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October 2, 2014

VIA OVERNIGHT DELIVERY & EMAIL

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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OCT 2 2014

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

Application of Lyft, Inc. (Experimental Service in Allegheny County)

PUC Dkt. No. A-2014-2415045

Dear Secretary Chiavetta:

Enclosed please find Kim Lyons and PG Publishing, Inc. d/b/a The Pittsburgh Post-Gazette's Response to Lyft's Petition for Interlocutory Review and Answer to a Material Question.

Respectfully,



Ellis W. Kunka

EWK/zng

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)

Secretary Rosemary Chiavetta

October 2, 2014

Page 2 of 2

Adeolu A. Bakare, Esquire, *counsel for Lyft, Inc.* (via e-mail)

Bohdan R. Pankiw, Esquire, *Chief Counsel for the PUC* (via email)

Michael S. Henry, Esquire, *counsel for Executive Transportation, Inc.* (via email)

David William Donley, Esquire, *counsel for JB Taxi LLC t/a Country Taxi Cab*
(via email)

Samuel Marshall, *CEO & President of Insurance Fed. Of Pennsylvania* (via email)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

KIM LYONS and
PG PUBLISHING, INC. d/b/a
THE PITTSBURGH POST-GAZETTE,
Petitioners

v.

LYFT, INC.
Respondent

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: PUC Dkt. No. P-2014-2442001
: PUC Ref. Dkt. No. A-2014-2415045

**RESPONSE TO LYFT'S
PETITION FOR
INTERLOCUTORY
REVIEW AND ANSWER TO
A MATERIAL QUESTION**

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Filed on behalf of:
Petitioners, Kim Lyons and
The Pittsburgh Post-Gazette

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

NOV 2 2014

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

KIM LYONS and
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v.

LYFT, INC.
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PUC Dkt. No. P-2014-2442001
PUC Ref. Dkt. No. A-2014-2415045

**RESPONSE TO LYFT'S PETITION OF FOR INTERLOCUTORY REVIEW
AND ANSWER TO A MATERIAL QUESTION**

Kim Lyons and PG Publishing, Inc. d/b/a The Pittsburgh Post-Gazette (collectively "The Post-Gazette") file the within Response to Lyft's Petition for Interlocutory Review and Answer to a Material Question.

I. Statement of Material Facts

On September 10, 2014, The Post-Gazette brought a Petition for an Interim Emergency Order ("The Post-Gazette's Petition") The Post-Gazette's Petition was docketed at PUC Dkt. No. P-2014-2442001.

The Post-Gazette's Petition *inter alia* seeks to unseal the record of the September 3, 2014 hearing at PUC Dkt. No. A-2014-2415045 in its entirety. It also requests that if any party seeks 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.

By letter dated September 10, 2014, the Secretary of the Pennsylvania Public Utility Commission (“PUC” or the “Commission”), indicated that Lyft’s Answer to The Post-Gazette Petition must be filed by September 15, 2014 and must address all relevant factors, as set forth in 52 Pa. Code § 5.365,¹ regarding orders to limit the availability of proprietary information. The Post-Gazette was also provided the ability to file a Response to Lyft’s Answer by September 18, 2014.

Lyft filed its Answer on September 15, 2014 (“Lyft’s Answer”). The Post-Gazette filed its Response to Lyft’s Answer on September 18, 2014 (“The Post-Gazette’s Response”), addressing specifically the issues raised in Lyft’s Answer.

Recently, on September 23, 2014,² Lyft filed a Petition for Interlocutory Review and Answer to a Material Question (“Petition for Interlocutory Review”) with the PUC at PUC Dkt. No. A-2014-2415045, seeking review of the Administrative Law Judges’ September 2, 2014 Interim Order on Motion for Protective Order (“September 2nd Interim Order”). Lyft seeks review of the September 2nd Interim Order that the data related to rides provided to passengers via Lyft’s mobile application platform was not confidential or proprietary information for which a protective order should be entered. Lyft’s Petition for Interlocutory Review contained

¹ The Secretary’s letter cites to 52 Pa. Code § 5.423, which was repealed in 2013. It is believed the Secretary was referring to 52 Pa. Code § 5.365, titled “Orders to limit availability of proprietary information,” which replaced the repealed section.

