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September 18, 2014

## VIA OVERNIGHT DELIVERY

Secretary's Bureau  
Attn: Secretary Rosemary Chiavetta  
Pennsylvania Public Utilities Commission  
Commonwealth Keystone Building  
2nd Floor, Room-N201  
400 North Street  
Harrisburg, Pennsylvania 17120

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PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

**RE: *Kim Lyons and PG Publishing, Inc. d/b/a The Pittsburgh Post-Gazette v. Lyft***  
**PUC Dkt. No. P-2014-2442001**  
**PUC Ref. Dkt. No. A-2014-2415045**

Dear Secretary Chiavetta:

Per my email of this date, enclosed please find the original letter from Frederick N. Frank and the original Response of Kim Lyons and PG Publishing, Inc. d/b/a The Pittsburgh Post-Gazette to the Answer of Lyft in the above captioned matter for filing with the Pennsylvania Public Utility Commission.

Very truly yours,



Zachary N. Gordon

ZNG

Enclosures

# FRANK, GALE, BAILS, MURCKO & POGRASS, P.C.

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September 18, 2014

## VIA ELECTRONIC MAIL

Secretary's Bureau  
Attn: Secretary Rosemary Chiavetta  
Pennsylvania Public Utilities Commission  
Commonwealth Keystone Building  
2nd Floor, Room-N201  
400 North Street  
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SEP 18 2014

PA PUBLIC UTILITY COMMISSION  
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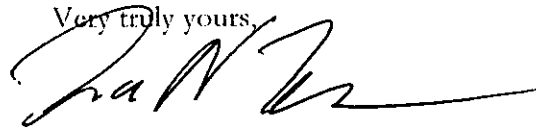
**RE: *Kim Lyons and PG Publishing, Inc. d/b/a The Pittsburgh Post-Gazette v. Lyft***  
**PUC Dkt. No. P-2014-2442001**  
**PUC Ref. Dkt. No. A-2014-2415045**

Dear Secretary Chiavetta:

Attached for filing with the Pennsylvania Public Utility Commission is the Response of Kim Lyons and PG Publishing, Inc. d/b/a The Pittsburgh Post-Gazette to the Answer of Lyft in the above captioned pleading. As shown by the attached Certificate of Service, all parties are being duly served.

I would appreciate your acknowledging receipt of this letter and the enclosed response by replying to my email as "read." Thank you for your attention to this matter.

Very truly yours,



Frederick N. Frank

FNF/Zng

Enclosures

cc: Administrative Law Judge Mary D. Long (via e-mail and First Class Mail)  
Administrative Law Judge Jeffrey A. Watson (via e-mail and First Class Mail)  
All parties per Certificate of Service (via e-mail)

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

KIM LYONS and :  
PG PUBLISHING, INC. d/b/a :  
THE PITTSBURGH POST-GAZETTE, :  
Petitioners : PUC Dkt. No. P-2014-2442001  
: PUC Ref. Dkt. No. A-2014-2415045

v. :

LYFT, INC. :  
Respondent :

**RESPONSE TO LYFT'S  
ANSWER TO THE  
PITTSBURGH POST-  
GAZETTE'S PETITION  
FOR AN INTERIM  
EMERGENCY ORDER**  
Filed on behalf of:  
Petitioners, Kim Lyons and  
*The Pittsburgh Post-Gazette*

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SEP 18 2014

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Counsel of Record  
for this Party:

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

KIM LYONS and	:	
PG PUBLISHING, INC. d/b/a	:	
THE PITTSBURGH POST-GAZETTE,	:	
Petitioners	:	
	:	PUC Dkt. No. P-2014-2442001
v.	:	PUC Ref. Dkt. No. A-2014-2415045
	:	
LYFT, INC.	:	
Respondent	:	

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**RESPONSE TO LYFT’S ANSWER TO PETITION OF KIM LYONS AND  
PG PUBLISHING, INC d/b/a THE PITTSBURGH POST-GAZETTE FOR  
AN INTERIM EMERGENCY ORDER**

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Kim Lyons and PG Publishing, Inc. d/b/a The Pittsburgh Post-Gazette (collectively “The Post-Gazette”) file the within Response to Lyft’s Answer to The Post-Gazette’s Petition for an Interim Emergency Order (“Petition for Emergency Order”).

