



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

IN REPLY PLEASE
REFER TO OUR FILE

October 14, 2014

Via E-Filing

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

Re: Pennsylvania Public Utility Commission, Bureau of Investigation
and Enforcement v. Uber Technologies, Inc.
Docket No. C-2014-2422723
**Brief in Opposition to Petition for Certification of a Discovery
Ruling for Interlocutory Review**

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Bureau of Investigation and Enforcement's Brief in Opposition to Uber Technologies, Inc.'s Petition for Certification of a discovery ruling for interlocutory review.

Copies have been served on the parties of record in accordance with the attached Certificate of Service.

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

Sincerely,

A handwritten signature in blue ink that reads "Stephanie M. Wimer".

Stephanie M. Wimer
Prosecutor
PA Attorney I.D. No. 207522

Enclosure

cc: Honorable Mary D. Long
Honorable Jeffrey A. Watson
As per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	
Complainant,	:	
	:	
v.	:	C-2014-2422723
	:	
Uber Technologies, Inc.,	:	
Respondent	:	

**BRIEF OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT
IN OPPOSITION TO
THE PETITION FOR CERTIFICATION OF A
DISCOVERY RULING FOR INTERLOCUTORY REVIEW
OF UBER TECHNOLOGIES, INC.**

Stephanie M. Wimer
Michael L. Swindler
Wayne T. Scott
Bureau of Investigation and Enforcement
P.O. Box 3265
Harrisburg, PA 17105-3265
Phone: 717-787-5000
Fax: 717-783-3458
stwimer@pa.gov
mwindler@pa.gov
wascott@pa.gov

I. STATEMENT OF THE CASE

The Bureau of Investigation and Enforcement (I&E) of the Pennsylvania Public Utility Commission (Commission), by and through its prosecuting attorneys, pursuant to 52 Pa. Code § 5.304(d), files this Brief in opposition to the Petition for Certification of a Discovery Ruling for Interlocutory Review (Petition for Certification) filed on October 6, 2014 by Uber Technologies, Inc. (Uber or Respondent).

A. Procedural History

On June 5, 2014, I&E filed a Formal Complaint (Complaint) against Uber alleging, *inter alia*, that Uber acts as a broker of transportation for compensation between points within the Commonwealth through its internet and mobile application software (the Uber app), which connects passengers to individuals who have registered with Uber as independent ride-sharing operators (Uber driver). Uber drivers do not possess Certificates of Public Convenience issued by the Commission authorizing them to provide motor carrier passenger service. As set forth in the Complaint, the Commission's Bureau of Technical Utility Services, Transportation Division, directed Uber to cease and desist from brokering transportation between points within the Commonwealth on July 1, 2012. In defiance of this letter, on or around March 13, 2014, Uber launched a ride-sharing passenger transportation service in Pittsburgh called UberX.

During the pendency of the above-captioned Complaint proceeding, I&E sought and obtained injunctive relief against Respondent. On June 16, 2014, I&E filed a Petition for Interim Emergency Relief seeking an order from the Commission directing Uber to immediately cease and desist from operating its passenger transportation service until it

receives the requisite authority to do so.¹ After a hearing on June 26, 2014, the presiding Administrative Law Judges (ALJs) granted I&E's interim emergency relief and directed Uber to immediately cease and desist from utilizing its digital platform to facilitate transportation to passengers using non-certificated drivers in their personal vehicles until Uber secures appropriate authority from the Commission.²

The Order also certified as a material question to the Commission the issue of granting or denying I&E's requested relief by an interim emergency order. By Order entered on July 24, 2014, the Commission determined that I&E met the requirements for obtaining interim emergency relief.³ The Commission directed Uber to immediately cease and desist from facilitating transportation through its digital platform until it secures appropriate authority from the Commission or I&E's Complaint is dismissed by a final and unappealable order.

On July 24, 2014, Commissioner James H. Cawley issued a Combined Statement in the Petition for Interim Emergency Relief proceeding at Docket No. P-2014-2426846, which also applied to I&E's Complaint proceeding. Commissioner Cawley stated as follows:

¹ *Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for an Interim Emergency Order requiring Uber Technologies, Inc. to immediately cease and desist from brokering transportation service for compensation between points within the Commonwealth of Pennsylvania*, Docket No. P-2014-2426846.