² The Petition for Interlocutory Review was published on the electronic docket on September 24, 2014.

substantial discussion of Lyft's reasons for continued sealing of the September 3, 2014 transcript at PUC Dkt. No. A-2014-2415045 and addressed the relevant factors in 52 Pa. Code § 5.365.³ Despite the clear interrelation between the claims raised in Lyft's Petition for Interlocutory Review and the Post-Gazette's Petition, Lyft failed to serve its petition on The Post-Gazette.

On September 26, 2014, Protestant JB Taxi, LLC filed a Motion to Strike Lyft's Petition for Interlocutory Review ("JB Taxi's Motion to Strike") asking the Commission to strike and deny Lyft's Petition for Interlocutory Review due to *inter alia* due process issues surrounding the inclusion of an affidavit in Lyft's Petition for Interlocutory Review.

Also, on September 26, 2014, The Post-Gazette by letter to the Secretary ("The Post-Gazette's Letter") requested that the Commission not consider Lyft's Petition for Interlocutory Review with The Post-Gazette's Petition. In the alternative, The Post-Gazette sought permission to respond to Lyft's Petition for Interlocutory Review. By secretarial letter dated September 29, 2014, the Secretary granted The Post-Gazette the right to respond to Lyft's Petition for Interlocutory Review.⁴

³ Lyft also refers to 52 Pa. Code § 5.423.

⁴ It is The Post-Gazette's position that by the Secretary granting The Post-Gazette the right to file a response to Lyft's Petition for Interlocutory Review that the PUC has granted The Post-Gazette party status in the action at PUC Dkt. No. P-2014-2442001.

II. Argument

a. Insurance Data

The September 2nd Interim Order denied Lyft's request to protect the insurance policy and Schedule E terms and conditions in its insurance policies entered as exhibits in the action at PUC Dkt. No. P-2014-2442001 other than solely the insurance rates. September 2nd Interim Order at 4-5. Lyft does not raise in either Lyft's Answer or Lyft's Petition for Interlocutory Review any objection or argument as to why the insurance policies' terms and conditions should not be of public record in unredacted form.

As Lyft has failed to raise any claims that the terms and conditions in the insurance policies are proprietary, the issue has been waived. Further, for the reasons set forth in The Post-Gazette's Response, the insurance rates are not proprietary information. As such, the redacted policies entered as the Insurance Federation's Exhibits 1 through 3, being Lyft's insurance policies, should be unsealed in their entirety.

b. Lyft's Affidavit is Procedurally and Substantively Improper

In its Petition for Interlocutory Review, Lyft includes the affidavit of Joseph Okpaku, Director of Public Policy for Lyft. This affidavit is the sole evidentiary basis for Lyft's claims of confidential and proprietary information. The affidavit, however, is impermissible both procedurally and substantively.

First, as explained in detail in The Post-Gazette's Petition, The Post-Gazette

was denied the right to have its counsel heard on September 3, 2014. The Post-Gazette's Petition sought, *inter alia*, an immediate hearing on these issues, which to date has not been granted. The Post-Gazette again requested a hearing in a letter to the Secretary on September 26, 2014. The Secretary, however, replied on September 29, 2014 by letter that "no oral hearing will be held unless deemed necessary upon Commission review of the pleadings."

It would be completely violative of The Post-Gazette's due process rights if the Commission considers the affidavit without allowing The Post-Gazette the opportunity to cross examine Mr. Okpaku. Similarly, as noted *supra*, Protestant JB Taxi, LLC filed a Motion to Strike raising similar due process claims regarding the inability to respond and cross examine Mr. Okpaku.

Even if the Commission decided to examine Mr. Okpaku's affidavit, substantively the affidavit is severely deficient. On the face of the affidavit alone, Mr. Okpaku fails to state how he is qualified to give testimony on this issue.⁵ The affidavit is also conclusory in the extreme being predominantly hearsay and speculation. It lacks any foundation for its claims to be considered as admissible evidence. These glaring defects amplify the gross violation of due process that would occur if the Commission considers the affidavit without a hearing. The affidavit, however, is so

⁵ The Post-Gazette believes Mr. Okpaku may have previously testified in the action at PUC Dkt. No. P-2014-2442001, but as noted in The Post-Gazette's Petition, The Post-Gazette was given no opportunity to be heard, in violation of its due process rights.

filled with inadmissible evidence, conclusory statements, and speculation there is little within it to bolster Lyft's alleged need for a protective order.

c. Lyft's Request for a Protective Order Should Fail Under the First Amendment and Common Law Right of Access

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. Thus, the overarching issue is whether Lyft has first met its burden under the common law and then under the First Amendment to have any portion of the record sealed.

