission’s discretion is overly broad. Uber states that in contrast the specific penalty matrix of the Department of Environmental Protection (DEP) provides clear notice of the minimum penalties for certain violations and contends that DEP’s penalty decisions are based on testimony explaining the calculations. For example, Uber cites to *Westinghouse Electric Corp. v. Pa. Dept. of Environmental Protection*, 705 A.2d 1349 (Pa. Cmwlth. 1998) (*Westinghouse Electric*), in which the Commonwealth Court vacated a $5.4 million civil penalty because of a faulty penalty analysis involving an improper calculation by DEP under the Clean Streams Law, 35 P.S. §§ 691.1, *et seq*. Reconsideration Petition at 67-68.

 Uber argues that we made several vague references in the application of the civil penalty analysis including references to a “higher civil penalty,” a “lower civil penalty” and a “significant penalty,” and the use of the phrase “shall modify the ALJs’ Initial Decision accordingly.” *Id.* at 69 (quoting the *May 2016 Order* at 54, 55, 57 and 59). According to the Petitioner, these references demonstrate the vagueness of our approach in civil penalty determinations. Uber cites to *Northern Associates, Inc. v. State Board of Vehicle Manufacturers, Dealers and Salespersons*, 725 A.2d 857 (Pa. Cmwlth. 1999) (*Northern Associates*), in which the Commonwealth Court vacated a civil penalty due to the vagueness of the administrative agency’s order. *Id.*

Further, Uber asserts that our application of “other relevant factors” under 52 Pa. Code § 69.1201(c)(10) was ambiguous because of our application of an average cost of trips taken by I&E’s enforcement officer in calculating the civil penalty. The Petitioner argues that we should have performed a similar analysis to the calculation in *HIKO Energy* which involved a comparison of the $125 civil penalty per violation to the amount the company obtained through illicit overbilling of customers in the amount of $124. Referencing extra-record evidence contained in the affidavit attached to the Reconsideration Petition, Uber claims that if we had used the actual revenue earned by the Petitioner per trip, the amount of the average cost per trip would have been lower than the average $7 per trip paid by the enforcement officer. The Petitioner posits that the inconsistency in calculating the penalty in this proceeding with the recent approach in *HIKO Energy* shows that the Policy Statement affords too much discretion to the Commission in determining civil penalties. Reconsideration Petition at 70-71.

 I&E counters that the civil penalty in this proceeding comports with Section 3301 of the Code and the interpretation of the Commonwealth Court in *Newcomer Trucking*, which permits a fine of up to $1,000 for each discrete violation of the Code regardless of the number of violations occurring. I&E also notes our finding of mitigating factors and our refraining from imposing the maximum allowable civil penalty of $1,000 for each of the 122,998 admitted violations. Additionally, I&E argues that we correctly concluded that Uber’s actions presented a significant risk to the safety of its passengers, drivers and to other travelers and pedestrians, and that I&E was under no duty to present evidence of actual injury or harm. Answer to Reconsideration Petition at 59.

 I&E contends that the civil penalty comports with the statutory authority conferred by the General Assembly to calculate and impose civil penalties for violations of the Code. According to I&E, the Policy Statement serves as non-binding guidelines used to evaluate civil penalties on a case-by-case basis. Moreover, I&E asserts that Uber actually benefitted from our analysis of the Petitioner’s actions under the Policy Statement because the actual civil penalty is far lower than what was sought by I&E and what had been recommended by the presiding ALJs. *Id.* at 60.

 Regarding Uber’s reference to DEP’s civil penalty matrix, I&E argues that it bears no relevance to a proceeding before the Commission and the application of Section 3301 of the Code. I&E further denies that the *May 2016 Order* is vague and contends Uber misconstrues the holding in *Northern Associates*. According to I&E, the board’s order in *Northern Associates* was vacated as being vague because it failed to specify each of the violations underlying the civil penalty. Here, I&E explains, the civil penalty expressly references Uber’s 122,998 admitted violations of the Code. I&E further denies that the Policy Statement factors are vague and notes that the tenth factor, 52 Pa. Code § 69.1201(c)(10), merely provides flexibility to consider any relevant issue not expressly contemplated in the other factors. Again, I&E explains that Uber benefited from our exercise of discretion because the civil penalty was far lower than I&E’s demand or the ALJs’ recommendation. Answer to Reconsideration Petition at 61-62.