**I. Response to Lyft’s Statement of Material Facts**

The Public Utility Commission (“PUC”) is conducting proceedings in the matter of Lyft at PUC Docket No. A-2014-2415045 before Administrative Law Judges Mary D. Long (“Judge Long”) and Jeffrey A. Watson (“Judge Watson”) to decide whether to grant Lyft’s application to operate a peer-to-peer ride-sharing network (“Lyft Application”). On August 29, 2014 Lyft filed a Petition for a Protective Order seeking to prohibit disclosure of (1) data relating to rides provided

to passengers via Lyft's mobile application platform, (2) Lyft's insurance policies and any proposed Form E, and (3) dollar amounts paid for Lyft's insurance policies.

Protestants to the Lyft Application, the Insurance Federation of Pennsylvania and JB Taxi, LLC t/a County Taxi Cabs<sup>1</sup> ("Protestants"), opposed Lyft's Petition for a Protective Order. By Order dated September 2, 2014 ("September 2, 2014 Order") Judge Long and Judge Watson denied Lyft's Petition for a Protective Order for its ride data and insurance policies, but granted the petition as to dollar amounts paid for insurance. Judge Long and Judge Watson did not find that the dollar amounts were proprietary. Instead their Order noted the Protestants did not object to the dollar amount redaction and deemed the information "irrelevant." September 2, 2014 Order at 5.

On September 3, 2014, the PUC was holding a continued hearing in Pittsburgh, Pennsylvania in the matter of Lyft at PUC Docket No. A-2014-2415045 before Judge Long and Judge Watson on the Lyft Application. As required by Section 703(c) of the Public Utility Code 66 Pa. C.S.A. § 703(c), the hearing was public. Ms. Lyons attended to report on the hearing on behalf of The Post-Gazette and the public. During the hearing, a subject matter of testimony was the number of rides that Lyft had when it was under a cease-and-desist order not to provide such rides. Lyft asserted the number of rides was "proprietary" information and requested to close the hearing

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<sup>1</sup> Due to a filing error, the Objection of JB Taxi, LLC was not made of record until September 10, 2014.

when that testimony was presented and seal that portion of the record. The issue of Lyft's insurance did come up during this hearing.

Despite having denied Lyft's Petition for Protective Order on September 2, 2014, Judge Long and Judge Watson temporarily granted an oral renewal of Lyft's Petition for a Protective Order during the September 3, 2013 hearing for the purpose of preserving Lyft's right to seek review of the denial of the Petition for a Protective Order.<sup>2</sup> *See* Interim Order On Temporary Protective Order dated September 10, 2014 ("Interim Order dated September 10, 2014). Notably, present at the hearing to the grant of Lyft's Application, were counsel for JB Taxi LLC t/a County Taxi Cab and the Insurance Federation of Pennsylvania (collectively "Protestors"), who were cross-examining the officer of Lyft who was testifying at the point the alleged "proprietary" information was to be presented.

Lyft's obfuscates The Post-Gazette's vehement objections to the closed hearing and its efforts to protect its rights to an open hearing. *See* Answer of Lyft, Inc. to Petition for An Interim Emergency Order ("Lyft's Answer") at 3. Ms. Lyons, a lay person, may not have said "objection," but she respectfully questioned Judge Long and Judge Watson about the closing of the hearing, and she also asserted that the hearing should be public.

After Ms. Lyons was removed from the courtroom, she immediately contacted

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<sup>2</sup> As of 9/18/14, The Post-Gazette is not aware of what efforts, if any, Lyft has sought to review the denial of its Petition for a Protective Order, except for noting a petition is forthcoming. Lyft's Answer at 11.

The Post-Gazette's counsel, Frederick N. Frank, Esquire ("Mr. Frank"), who then came to the hearing to seek to intervene to formally assert The Post-Gazette's common law, First Amendment and the Pennsylvania Constitutional right of access to the proceeding. When Mr. Frank began to speak, noting the violation *inter alia* of the First Amendment by the Commission's actions, Judge Long told Mr. Frank that The Post-Gazette was "an extraneous party" and refused to allow him to speak even though Mr. Frank again noted First Amendment violations were at issue. When the Court was about to adjourn, Mr. Frank again attempted to speak and Judge Long ordered him to "stand back" and stop speaking. This obfuscation of the record calls into question the credibility of Lyft's Answer.