For the reasons previously set forth in The Post-Gazette's Petition and The Post-Gazette's Response to Lyft's Answer, the conclusory arguments in Lyft's Petition for Interlocutory Review are insufficient to overcome Lyft's burden under the common law and First Amendment right of access.

Lyft in their Answer at 7 cited, *US Investigations Services, LLC. v. Calliban*, No. 2:11-cv-0355, 2011 WL 1157256 (W.D. Pa. Mar. 29, 2011). This case demonstrates that Lyft has not met its burden in the instant case, because *Calliban* 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). Lyft's conclusory affidavit is hardly specific enough to meet the standard under the common law and First Amendment right of

access. Thus, the consideration of the factors for a protective order codified at 52 Pa. Code § 5.365 is unnecessary as Lyft cannot meet the higher burdens under the common law and First Amendment right of access and The Post-Gazette's Petition should be granted.

d. **Lyft Fails to Show Why a Protective Order is Warranted under § 5.365**

As stated in The Post-Gazette's Letter, Lyft has waived its right to discuss the factors in 52 Pa. Code § 5.365 in its Petition for Interlocutory Review. The September 10, 2014 secretarial letter mandated that Lyft address the factors prescribed under 52 Pa. Code § 5.365 in its Answer to The Post-Gazette's Petition. Lyft's Answer failed to do so. Subsequently, Lyft's Petition for Interlocutory Review attempts to address the factors prescribed under 52 Pa. Code § 5.365. As Lyft did not address the factors prescribed under 52 Pa. Code § 5.365 when it was required to do so by the PUC, it has waived its ability to do so and it is not entitled to a second bite at the apple.

If the Commission decides to consider the argument on these factors in Lyft's Petition for Interlocutory Review, an analysis of the protective order factors of § 5.365 show Lyft has failed to meet their burden under that regulatory standard.

In defense of its assertion that its information should be protected Lyft's Petition for Interlocutory Review relies upon *Pa. P.U.C. vs. Bell Atlantic, Pa., Inc.*, 86 Pa.P.U.C. 208 (June 18, 1996) ("*Bell Atlantic*") and *In Re Exelon Energy*, 94 Pa. P.U.C. 382 (June 20, 2000) ("*Exelon*"). Both cases, however, show that Lyft has failed to meet its burden under § 5.365.

In *Bell Atlantic* the Commission applied the factors of § 5.365⁶ and held that a phone carrier did not have to release a study it conducted in support of its claim to adjust service costs. *Bell Atlantic* at *9.⁷ The Commission noted that the phone company spent \$500,000 to conduct the study. *Id.* at *4, n.6. The Commission found that disclosure of the study would reveal the cost “to provide basic universal service in each of its 384 wire centers.” *Id.* at *5. This would allow competitors to know, “exactly how much it costs BA-PA to provide Basic Universal Service in each wire center and would know exactly how to price its service to underprice BA-PA.” *Id.* Further, in *Bell Atlantic*, the Administrative Law Judge (“ALJ”) interpreted a federal telecommunications statute to require disclosure of the study, but the Commission overruled that interpretation finding that the phone company was under no statutory or regulatory duty to release the study. *Id.* at *8-9.

In *Exelon*, the Commission applied the protective order standard in the context of a Right-To-Know-Law Request seeking access to three energy companies’ “total amount of gross receipts and total amount of electricity sold.” *Exelon* at *2.⁸ The Commission found that release of the total amount of electricity sold would not cause substantial economic harm to the energy companies. *Id.* at *3. The Commission explained:

⁶ The decision applied §5.423, which by 2013 amendment was repealed, but is found in identical form at § 5.365.

⁷ Pagination refers to the copy available on Westlaw at 1996 WL 497173.

⁸ Pagination refers to the copy available on Westlaw at 2000 WL 1510088.

[T]he Commission agrees that requiring the disclosure of both sales and revenue data would potentially cause unfair economic or competitive damage to the companies. The combination of this data could allow competitors to calculate the EGS's average price per kWh. As a general rule, the Commission does not require EGSs to release pricing data because such information may cause unfair economic and competitive damage. Therefore, the Commission will issue a protective order regarding the release of the EGSs' total amount of gross receipts data balancing the two competing interests, however, the Commission has determined that the total amount of electricity sold should be released as this information alone will not cause any substantial economic or competitive damage to the EGSs.