 Once again, Uber is positing an argument that it failed to raise prior in the proceeding. Here, the Petitioner is essentially challenging the validity of the Policy Statement itself. In their Initial Decision, the ALJs conducted a full analysis under 52 Pa. Code § 69.1201, but the Petitioner did not raise any argument in its Exceptions that the Policy Statement was vague, ambiguous or somehow invalid. Now, Uber attempts to challenge the validity of 52 Pa. Code § 69.1201 in its Reconsideration Petition. We shall decline to address this argument under the principle of waiver. Furthermore, we note that we conducted a thorough analysis under both Section 3301 of the Code and the Policy Statement in arriving at the civil penalty that was representative of the fully developed record and Uber’s actions in this case.

### 6. Substantial Evidence under 52 Pa. Code § 69.1201

Uber states that under our analysis of the Policy Statement we found that only two factors weighed in favor of a lower civil penalty: (1) the Petitioner’s modifications of its internal practices to comply with the conditions on Rasier-PA’s current authority; and (2) the lack of any significant compliance problems since the grant of its ETA and the experimental services authority. In making this determination, Uber claims that we overlooked evidence in the record demonstrating that other mitigating factors should have resulted in a significantly lower penalty. As a result, Uber argues that our decision is not based on substantial evidence. According to the Petitioner, the additional mitigating factors are: (1) the Petitioner was in full compliance with the Commission’s safety and consumer protection regulations prior to the grant of its ETA; (2) the public was not harmed by the Petitioner’s TNC services and there is no evidence in the record to suggest any unsafe business practices; (3) Uber’s operations fell within a grey area of the Code; (4) a civil penalty primarily based on the deterrence factor is inappropriate given the Commission’s traditional focus on deterring the entity that is the respondent in the proceeding from future violations, and in view of Uber holding authority for two years to cover the operations that are the subject of this proceeding; and (5) decisions in similar cases, including the identical case in *Lyft*, support a civil penalty significantly less than $11.3 million. Reconsideration Petition at 73.

In response, I&E states that all of the averments, which Uber believes should be considered as mitigating factors, were previously raised and do not constitute proper grounds for reconsideration. Thus, I&E requests that Uber’s arguments in this regard should be denied. Answer to Reconsideration Petition at 63.

We agree with I&E that Uber’s arguments were previously raised and considered in our *May 2016 Order*. The Petitioner has failed to set forth any new and novel arguments that appear to have been overlooked or not addressed in our prior determination. Accordingly, we will not exercise our discretion to consider these arguments.[[42]](#footnote-42)

For the foregoing reasons, we shall deny the Reconsideration Petition.

# IV. Discussion – Stay Petition

## A. Legal Standards

 Section 332(a) of the Code, 66 Pa. C.S. § 332(a), provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding. As to its request for a stay, therefore, the burden of proof is on Uber. It is axiomatic that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

 We have adopted the standards set forth in *Pa. PUC v. Process Gas Consumers Group*, 502 Pa. 545, 467 A.2d 805 (1983) (*Process Gas*), in reviewing petitions which seek to stay the effect of our orders. The standards set forth in *Process Gas* require a petitioner to fulfill the following:

1. Make a strong showing that it is likely to prevail on the merits;
2. Show that without the requested relief, it will suffer irreparable injury;
3. Show that the issuance of a stay will not substantially harm other interested parties in the proceedings; and
4. Show that the issuance of a stay will not adversely affect the public interest.

*Process Gas*, 502 Pa. at 552-53, 467 A.2d at 808-09, citing *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958) (*Virginia Jobbers*). These criteria require the balancing of all interests, including the public, where applicable.

 In *Process Gas*, the court also acknowledged that demonstration of the first factor, success on the merits, usually involves review of the merits of a dispute that have 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 80 (quoting *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc*., 559 F.2d 841, 843 (D.C. Cir. 1977)).

## B. Positions of the Parties

 Under the first standard for obtaining a stay, Uber argues that it has made a strong showing that it is likely to prevail on the merits. In support, Uber summarizes all of the arguments set forth in its Reconsideration Petition. The Petitioner asserts that the Commission need not agree with the merits of Uber’s position and cites to *Process Gas* for the proposition that there are instances in which a lower tribunal could find a showing of substantial case on the merits even though it disagrees with the applicant. Stay Petition at 4-5.