With the next hearing date scheduled for September 10, 2014, The Post-Gazette brought a Petition for an Interim Emergency Order, seeking the unsealing of the record of the September 3, 2014 hearing in its entirety, an Order granting The Post-Gazette the right to intervene, and that if any party sought to close the hearings or seal any portion of the record, that the party so seeking must provide reasonable notice of two business days to all parties, including The Post-Gazette, as intervenor, of their intent to seal. On September 10, 2014, the Lyft Application hearing continued without any attempts to remove the press from the proceeding or to seal portions of the record.

**II. Argument: Lyft Fails to Show The Post-Gazette's Has Not Met Its Burden For A Preliminary Injunction.**

There is no dispute that, Section 3.6(a) of the PUC's regulations, 52 Pa. Code § 3.6(a), permits a party to petition the PUC for an interim emergency order during the course of a proceeding. The petition must establish facts to demonstrate that:

1. The Petitioner's right to relief is clear.
2. The need for relief is immediate.
3. The injury would be irreparable if relief is not granted.
4. The relief is not injurious to the public interest.

52 Pa. Code § 3.6(b). In its Petition for an Interim Emergency Order, The Post-Gazette set forth how it meets this burden to which Lyft replies. *See* Lyft's Answer. A review of Lyft's Answer on each element demonstrates that The Post-Gazette, indeed, has met its burden.<sup>3</sup>

**A. The Post-Gazette's Right to Relief is Clear**

Lyft agrees that the PUC hearings at issue were quasi-judicial. Lyft's Answer at 5. Lyft further agrees that because the hearing is quasi-judicial, the common law and First Amendment right of access apply to the PUC hearing at issue. Lyft's Answer at 5.

Lyft's Answer puts the burden on The Post-Gazette to bring forward precedent or facts "to demonstrate that Lyft would not suffer serious injury were its proprietary information to be made public." Lyft's Answer at 8. This is a serious

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<sup>3</sup> Lyft does not challenge The Post-Gazette's right to intervene and assert its rights.



misstatement of the law. As detailed *infra* under the both the common law right of access and the First Amendment, the party seeking closure, here Lyft, bears a heavy burden. It is not the reverse.

1. The Common Law Right of Access

The Pennsylvania Superior Court has noted that under the common law analysis of requests for closure of judicial proceedings “the party seeking closure must show that his or her interest in secrecy outweighs the presumption of openness.” *PA ChildCare LLC v. Flood*, 887 A. 2d 309, 312 (Pa. Super. 2005).

The Superior Court has emphasized how high a burden this is by numerous opinions finding the proponent of closure has failed to show his or her interest in secrecy overcomes the presumption of openness. In *R.W. v. Hampe*, 626 A.2d 1218, 1223-24 (Pa Super. 1993), the Superior Court found that a litigant’s interest in avoiding embarrassment about the sexual nature of information in her medical malpractice suit was insufficient to outweigh the public’s interest in observing adversarial proceedings. In *Storms ex rel. Storms v. O’Malley*, 779 A.2d 548, 569-70 (Pa. Super. 2001), the Superior Court found the record should not be sealed in the case of a minor’s medical malpractice suit. The Superior Court found that the minor’s interest in not receiving solicitation to purchase her structured settlement, the embarrassment and harm to the reputation of the defendant doctor, and the public policy encouraging settlement were all insufficient to outweigh the public’s interest public’s interest in open proceedings. *Id.*

In this instance, Judge Long and Judge Watson conducted their analysis under 52 Pa. Code § 5.365, which provides that a protective order should only issue for confidential information after a showing of substantial harm from release and that the harm outweighs the public's interest in open access to the PUC hearings. September 2, 2014 Order at 2. This regulation mirrors burden in the common law right of access discussed *supra*.

Judge Long and Judge Watson rejected Lyft's claim that the harm to Lyft from release of the trip data would be substantial. September 2, 2014 Order at 3. ("Therefore, according to Applicant [Lyft], the potential harm to its operations is 'substantial' and outweighs any need for public disclosure. *We disagree.*") (emphasis added). Their Order explained that the trip data the PUC sought from Lyft, "is of the sort that all motor carriers are directed to submit to the Commission on a routine basis." September 2, 2014 Order at 3. (citing 52 Pa. Code § 29.313(c); 52 Pa. Code § 29.225). Their Order continued finding that Lyft's "bald statement that trip data for transportation network companies is proprietary when it is clearly not for other motor carriers, does not outweigh the public interest in an open record in this proceeding." September 2, 2014 Order at 4.