² *Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for an Interim Emergency Order requiring Uber Technologies, Inc. to immediately cease and desist from brokering transportation service for compensation between points within the Commonwealth of Pennsylvania*, Docket No. P-2014-2426846 (Order entered July 1, 2014).

³ *Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for an Interim Emergency Order requiring Uber Technologies, Inc. to immediately cease and desist from brokering transportation service for compensation between points within the Commonwealth of Pennsylvania*, Docket No. P-2014-2426846 (Order entered July 24, 2014).

In order to aid in the formulation of a final order in these proceedings, I will request by subsequent Secretarial Letter that Uber . . . provide the number of transactions/rides provided to passengers in Pennsylvania via the connections made to drivers through Internet, mobile application, or digital software during the following periods:

- a. From the initiation of such service in Pennsylvania to the date on which complaints were first filed by the Commission's Bureau of Investigation and Enforcement against Uber . . . drivers.
- b. From the date that the same complaints were filed to the date on which a cease and desist order was entered against Uber
- c. From the date of entry of the cease and desist order to the date on which the record in these proceedings are closed.

On July 28, 2014, a Secretarial Letter was issued that incorporated Commissioner Cawley's Combined Statement.

Consistent with the direction set forth in the Secretarial Letter, on August 8, 2014, I&E propounded Interrogatories and Requests for Production of Documents – Set I upon Uber in this proceeding. I&E's Interrogatories largely mirrored the information that was requested in the Secretarial Letter in that it asked Uber to identify the number of trips provided using its digital software between certain points in time in which Uber lacked authority to facilitate or provide passenger transportation service for compensation. I&E's Interrogatories and Requests for Production of Documents – Set I also requested that Uber identify the name of the affiliate or entity responsible for providing rides to persons between points within the Commonwealth of Pennsylvania via connections made with drivers through Uber's digital software, if such transportation was not provided by Uber Technologies, Inc.

On August 18, 2014, Uber filed Objections to I&E's Interrogatories and Requests for Production of Documents – Set I. Uber objected to the entirety of I&E's Interrogatories and document requests.

On August 28, 2014, I&E filed a Motion to Compel requesting that the presiding ALJs dismiss the objections to discovery by Uber and direct Uber to provide the information sought in I&E's Interrogatories and Requests for Production of Documents – Set I. I&E amended its Motion to Compel on August 29, 2014 to reflect that I&E unsuccessfully attempted to resolve the discovery dispute with counsel for Uber prior to seeking judicial resolution of the dispute.

Uber filed an Answer to I&E's Motion to Compel on September 3, 2014.

On October 3, 2014, the presiding ALJs entered an Interim Order granting I&E's Motion to Compel (Discovery Order).⁴

On October 6, 2014, Uber filed the instant Petition for Certification seeking interlocutory review of the Discovery Order.

B. Uber's Petition for Certification and the Discovery Order

Uber is pursuing interlocutory review because the presiding ALJs granted I&E's Motion to Compel Uber to provide the following: (1) the number of transactions or rides provided to persons in Pennsylvania via connections made with drivers through Uber's website, mobile application or digital software during certain periods of time when Uber was not authorized to provide passenger transportation service for compensation in

⁴ The Discovery Order also granted I&E's Motion for Continuance of the evidentiary hearing that was scheduled for October 23, 2014.

Pennsylvania; (2) the name of the affiliate that provided the transactions or rides if they were not provided by Uber Technologies, Inc.; and (3) supporting documentation including invoices, receipts, e-mails or other documents generated by Uber or the affiliate responsible for the distribution of the supporting documentation.

As noted above, a purpose of I&E's discovery request was to gather the necessary information in compliance with the express directive of the Commission in its July 28, 2014 Secretarial Letter at this docket. The Secretarial Letter seeks the number of transactions or rides provided by Uber during specific periods of time in order to create a complete record and aid in the formulation of a final order in the Complaint proceeding.