 According to Uber, the grant of the stay is appropriate because the Petitioner has raised significant legal issues involving constitutional rights, due process principles, statutory interpretation and the Commission’s subject matter jurisdiction. Uber argues that the Commonwealth Court will likely consider these challenges to be significant and substantial. *Id.* at 6.

 In its replies, I&E argues that Uber fails to address the Commonwealth Court’s standard of review which is limited to considering whether substantial evidence supports necessary factual findings, whether the Commission erred as a matter of law, and whether any constitutional rights were violated. According to I&E, Uber will not prevail on appeal under this standard when taking into consideration the deference to the Commission’s interpretation of the Code and our Regulations. Additionally, I&E argues that Uber fails to address the Commission’s stringent standards for granting reconsideration. I&E asserts that all of Uber’s arguments have already been definitively decided against the Petitioner or have been waived. I&E also summarizes its arguments in response to Uber’s Reconsideration Petition and notes the Petitioner provides no new evidence that was previously unavailable, asserts extra-record material, raises the same arguments decided against it, and brings forth challenges that were not raised below and were waived. Answer to Stay Petition at 4-5.

 As to the second standard, Uber argues that economic loss can satisfy the element of irreparable harm in the context of a request for an emergency order. Stay Petition at 6 (citing *Com. Bd. of Fin. and Revenue v. Rosetta Oil, Inc.*, 535 Pa. 343, 635 A.2d 139, 142 (1993)). Citing to extra-record evidence, Uber claims that the civil penalty is larger than the revenue it earned during the Cease and Desist Period and that the penalty would cause financial distress to Rasier-PA’s operations and at a minimum would deprive it of being able to compete with its rivals including Lyft. Moreover, Uber asserts that the level of civil penalty would cause irreparable harm to the traveling public which relies on its service and to the drivers who depend on Uber for income. The Petitioner further argues that the penalty would impact the technology economy in Pennsylvania, again citing to extra-record evidence about its involvement in technology research activities. Stay Petition at 7-8.

 In response, I&E asserts that economic harm alone will not establish irreparable harm. Answer to Stay Petition at 6 (citing *Nationwide Mutual Insurance Co., et al. v. Com. of Pennsylvania, Insurance Dept.*, 522 A.2d 1167 (Pa. Cmwlth. 1987)). I&E objects to Uber’s references to extra-record evidence and argues that the Petitioner makes only vague, unsupported and speculative assertions about irreparable harm. Answer to Stay Petition at 6-7.

 Uber addresses the third standard by stating that I&E, the only other party to this proceeding, would not be substantially harmed if a stay were to be granted. The Petitioner contends that the civil penalty is the only relief being sought which is payable to the Commonwealth’s General Fund; thus, it would have no effect on I&E. Stay Petition at 8.

 I&E responds that the objective of the civil penalty is to deter future misconduct by Uber and the industry. According to I&E, allowing Uber to defer payment as it allocates resources to preserving its business interests diminishes the purpose of the fine and provides no incentive to deterring future misconduct. I&E states that granting the stay weakens the Commission’s ability to enforce the Code and our Regulations. Answer to Stay Petition at 7-8.

 As to the fourth standard, Uber contends that the Commission failed to explain in the *May 2016 Order* how the civil penalty actually serves the public interest. Referring to its Reconsideration Petition, Uber claims that the civil penalty is grossly disproportionate to the conduct it sought to address and states that Uber’s services caused no harm to the public – financial or otherwise. Stay Petition at 9.

 In its replies, I&E argues that a stay would weaken the Commission’s enforcement duties and would permit Uber to divert financial resources away from the penalty to bolster its own business interests. I&E contends that Uber must be held accountable for threatening the public safety and for defiantly refusing to submit to the Commission’s oversight. Answer to Stay Petition at 8-9.

 Alternatively, I&E argues that if we were to grant the Stay Petition we should also require Uber to post a bond in the amount of 120 percent of the total civil penalty pursuant Pa. R.A.P. 1731.[[43]](#footnote-43) Answer to Stay Petition at 9.