Since that Order, Lyft has not provided any affidavit or other testimony as to why the information is proprietary. Instead, Lyft has only provided similar bald assertions in legal documents claiming information should be protected. *See e.g.*, Lyft's Answer at 5. Lyft's Petition for a Protective Order was denied on September 2, 2014

but temporarily granted on September 3, 2014 in order for Lyft to seek review of that Order. On September 15, 2014, almost two weeks, after the denial of Lyft's Petition for a Protective Order was denied, Lyft's Answer avers that its petition seeking interlocutory review of the ALJ's decision is still "forthcoming." Lyft's Answer at 11. Nearly two weeks and two hearings have passed without Lyft filing its petition. Lyft's delay demonstrates that Lyft's injury will not be substantial. Thus, whatever injury results will not outweigh the presumption of openness under the common law right of access.

Even without the findings in the September 2, 2014 Order, it is self-evident that Lyft has not met its common law burden. Lyft merely claims that the information is "proprietary." It has never claimed it rises to the level of a trade secret. Lyft's Answer contained no affidavits showing how it faces serious injury from the information's disclosure. Legion corporate information arguably is "proprietary" and that alone will not shield its disclosure when the information is part of a judicial proceeding.

In addition, Lyft's Answer does not articulate any basis as to why its insurance policies are proprietary. In fact, the only time Lyft's Answer mentions insurance is in the procedural history of the case. Lyft's Answer at 2. In explaining why the information is allegedly proprietary Lyft does not even mention why its insurance coverage and rates would be proprietary. *Id.* at 5. ("Lyft utilizes data-intensive market analytics based on proprietary usage data available only through its platform, such as

the number of rides provided in a particular market or the concentration of pick-ups and drop-offs in specific segments of that market.”) To the extent that Lyft claims its insurance policies and rates and proprietary, there is no specific mention, let alone, specific averments on that issue. Thus, Lyft has not even presented the PUC with any circumstances to balance against the common law presumption of openness.

## 2. The United States Constitution First Amendment Right of Access

Even if the common law presumption is overcome, the movant still must overcome the higher First Amendment burden. *Commonwealth v. Long*, 922 A.2d 892, 897 (Pa. 2007) (“the First Amendment provides a greater right of public access than the common law”). In *Long*, the Pennsylvania Supreme Court found the common law right of access did permit the public to obtain jurors’ names. *Id.* at 897-898. The Court, however, explained that First Amendment right of access is broader and includes the right to attend to judicial proceedings and obtain the information contained in those proceedings. *Id.* at 898, n.6. Under that standard, the Court found that jurors’ names are commonly disclosed information during trial, so the First Amendment right of access attaches. *Id.* 903-04.

*The PA ChildCare* Court summarized the First Amendment burden:

“. . . [T]he party seeking to keep the proceedings closed may rebut the presumption of openness by demonstrating that: (1) the denial of public access serves an important government interest, and (2) no less restrictive means to serve that interest exists. To satisfy these requirements, the party seeking closure must demonstrate that the material is the kind of information that the courts will protect and that there is good cause for the order to issue. A party established good cause

by showing that that opening the proceedings will work a clearly defined and serious injury to the party seeking closure. We have emphasized that only a *compelling* government interest justifies closure and then only by a means narrowly tailored to serve that interest.”

887 A.2d at 312. (citations omitted) (emphasis in the original). Lyft essentially acknowledges this is their burden under the First Amendment.<sup>4</sup>

In *PA ChildCare LLC, supra*, PA ChildCare, LLC claimed that “the manner in which it operated its business was unique, [and] constituted a trade secret.” Using the First Amendment analysis,” the Superior Court rejected PA Childcare, LLC’s claims that its own “innovative compilations of data” were trade secrets significant enough to justify closure. *Id.* at 311-12. “Weak assertions involving trade secrets” that function as “a ruse to prevent public exposure” will not constitute good cause. 887 A.2d at 313.

Lyft alleges two governmental interests. One interest is the right to protect Lyft’s right to seek review of the ALJ’s denial of its request for a protective order and the other asserted interest is Lyft’s interest in protecting its alleged proprietary information. Lyft’s Answer at 7, n. 1. Neither of these asserted interests rise to the level of a compelling governmental interest.