In the Discovery Order, the ALJs found that the trip data sought by the July 28, 2014 Secretarial Letter and by I&E's discovery is relevant to the proceeding because I&E requests civil penalties for each and every day that Uber continues to operate after the date of filing of the Complaint on June 5, 2014. The ALJs further noted that "the extent of Uber's activities may be relevant to the amount of any civil penalties that may be imposed." The ALJs also found that the trip data is not confidential because such information is of the sort that all motor carriers are obliged to provide to the Commission on a routine basis. *E.g.*, 52 Pa. Code § 29.313(c); 52 Pa. Code § 29.225. Additionally, the ALJs concluded that if the trip data were proprietary, then the proprietary nature of the material cannot act as a shield to protect its disclosure from discovery. The ALJs encouraged the parties to negotiate a confidentiality agreement or seek a protective order for the purposes of discovering the trip data. Lastly, the ALJs found that the identity of

the Uber affiliate that may have provided the trips and/or associated trip data is not confidential.

Recognizing the heavy burden imposed on one who seeks interlocutory review of a discovery ruling, Uber seeks certification of an issue that has been thoroughly considered by the ALJs and its arguments to withhold discovery have been previously rejected. In its Petition for Certification, Uber, once again, argues that the material sought by I&E's Interrogatories constitutes privileged, confidential information and highly sensitive commercial data that qualifies as a trade secret. Uber asserts that a protective order "would not be helpful" and would not prevent public disclosure of what Uber considers to be proprietary information, but does not explain how. As such, Uber fails to demonstrate extraordinary circumstances of compelling reasons necessitating interlocutory review.

II. STANDARD OF REVIEW

A discovery order will not be certified for interlocutory review unless the ruling involves "an important question of law or policy that should be resolved immediately by the Commission." 52 Pa. Code § 5.304(b). This standard is not met unless the discovery ruling involves compelling circumstances that cannot be remedied in the normal course of Commission review after an initial decision is issued. *Re Structural Separation of Bell Atlantic-Pa., Inc.*, 94 Pa. P.U.C. 375, 2000 WL 1336490 at *3 (Pa. P.U.C. 2000) ("[w]e do not routinely grant interlocutory review except upon a showing by the petitioner of extraordinary circumstances of 'compelling reasons'") (citing *Application of Knights*

Limousine Service, Inc., 59 Pa. P.U.C. 538 (1985)). Interlocutory review should not be used to “second-guess” the rulings of an administrative law judge. *Application of Academy Bus Tours, Inc.*, 1995 WL 945186 (Pa. P.U.C. 1995).

[T]he correctness or erroneousness of the ALJ’s ruling on admissibility is not a relevant consideration, either initially in considering a request for certification of a question (except to the extent that such arguments might persuade the ALJ to reverse his or her ruling), or later in considering whether interlocutory review is warranted. The pertinent consideration in both instances is whether interlocutory review is necessary, in order to prevent substantial prejudice, that is that the error and any prejudice flowing there from, could not be satisfactorily cured during the normal Commission review process. . . .

We do not routinely grant interlocutory review except upon a showing by petitioner of extraordinary circumstances . . .

Id. at 2-3 (emphasis in original). See *Re Structural Separation of Bell Atlantic-Pa., Inc.*, 94 Pa. P.U.C. 375, 2000 WL 1336490 at 3 (Pa. P.U.C. 2000); *Re Pa. Universal Serv. Fund*, 2005 WL 2170442 at 4 (Pa. P.U.C. 2005) (“correctness or erroneousness of the ALJ’s action is not a relevant consideration in determining whether interlocutory review is appropriate . . . analysis will focus on whether the alleged error, and any prejudice flowing from that issue, could not be satisfactorily cured during the normal course of Commission review . . .”) (Citing *Shea v. Freeport Telephone & Telegraph Co.*, Docket No. C-812580 (order entered Feb. 15, 1984) and *Application of Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985)).

III. SUMMARY OF ARGUMENT

Uber has not met its heavy burden to justify certification of a discovery ruling for interlocutory review. No extraordinary circumstance, or novel or important issue of law is presented. Providing responses to I&E's Interrogatories will not cause Uber substantial prejudice, especially if provided pursuant to the terms of a confidentiality agreement or protective order. The ALJs' Discovery Order does not invite extraordinary interlocutory review.