## C. Disposition

 In its Stay Petition, Uber requests that we stay the effectiveness of the *May 2016 Order* pending resolution of its Reconsideration Petition. As previously stated, we considered this portion of the Stay Petition as a request to extend the deadline for the payment of the civil penalty pursuant to 52 Pa. Code § 1.15 and extended the deadline for payment of the penalty pending final disposition of the Reconsideration Petition. *June 2016 Order*. Thus, we have already granted a portion of Uber’s requested relief. Additionally, Uber makes a general request that it is seeking a stay pending “any subsequent appellate proceedings, as well as any required Commission proceedings on remand.” Stay Petition at 1.

The Stay Petition does not definitively state that Uber will appeal our determination to Commonwealth Court and its exact intentions as to how it will proceed are not clear at this stage of the proceeding. However, Uber indicates in its Reconsideration Petition that it will be filing a Petition for Review with the Commonwealth Court on other aspects of our *May 2016 Order* if the Reconsideration Petition is denied. Reconsideration Petition at 16. Thus, Uber’s remaining portion of its Stay Petition appears to be ripe for consideration.

 Upon review of the *Process Gas* standards, however, we find that the Petitioner has failed to satisfy the criteria necessary to justify a stay of our *May 2016 Order*. For the reasons set forth in our lengthy prior decision and in our disposition of the Reconsideration Petition, we determine that the civil penalty is fully supported by substantial record evidence. Additionally, we find that there is clear statutory authority for the Commission to impose a civil penalty based on each of the 122,998 violations of the Code. Accordingly, we find that Uber has not established a strong showing that it will prevail on the merits.

 Moreover, the Petitioner relies on extra-record material and general statements in support of its claim that it will suffer irreparable harm, including financial harm. As discussed above, we have denied Uber’s request to reopen the record to consider these materials. It is axiomatic that we must base our decisions on evidence in the record. Thus, we cannot consider Uber’s extra-record arguments as support for its claim of irreparable harm.

 Regarding the last two factors, we agree with I&E that the issuance of a stay would harm enforcement efforts of the Commission and will thereby adversely affect the public interest.

 Accordingly, we shall deny Uber’s Stay Petition.

# V. Conclusion

Consistent with the foregoing discussion, we shall deny the Reconsideration Petition and the Stay Petition; **THEREFORE,**

 **IT IS ORDERED:**

1. That the Petition for Rehearing and Reconsideration filed by Uber Technologies, Inc., Gegen, LLC, Rasier LLC, and Rasier-PA, LLC, on May 26, 2016, is denied.

2. That the Petition for Supersedeas filed by Uber Technologies, Inc., Gegen, LLC, Rasier LLC, and Rasier-PA, LLC, on May 26, 2016, is denied.

3. 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

 Commonwealth Keystone Building

400 North Street

 Harrisburg, PA 17120

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

5. That the proceeding docketed at C-2014-2422723 be marked closed upon payment of the penalty described in Ordering Paragraph No. 3.

 **BY THE COMMISSION,**

 Rosemary Chiavetta

 Secretary

(SEAL)