Lyft refers to *US Investigations Services, LLC. v. Calliban*, No. 2:11-cv-0355, 2011 WL 1157256 (W.D. Pa. Mar. 29, 2011) *See* Lyft’s Answer at 7. *Calliban* demonstrates

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<sup>4</sup> *See* Lyft’s Answer at 7.

that Lyft has not met its burden in the instant case. It rejected a prospective request to close the courtroom because trade secrets or proprietary information may come out. *Id.* at \*1. *Callihan* noted if it became “necessary for a witness to explain to the Court with *specificity* the precise trade secret information at issue, the Court will reconsider and may conduct a limited *in camera* procedure.” *Id.* (emphasis in original). It did hold that documents implicating national security would be filed under sealed. *Id.* at \*2.

Neither of Lyft’s alleged governmental interests are compelling, if indeed they are governmental interests at all. First, neither of Lyft’s alleged interests implicate national security. Further, Lyft has not asserted that it is seeking to protect trade secrets. Instead Lyft is seeking to protect “proprietary information.” Lyft’s Answer at 7. As described *supra*, Judge Long and Judge Watson disagreed with Lyft that the release of this information would “substantially” harm Lyft. September 2, 2014 Order at 3. Here the compelling interest is the public’s right of access to the PUC proceedings.

3. The Post-Gazette has a Clear Right to Protect against Violation of the Law

In *Pa. P.U.C. v. Israel*, 52 A.2d 317, 320 (Pa. 1947), the Pennsylvania Supreme Court, issued a preliminary injunction when a group operated as taxi cab drivers without obtaining the proper certificate from the PUC. The Court noted a preliminary injunction should be granted to protect against violations of the law, because “if the law is being violated, our duty is clear.” *Id.* at 322. The Court added, “When the right to such injunction is clear, as it is here, under the undisputed facts, it is our duty to

issue a preliminary injunction.” *Id.*

Few violations of the law could be more egregious than those that would vitiate the public’s common law and Constitutional right of access to judicial proceeding. The effect of denial of the relief would result in such a violation. The Post-Gazette’s rights are eminently clear.

B. The Need for Relief is Immediate

Lyft asserts that because dangerous wiring or impending cessation of electric service is not present in this case, The Post-Gazette’s need for relief is not immediate. Lyft’s Answer at 11. The relief sought to vindicate The Post-Gazette’s common law and First Amendment rights of access is different than the typical emergency petition before the PUC. At stake is the public’s right to know about the functioning of its government and the corresponding right of The Post-Gazette to gather this information to inform the public. *See Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“The Constitution specifically selected press . . . to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”).

If immediate relief is not granted, there is a *de facto* denial of the common law and First Amendment right of access. For the public to learn of the judicial proceedings long after they take place defeats “the principle of openness of all judicial

proceeding”<sup>5</sup> supported by the common law, the First Amendment and the Pennsylvania Constitutional provision that all courts shall be open. Pa. Const. Art. I, § 11. The *PA ChildCare* Court noted that “this “mandate of openness becomes particularly important” when matters of public interest such as the Lyft application and its impact on taxi services are involved. 887 A.2d at 312. The Post-Gazette’s ability to inform the public when the information “can be most effective” justifies immediate relief. *Mills, supra*, 384 U.S. at 219.

C. The Injury Will Be Irreparable if Relief is Not Granted

In *Core Communications, Inc. v. Verizon Pennsylvania Inc.*, P-2011-2253650 (Pa. P.U.C. Order Entered Sept. 23, 2011), the PUC found that “a violation of law constitutes irreparable harm *per se.*” *citing Pa. P.U.C. v. Israel*, 52 A.2d 317, 321 (Pa. 1947). *Israel* explains:

The argument that there is no ‘irreparable damage,’ would not be so often used by wrongdoers, if they would take the trouble to observe that the word ‘irreparable’ is a very unhappily chosen one, used in expressing the rule that an injunction may issue to prevent wrongs of a repeated and continuing character, or which occasion damages which are estimable only by conjecture and not by any accurate standard. . . . Besides this, where the right invaded is secured by statute or by contract, there is generally no question of the amount of damage, but simply of the right.

*Id.* The proceedings before the PUC are presumed public by statute. 66 Pa. C.S.A. 703. The common law right of access, the First Amendment, and the Pennsylvania

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<sup>5</sup> *PA ChildCare, supra*, 887 A.2d at 312.