Id. at *3 (emphasis added).

Considering 52 Pa. Code § 5.365, on whether to grant a protective order, that section provides:

a) *General rule for adversarial proceedings.* A petition for protective order to limit the disclosure of a trade secret or other confidential information on the public record will be granted only when a party demonstrates that the potential harm to the party of providing the information would be substantial and that the harm to the party if the information is disclosed without restriction outweighs the public's interest in free and open access to the administrative hearing process. A protective order to protect trade secrets or other confidential information will apply the least restrictive means of limitation which will provide the necessary protections from disclosure. In considering whether a protective order to limit the availability of proprietary information should be issued, the Commission or the presiding officer should consider, along with other relevant factors, the following:

- (1) The extent to which the disclosure would cause unfair economic or competitive damage.
- (2) The extent to which the information is known by others and used in similar activities.
- (3) The worth or value of the information to the party and to the party's competitors.
- (4) The degree of difficulty and cost of developing the information.
- (5) Other statutes or regulations dealing specifically with disclosure of the information.

In this case, Lyft has failed to overcome its burden under the criteria set forth in 52 Pa. Code § 5.365.

(1) The extent to which the disclosure would cause unfair economic or competitive damage.

In *Exelon*, the Commission noted that the combination of total amount of electricity sold and sales data could allow competitors to calculate proprietary pricing information. *Exelon*, at *3. However, the total amount of electricity sold without the sales data was released. *Id.* Ride sharing and electricity service are vastly different public utilities, but Lyft's asserted harm is similar to the electric companies' alleged harm in *Exelon*, namely that disclosure will allow competitors to model their business structure. *Id.* at *2-3; Lyft's Petition for Interlocutory Review at 7-9; Affidavit of Joseph Okpaku (alleging trip data sought "would be specific enough to formulate market models and projections").

In this case, Lyft has been required to submit only three totals. The first is the number of trips from the start of Lyft's service in Pennsylvania until June 5, 2014; the second is the number of trips from June 5, 2014 to July 1, 2014;⁹ and the third is the number of trips from July 1 to September 16, 2014. *See* September 2nd Interim Order, at 3 (citing July 31, 2014 Interim Order). Each of these three numbers would reveal only the aggregate number of trips, which similar to the total amount of electricity,

⁹ This data relates to trips provided by Lyft in violation of the PUC's cease and desist order.

would be “a sensible balance of the public’s interest to free and open access of data” against the “potential harm resulting from disclosure of data.” *Exelon* at *3.

Lyft’s adopts the argument of Raiser-PA, a subsidiary of Uber Technologies, Inc., and alleges that the limited time period of some of the requested trip data would be very revealing about the success of company. *See* Lyft’s Petition for Interlocutory Review at 9. First, this time period is of Lyft’s own making by operating without previously obtaining regulatory approval. *See* September 2nd Interim Order at 3. Further, Lyft has failed to explain how releasing trip data in the aggregate even for short periods of time would allow a competitor to harm Lyft.

(2) The extent to which the information is known by others and used in similar activities

This information should be known to at least the Commission as discussed *infra* Part II (d) (5), as Lyft is under a duty to maintain this information and provide it to the Commission. In addition, other transportation carriers routinely disclose similar information as noted in the September 2nd Interim Order. Order at 4.

(3) The worth or value of the information to the party and to the party’s competitors

Lyft addresses this factor in its discussion of the first factor under § 5.365, extent to which disclosure would cause unfair economic or competitive harm. Yet, Lyft has failed to explain how aggregate trip numbers for an entire county could be used by a competitor to extrapolate about Lyft’s business. The affidavit of Mr.

Okpaku¹⁰ speculates that competitors would know how much volume of business Lyft does in Allegheny County. Lyft fears competitors will market differently in the region with this data. The affidavit also speculates that releasing this county wide data could allow competitors to potentially create “neighborhood-specific market forecasts.” Not only are Lyft’s claims bold and conclusory assertions which should not be considered by the Commission, they in no way satisfy Lyft’s immense burden.