ORDER ADOPTED: September 1, 2016

ORDER ENTERED: September 1, 2016

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 Petitioner or Uber. [↑](#footnote-ref-1)
2. 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). [↑](#footnote-ref-2)
3. Attached to the Complaint was a letter dated July 6, 2012, from the Commission’s Bureau of Technical Utility Services to Uber directing the Petitioner to cease and desist from acting as a broker of transportation without authority to provide that service. The letter provided, in part, that “[c]ontinued operations, as described above, will subject you to a $1,000 penalty per violation.” *Id.* at 2, Exh. 1. [↑](#footnote-ref-3)
4. *See Application of Gegen, LLC for a Brokerage License*, Docket No.
A-2012-2317300 (Order entered January 24, 2013) (*Gegen Order*). [↑](#footnote-ref-4)
5. 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. [↑](#footnote-ref-5)
6. Pursuant to 52 Pa. Code § 3.10(a), the *July 1, 2014 Order* became effective upon issuance. [↑](#footnote-ref-6)
7. Prior to the entry of the *May 2016 Order*, the Commissioners received a letter dated May 3, 2016, from Governor Tom Wolf which was co-signed by the Allegheny County Executive and the Mayor of Pittsburgh (Governor’s Letter). In response, the Commission issued a Secretarial Letter dated May 3, 2016, stating that the matter was still pending before the Commission and due to the statutory prohibitions on *ex parte* communications under 66 Pa. C.S. § 334(c), the Commission would serve the Governor’s Letter on the parties and place it on the record to cure any possible *ex parte* concerns. [↑](#footnote-ref-7)
8. In its Reconsideration Petition, Uber states it is “now disclosing publicly the total number of trips that were provided during the relevant time period” and throughout its filing makes numerous references to the total number of unauthorized trips. Reconsideration Petition at 22. The Petitioner also references the amount of the civil penalty imposed per trip throughout the period of its unauthorized service and the additional civil penalty imposed per trip after the issuance of the first cease and desist order. *Id.* at 13. Furthermore, Uber now references the breakdown of the number of unauthorized trips provided after the first cease and desist order. See Reconsideration Petition, App. A at 3. We are not aware of whether Uber has obtained the agreement of I&E to release the proprietary information and the Commission has not issued an order authorizing the release. Thus, Uber’s actions appear to be in violation of the terms of the Protective Order. See Protective Order at ¶ 17. In our *May 2016 Order* we had limited our discussion of the total number of trips and the civil penalty calculations pertaining to this data to the proprietary version of the order in compliance with the Protective Order. As a result of Uber’s unilateral disclosure of its trip data, however, the operative provisions of the Protective Order are now moot and we shall refer to the data throughout this Opinion and Order. [↑](#footnote-ref-8)
9. This summary is based on the Stipulations of Fact (Stipulations) provided by the Parties during the May 6, 2015, hearing and the testimony provided during the hearing. [↑](#footnote-ref-9)
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 a certificate to Rasier-PA to operate under its ETA. [↑](#footnote-ref-10)
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. Also, the Commonwealth Court in *Executive Transportation Co., Inc., v. Pa. PUC*, No. 252 C.D. 2015, 2016 WL 1612955 (Pa. Cmwlth. April 22, 2016), affirmed our order denying the Petition for Reconsideration in the *Rasier-PA Allegheny County Order* proceeding. [↑](#footnote-ref-11)
12. In fact, the Petitioner 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. [↑](#footnote-ref-12)
13. Rasier-PA also received a certificate for motor common carrier service pursuant to its statewide application in the *Rasier-PA Statewide Order.* [↑](#footnote-ref-13)
14. 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 . . . .