IV. ARGUMENT

The Discovery Order appropriately considers each one of the arguments that Uber presents again in its Petition for Certification. There is no extraordinary circumstance or novel or important legal issue that suggests a basis for interlocutory review.

Uber argues that the information sought in I&E's Interrogatories is privileged because it includes private confidential information pertaining to customer names, e-mail addresses and payment information and includes highly sensitive commercial data that purportedly qualifies as a trade secret.

The Discovery Order carefully considers and rejects Uber's claim of privilege. The ALJs found that the trip data that I&E seeks in discovery "is of the sort that all motor carriers are directed to submit to the Commission on a routine basis." Discovery Order at 3. The ALJs noted that Uber did not cite to a Commission decision or order where a motor carrier was exempt from providing trip information under the claim of confidentiality. The ALJs further found that the identity of the Uber affiliate that may

have provided transportation “is well within [I&E’s] purview to explore.” Discovery Order at 4. Additionally, the ALJs stated that the alleged “proprietary nature of the material by itself is insufficient to shield it from discovery.” *Id.* The ALJs encouraged the parties to share the information pursuant to a confidentiality agreement or seek a protective order.

Uber’s concern regarding the disclosure of confidential and proprietary information that may qualify as a trade secret can simply be resolved by being produced pursuant to a protective order, as the ALJs correctly observed. Documents that contain confidential or proprietary information are routinely discovered by and shared between the parties of a litigated proceeding.

Uber’s argument that a protective order is insufficient lacks merit. First, to the extent that the information sought qualifies as a trade secret, to which I&E does not agree, I&E is not a competitor and is unable to utilize the information provided for competitive advantage.

Secondly, Uber baldly asserts that disclosure of the requested information, even subject to a protective order, may eventually lead to public disclosure pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101-67.3104. Uber does not cite to a case or provide an example illustrating how the Right-to-Know Law would cause public dissemination of information that was discovered pursuant to a protective order. To the contrary, should the information that I&E seeks constitute or reveal a trade secret or confidential proprietary information, such information is expressly protected from disclosure pursuant

to the Right-to-Know Law. 65 P.S. § 67.708(b)(11) (a record that constitutes or reveals a trade secret or confidential proprietary information is exempt from access by a requester).

Lastly, Uber indicates that it is prepared to share information about the number of rides directly with the Commissioners, thus bypassing this entire proceeding. This cannot occur without violating the prohibition on *ex parte* communications, set forth in 66 Pa.C.S. § 334(c), because such a communication would be “off-the-record” during the pendency of this contested “on-the-record” proceeding. Further, Uber was directed by the Commissioners to provide trip data in order to create a complete record in this matter, pursuant to the July 28, 2014 Secretarial Letter.

Uber’s Petition for Certification is a thinly veiled attempt to delay producing information that is discoverable and evade enforcement of its unlawful actions. The fact that the information sought may be confidential or proprietary is not a valid basis to withhold from disclosure because it can be provided pursuant to a confidentiality agreement or protective order. The ALJs’ decision to grant I&E’s Motion to Compel was proper. Certification of the question should not be granted.

V. CONCLUSION

There is no compelling circumstance presented by the Discovery Order's grant of I&E's Motion to Compel responses to I&E's Interrogatories and Requests for Production of Documents – Set I that requires certification for immediate Commission review. Uber's Petition should be denied.

Respectfully submitted,



Stephanie M. Wimer
Prosecutor
PA Attorney ID No. 207522

Michael L. Swindler
Prosecutor
PA Attorney ID No. 43319

Wayne T. Scott
First Deputy Chief Prosecutor
PA Attorney ID No. 29133

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000

Date: October 14, 2014

CERTIFICATE OF SERVICE

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

Service by First Class Mail and Email:

Karen O. Moury, Esq.
Buchanan Ingersoll & Rooney, PC
409 North Second Street
Suite 500
Harrisburg, PA 17101-1357
karen.moury@bipc.com



Stephanie M. Wimer
Prosecutor
PA Attorney I.D. No. 20755

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000
stwimer@pa.gov

Date: October 14, 2014