Constitution also provide access to judicial proceedings. Each day the transcript is sealed improperly, these rights are invaded.

D. The Relief Requested is Not Injurious to the Public Interest

The relief requested is the anti-thesis of relief injurious to the public interest. It would *validate* the public interest. The General Assembly explicitly set forth that PUC hearings, and the related record, are to be open to the public. 66 Pa. C.S.A. §703. “When the Legislature declares certain conduct unlawful it is tantamount in law in calling it injurious to the public.” *Israel*, 52 A.2d at 321. Closing the proceeding and sealing the transcript violates the Legislature’s decide public policy of open PUC proceedings.

Further, Lyft’s contention that the public interest should consider the business interest was expressly weighed and found lacking by Judge Watson and Judge Long. September 2, 2014 Order at 4 (finding Lyft’s claim of proprietary information, “does not outweigh the public interest in an open record in this proceeding.”).

E. The Post-Gazette’s Request for Procedural Protections is Not Moot

Among the relief The Post-Gazette requests is an order directing that if any party seeks to close the hearings or seal any portion of the record in the above-captioned matter, the party seeking this relief must provide reasonable notice of two business days to all parties, including The Post-Gazette, as a representative of the public, of their intent to seek this relief. Thereafter, the Administrative Law Judge

would schedule a hearing on the request in which The Post-Gazette would be allowed to participate.

While the hearing in the Lyft Application may be concluded, the matter is not moot for two reasons. First, even though it appears as though the formal hearings in the action have concluded, the PUC has yet to issue its final determination of Lyft's Application. There could be additional hearings or hearing on appeals, which The Post-Gazette should be permitted to intervene so that it may participate in any additional proceedings.

Second, as discussed in section B. 1 of the Petition for Emergency Order, The Post-Gazette's unassailable due process rights were violated in the September 3, 2014 hearing. Its counsel was denied the right to speak and was told The Post-Gazette was "extraneous." The PUC must insure there are due process protections when the right of access is asserted.

The denial of the due process rights is "capable of repetition, yet evading review," so the issue should be decided on the merits, "even though the issue it raises otherwise appears moot." *Com. v. Buehl*, 462 A.2d 1316, 1319 (Pa. Super. 1983).

Respectfully submitted,

FRANK, GALE, BAILS, MURCKO & POCRASS, P.C.

By: 

Frederick N. Frank, Esq.

Attorneys for Kim Lyons and *The Pittsburgh Post-Gazette*

DATED: September 18, 2014

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**PROOF OF SERVICE**

I hereby certify that I am this day serving the foregoing Response to Lyft's Answer to The Post-Gazette's Petition of Kim Lyons and PG Publishing, Inc. d/b/a The Pittsburgh Post-Gazette for an Interim Emergency Order upon the person via email set forth below, in accordance with 52 Pa.Code § 1.54.

**Lyft, Inc.**  
James P. Dougherty  
Barbara A. Darkes  
Adeolu A. Bakare  
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**JB Taxi LLC t/a Country Taxi Cab**  
David William Donley, Esq.  
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**Executive Transportation Inc.**  
Michael S. Henry Esq.  
Michael S. Henry, LLC  
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Date: September 18, 2014



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Pittsburgh, Pa. 15219  
(Attorneys for Petitioners, Kim Lyons and *The Pittsburgh Post-Gazette*)  
(412) 471-5912

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SEP 18 2014

PA PUBLIC UTILITY COMMISSION  
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SEP 18 2014

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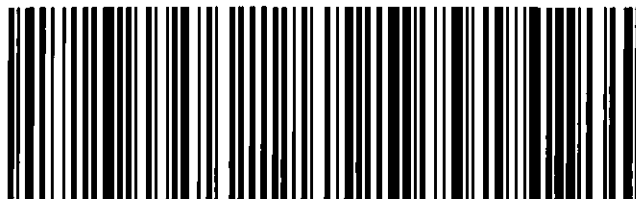
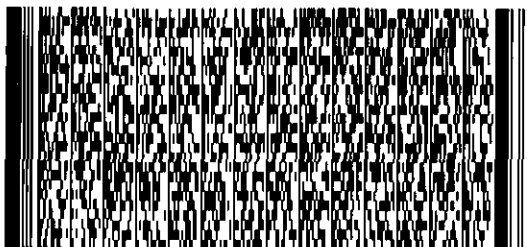
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