66 Pa. C.S. § 3301 (emphasis added). [↑](#footnote-ref-14)
15. “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. [↑](#footnote-ref-15)
16. 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). [↑](#footnote-ref-16)
17. 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). [↑](#footnote-ref-17)
18. 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). [↑](#footnote-ref-18)
19. Additionally, we found 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 were irrelevant to an evaluation of whether a per trip or a per-day violation should be imposed. According to our disposition, these arguments were more appropriately addressed in the section pertaining to the evaluation of our policy statement. [↑](#footnote-ref-19)
20. See pages 34-42 of the *May 2016 Order*. [↑](#footnote-ref-20)
21. Additionally, we explained that 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, we stated that 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). As an example, we noted the Commission’s references to the potential for harm in more recent cases such as *Pa. PUC v. Columbia Gas of Pa.*, Docket No. M‑2014-2306076 (Order entered September 11, 2014), and *Pa. PUC v. WGL Energy Services, Inc.*, Docket No. M‑2015-2401964 (Order entered January 28, 2016). [↑](#footnote-ref-21)
22. Moreover, we noted 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. [↑](#footnote-ref-22)
23. We cited to Rasier-PA’s waiver of its right to a hearing in five complaint proceedings filed by I&E and its voluntarily payment of 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. [↑](#footnote-ref-23)
24. Additionally, Uber attempted to distinguish the Commission’s decisions in *Blue & White Lines* and *Pa. PUC v. Brungard*, Docket No. A-00113098C0101 (Order entered June 3, 2002) (*Brungard*).Both of those cases we explained 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 entity to cease and desist from continued operation of its transportation services. Thus, we found that *Blue & White Lines* and *Brungard* actually support the level of civil penalty recommended herein. [↑](#footnote-ref-24)
25. We also explained that we were unable to verify the actual average cost per trip for the entire period of unauthorized service because Uber refused to provide the supporting data and invoices at the hearing despite the ALJs’ granting of I&E’s motion to compel the production of this information. Tr. at 91-94. [↑](#footnote-ref-25)
26. 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.’” [↑](#footnote-ref-26)
27. For a summary of these motions and interim orders, *see* pages 35-39 of the Initial Decision. [↑](#footnote-ref-27)
28. The ALJs’ rationale in support of a finding of a discovery violation is summarized on pages 61-65 of our *May 2016 Order*. [↑](#footnote-ref-28)
29. We determined that Uber’s additional argument, that the data is subject to verification pursuant to the Commission’s authority to inspect records, was irrelevant for purposes of this proceeding. We refused 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. [↑](#footnote-ref-29)
30. Furthermore, we noted that the amount of the civil penalty was 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, we found that the Petitioner improperly attempted to control what evidence was permissible and relevant at the evidentiary hearing. [↑](#footnote-ref-30)
31. The Excessive Fines Clause of the Pennsylvania Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.” Pennsylvania Constitution, Article I, Section 13. The Eighth Amendment contains similar language. [↑](#footnote-ref-31)
32. Uber also attempts to insert extra-record evidence pertaining to the amount it claims to have actually received from its drivers for each fare. [↑](#footnote-ref-32)
33. Uber makes additional arguments that the size of the civil penalty is grossly disproportionate when considering the Petitioner’s revenue earned during its period of unlawful service. Moreover, Uber claims this level of penalty will cause financial distress to its operations in Pennsylvania, its customers and drivers. In support of these arguments, the Petitioner attempts to insert extra-record evidence. [↑](#footnote-ref-33)
34. The Petitioner also cites to the following provisions of the Pennsylvania Constitution: Article I, Section 1 (Inherent rights of mankind); Article I, Section 9 (Rights of accused in criminal prosecutions); and Article I, Section 11 (Courts to be open; suits against the Commonwealth). [↑](#footnote-ref-34)
35. Moreover, even if we were to consider the constitutional arguments, the Petitioner’s claim in our view lacks merit. The civil penalty in the *May 2016 Order* is directly proportional to the admitted number of trips conducted by Uber during the Launch and Cease and Desist Periods. The imposition of the civil penalty based on a per-trip/per violation analysis is permissible under Section 3301(a) of the Code. To the extent that Uber is now challenging the constitutionality of Section 3301, and particularly the distinction under 66 Pa. C.S. § 3301(c) pertaining to the statutory cap for civil penalties relating to gas pipeline safety violations, the Commission is without authority to determine this issue. *City of Philadelphia v. Kenny*, 369 A.2d 1343, 1353 (Pa. Cmwlth. 1977). [↑](#footnote-ref-35)
36. The Petitioner provides the following explanation of its calculations:

The Complaint sought a civil penalty of $95,000 consisting of:

(i) $84,000 or $1,000 per day for each day since from [*sic*] March 13, 2014, or the date on which TNC services were launched, and (ii) $11,000 for the eleven trips obtained by I&E enforcement staff. Given the evidence furnished by [Petitioner] that the services were launched on February 11, 2014, the original Complaint’s request would be for an additional 29 days or $29,000 for a civil penalty of $124,000. The Complaint also requested a $1,000 civil penalty for each day that [Petitioner] continued to operate after the filing of the Complaint, which would encompass the period from June 6, 2014 through August 20, 2014, or 75 more days, adding another $75,000 to make the total exposure $198,000. In the Amended Complaint, I&E alleged five more individual trips, and proved three of them at the hearing, taking the total amount to $201,000.