Lyft’s speculation of different marketing is significantly less valuable to its competitors compared to the finding in *Bell Atlantic* and *Exelon*. In *Bell Atlantic*, the information was protected, because releasing the information at issue would allow competitors to know exactly how to underprice the phone company at each of its wire centers. *Bell Atlantic*, at *5. In *Exelon*, the only information protected was the sales data so that competitors could not figure out the companies’ exact charge per kilowatt. *Exelon*, at *2. Lyft has failed to show how the value to its competitors in releasing Lyft’s trip data is anything close to the value of rival phone and electric companies in *Bell Atlantic* and *Exelon*.

(4) The degree of difficulty and cost of developing the information.

In *Bell Atlantic*, the Commission noted that it cost the phone company \$500,000 to acquire the requested information. *Bell Atlantic* at *4, n. 6. In contrast, Lyft is

¹⁰ Again, it is The Post-Gazette’s stringent position that the affidavit of Mr. Okpaku should not be considered by the Commission as a result of the due process violations its use would cause. Even considering Mr. Okpaku’s affidavit, Lyft has not sufficiently satisfied their burden under the common law, First Amendment, Pennsylvania Constitution or the factors enunciated under 52 Pa. Code § 5.365.

already under a duty to collect the trip data at issue. *See infra* Part II (d) (5). Thus, if Lyft intends to comply with its administrative requirements in this Commonwealth, there would be no additional difficulty or cost of developing the information requested.

(5) Other statutes or regulations dealing specifically with disclosure of the information.

In *Bell Atlantic*, the Commission determined neither statutory nor regulatory requirements mandated disclosure of the information sought. *Bell Atlantic* at *8-9. In *Exelon*, the Commission also noted that it did not regularly require disclosure of pricing information. *Exelon*, at *3. In contrast, as pointed out by the ALJs in their September 2nd Interim Order, 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.” Order at 3. (citing 52 Pa. Code § 29.313(c); 52 Pa. Code § 29.225).

In addition, the information was introduced at a public hearing before the commission. The proceedings before the PUC are presumed public by statute. 66 Pa. C.S.A. 703. As previously set forth in The Post-Gazette’s Petition and The Post-Gazette’s Response to Lyft’s Answer, the First Amendment, Pennsylvania Constitution, and common law right of access all mandate access to judicial proceedings.¹¹

¹¹ *Bell Atlantic* acknowledges that the Pennsylvania Constitution, First Amendment, and common law right of access to, “Judicial and administrative records are subject to

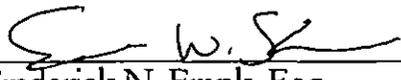
III. Conclusion

Therefore, Lyft has failed to overcome its burden under the First Amendment, Pennsylvania Constitution, and common law right of access. Further, the factors for granting a protective order under 52 Pa. Code § 5.365 also do not support the continued sealing of the public records as it relates to Lyft's trip date and insurance policies, including insurance rates. Thus Lyft's Petition for Interlocutory Review should be denied and The Post-Gazette's Petition should be granted.

Respectfully submitted,

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

DATED: October 2, 2014

By: 
Frederick N. Frank, Esq.
Ellis W. Kunka, Esq.
Attorneys for Kim Lyons and
The Pittsburgh Post-Gazette

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing Response to Petition for Interlocutory Review and Answer to a Material Question upon the person via email set forth below, in accordance with 52 Pa. Code § 1.54.

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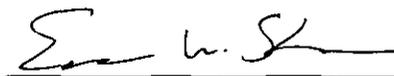
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Date: October 2, 2014



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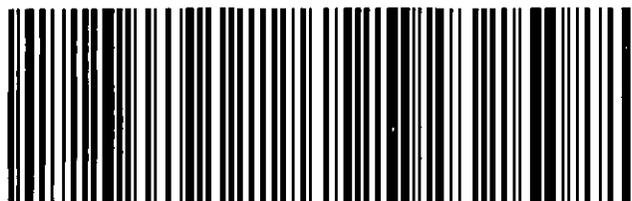
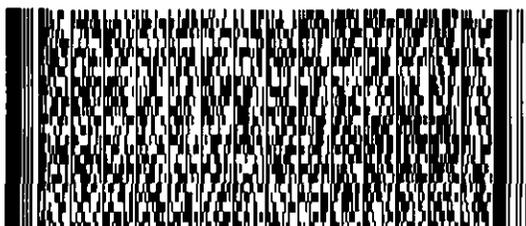
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