

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17120

**Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement**

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

v.

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

STATEMENT OF COMMISSIONER ROBERT F. POWELSON

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

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

Background

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

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

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

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

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

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

However, when Uber began operating, the service it provided did not neatly fall within any of the categories of motor carrier service in our regulations. That is why the Commission ultimately granted Uber a certificate for experimental authority, instead of categorizing Uber as call or demand service, or any other existing category of motor carrier service. This issue has since been resolved both because Uber voluntarily submitted to our jurisdiction and with this week's Commonwealth Court decision³ finding that the Commission acted appropriately in exercising its jurisdiction over Uber. However, this does not change the fact that when Uber launched its operations in Pennsylvania, they were operating in a legally grey area. The Commission should take this into account when assessing a penalty.

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

² 66 Pa. C.S. § 102, "Public Utility" (1)(iii); "Common Carrier;" "Common Carrier by Motor Vehicle."

³ *Capital City Cab Service, et al. v. Pa. Pub. Util. Comm'n*, 2016 Pa. Commw. LEXIS 172 (Comwlth. Ct. 2016).

⁴ 66 Pa. C.S. § 1101, 2501.

Penalty Factors

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

Factors One and Two

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

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

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

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

⁵ 66 Pa. C.S. § 3301.

⁶ 52 Pa. Code § 69.1201(c).

⁷ "The Commission, however, declines to speculate about the possibility of potential, and not actual harm[.]" *Final Policy Statement for Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations*, M-00051875 (Opinion and Order issued December 22, 2007).

⁸ 52 Pa. Code § 69.1201(c)(2).

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

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

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

Factor Five

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

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

⁹ Tr. 138 (May 6, 2015).

¹⁰ *Final Policy Statement for Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations*, M-00051875 (issued December 22, 2007).

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

Factor Ten

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

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

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

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

¹¹ Uber Exceptions at p. 12.

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

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

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

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

Remaining Penalty Factors

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

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

Penalty Amount

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

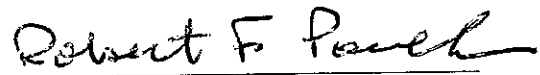
¹⁵ See *Rasier-PA LLC Compliance Plan*, Docket Nos. A-2014-2424608 and A-2014-2416127 (filed December 24, 2014, rev'd January 9, 2015). See also *Rasier-PA LLC Compliance Plan – Quarterly Reports*, Docket Nos. A-2014-2424608 and A-2014-2416127 (filed April 20, 2015; July 23, 2015; October 29, 2015; and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

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

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

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

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


ROBERT F. POWELSON
COMMISSIONER

DATE: April 21, 2016

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

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