*Id.*  [↑](#footnote-ref-36)
37. Uber cites to the following cases: *Pa. PUC v. Erie Transportation Services, Inc., t/a Erie Yellow Cab*, Docket No. A-00108419C0603 (Order entered March 5, 2007) (*Erie Yellow Cab*); *Pa. PUC v. Big Time’s Night Train*, Docket No. A-00121227C0602 (Order entered July 25, 2007) (*Big Time’s Night Train*); and *Pa. PUC v. Penn Harris Taxi Service Company, Inc.,* Docket No. A-00002450C9603 (Order entered March 12, 1998) (*Penn Harris Taxi*); *Pa. PUC v. Collegeville Airport Service,* Docket No. C-2010-2176745 (Order entered January 12, 2012) (*Collegeville Airport*); *Pa. PUC v. K-Larens Transportation Service, Inc.*, Docket No. C-2010-2172842 (Order entered January 13, 2011) (*K-Larens Transportation*); *Pa. PUC v. Tri-Star Enterprises*, Docket No. C-2009-2088370 (Order entered October 8, 2009) (*Tri-Star Enterprises*); [↑](#footnote-ref-37)
38. Uber cites, in part, to: *M&G Trucking; J&E Transportation*; *Pa. PUC v. Constanza’s Chauffeur Service of Pittsburgh*, Docket No. A-00119040C0701 (Order entered September 13, 2007) (*Constanza’s Chauffeur*); *Pa. PUC v. Neighboring Movers of Pittsburgh*, Docket No. C-2010-2144722 (Order entered October 21, 2010) (Neighboring Movers); *Pa. PUC v. Transit Aide Inc.*, Docket No. C-2010-2187719 (Order entered February 10, 2011) (*Transit Aide*); *Pa. PUC v. Same Day Delivery Service*, Docket No. A-00110909C0601 (Order entered May 4, 2006) (*Same Day Delivery*); and *Pa. PUC v. Sun Coach Lines*, Docket No. C-20065888 (Order entered May 4, 2006) (*Sun Coach Lines*). [↑](#footnote-ref-38)
39. Uber cites to: *Pa. PUC v. Rosemont Taxicab Co., Inc.*, Docket No. C-2011-2249510 (Order entered February 16, 2012) (*Rosemont Taxicab 2012*); *Pa. PUC v. Premium Taxi*, Docket No. C-2010-2181602 (Order entered September 26, 2011) (*Premium Taxi*); *Pa. PUC v. Rosemont Taxi Cab Co.*, Docket No. C-2011-2229464 (Order entered August 11, 2011) (*Rosemont Taxicab 2011*); *Pa. PUC v. Altoona USA & Transfer*, Docket No. C-2010-2189008 (Order entered January 13, 2011) (*Altoona USA & Transfer*); *Pa. PUC v. Trinity Limo, Inc.,* Docket No. C-2010-2131626 (Order entered June 3, 2010) (*Trinity Limo*); *Pa. PUC v. Yellow Cab Co. of Pittsburgh*, Docket No. C-2008-2034624 (Order entered May 14, 2009) (*Yellow Cab*); *Pa. PUC v. J.B. Taxi,* Docket No. A-00118810C0701 (Order entered December 20, 2007) (*J.B. Taxi*); *Pa. PUC v. Capital City Cab Service,* Docket No. A-00113875C0501 (Order entered October 6, 2005) (*Capital City Cab*); and *Pa. PUC v. Classic Coach Ltd.*, Docket No. A-00107689C0303 (Order entered May 10, 2007). [↑](#footnote-ref-39)
40. I&E asserts that it sought discovery of Uber’s trip data as early as August 8, 2014, but the Petitioner refused to divulge it until the evidentiary hearing on May 6, 2015. *Id.*  [↑](#footnote-ref-40)
41. Whenever the commission shall be of opinion that any person or corporation, including a municipal corporation, is violating, or is about to violate, any provisions of this part; or has done, or is about to do, any act, matter, or thing herein prohibited or declared to be unlawful; or has failed, omitted, neglected, or refused, or is about to fail, omit, neglect, or refuse, to perform any duty enjoined upon it by this part, or has failed, omitted, neglected or refused, or is about to fail, omit, neglect, or refuse to obey any lawful requirement, regulation or order made by the commission; or any final judgment, order, or decree made by any court, then and in every such case the commission may institute injunction, mandamus or other appropriate legal proceedings, to restrain such violations of the provisions of this part, or of the regulations, or orders of the commission, and to enforce obedience thereto.

66 Pa. C.S. § 502. [↑](#footnote-ref-41)
42. We note that Uber intersperses references to Mr. Feldman’s affidavit in apparent support of its arguments. However, we will not address these extra-record citations. [↑](#footnote-ref-42)
43. Pa. R.A.P. 1731(a) provides:

 Except as provided by subdivision (b), an appeal from an order involving solely the payment of money shall, unless otherwise ordered pursuant to this chapter, operate as a supersedeas upon the filing with the clerk of the lower court of appropriate security in the amount of 120% of the amount found due by the lower court and remaining unpaid. Where the amount is payable over a period of time, the amount found due for the purposes of this rule shall be the aggregate amount payable within 18 months after entry of the order. [↑](#footnote-ref-43)