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October 14, 2014

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Bureau of Investigation and Enforcement v. Uber Technologies, Inc.
Docket No. C-2014-2422723

Dear Secretary Chiavetta:

On behalf of Uber Technologies, Inc., I have enclosed for electronic filing the Brief of Uber Technologies, Inc. in Support of Petition for Certification in the above-captioned matter.

Copies have been served on all parties as indicated in the attached certificate of service.

Sincerely,

Karen O. Moury

KOM/tlg
Enclosure
cc: Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY COMMISSION, BUREAU OF INVESTIGATION AND ENFORCEMENT	:	
	:	**Docket No. C-2014-2422723**
v.	:	
UBER TECHNOLOGIES, INC.,	:	

BRIEF ON BEHALF OF UBER TECHNOLOGIES, INC. IN SUPPORT OF PETITION FOR CERTIFICATION

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Dated: October 14, 2014

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Uber Technologies, Inc. ("UTI") files this brief in support of its Petition for Certification filed on October 6, 2014 pursuant to Section 5.304(c) of the Commission's regulations, 52 Pa. Code § 5.304(c), seeking interlocutory review of the Interim Order on Motion to Compel ("*Interim Order*") issued by Administrative Law Judges ("ALJs") Mary D. Long and Jeffrey A. Watson on October 3, 2014. By the Petition, UTI seeks certification and interlocutory review of the following important question of law:

> Is UTI required to produce to the Bureau of Investigation and Enforcement ("I&E") customer and trip information that is protected from disclosure by the Commission's discovery rules and well-established case law?

The suggested answer: No.

I&E's interrogatories requested UTI to identify the number of rides provided to persons via connections made with drivers through UTI's website, mobile application or digital software ("App") during distinct time periods; to identify the entity that "provided rides to persons" via connections through the App if the entity was not UTI; and to provide invoices, receipts, e-mails, records and documents sent to individuals in relation to rides they received via connections through the App. The Commission's regulations do not permit parties to seek privileged information, and in this situation, a protective order would not be helpful since the information is so confidential and commercially sensitive so as to justify outright prohibition of its disclosure.

Commission review of the *Interim Order* directing UTI to answer those interrogatories is essential to prevent substantial prejudice. As a new and innovative product that is facilitating travel between points in Allegheny County, ridesharing network services are highly competitive. The privileged material sought by the interrogatories includes commercially sensitive data, which qualifies as a trade secret, especially due to its narrow focus with respect to time periods and the fact that results would cover a limited geographic region. As disclosure of this

information would diminish the value of this UTI asset and be competitively harmful to UTI's business by allowing competitors to mine historical data to give them a future competitive advantage, it is not discoverable under the Commission's rules.

Of particular concern to UTI is the broad scope of Pennsylvania's Right-to-Know Law ("*RTK Law*"), 65 P.S. §§ 67.101-67.3104. Written disclosure of trip information, even subject to a protective order, may eventually lead to public disclosure of this highly proprietary information. Certifying these questions for Commission review is particularly appropriate given a similar proceeding in which issues concerning the proprietary nature of trip data are currently pending before the Commission. *See Application of Lyft, Inc.*, Docket No. A-2014-2415045.

Moreover, the privileged material that UTI has been directed to produce contains private confidential customer information, including their email addresses and payment information, the disclosure of which would be harmful to riders and violate their rights to privacy without any advance notice or opportunity to prevent such disclosure. As its customers do not want to have this information disclosed, UTI is obligated to protect their legitimate expectations of privacy.

Notably, the *Interim Order* directs the production of information about past practices that is irrelevant to this proceeding and is not needed by I&E to prosecute the complaint. Moreover, a UTI subsidiary has obtained emergency temporary authority and is currently filling a void in the existing transportation infrastructure in Allegheny County by meeting a critical and immediate need of the traveling public for safe, reliable and affordable transportation options. See *Application of Rasier-PA LLC for Emergency Temporary Authority to Operate an Experimental Ride-Sharing Network Service Between Points in Allegheny County, Pennsylvania*, Docket No. A-2014-2429993 (Order adopted July 24, 2014) ("*ETA Order*"). By continuing to dwell on past practices that were based on a belief that another subsidiary's license covered the services that were provided through the App, the *Interim Order* is subjecting UTI to

unreasonable annoyance and burden, which is not permitted by the Commission's discovery rules.

Consistent with the Commission's Secretarial Letter dated July 28, 2014 issued at this docket, UTI is prepared to share information about the number of rides arranged between points in Allegheny County through the App during specific time periods with the Commissioners. Due to the pending complaint proceeding, UTI has not yet identified a time and means through which disclosure of this information would be appropriate in view of the prohibitions against *ex parte* communications in Section 334 of the Public Utility Code ("Code"), 66 Pa.C.S. § 334(c), and that would allow UTI to avoid leaving documents behind that that could later be requested and possibly retrieved through a request submitted to the Commission under Pennsylvania's *RTK Law*. Receipt of the information following the conclusion of the complaint proceeding should not hinder the Commission's ability to adjudicate the allegations set forth in the complaint concerning the alleged launch of UberX in March 2014 and use of the App to arrange eleven rides in Allegheny County from then until June 5, 2014.

II. BACKGROUND

On June 5, 2014, I&E filed a Complaint against UTI, alleging that it was acting as a broker, as defined by Code Section 2501(b), 66 Pa.C.S. § 2501(b), without Commission authority, through the licensing of the App that enables passengers to connect with drivers. The Complaint specifically alleges that on March 13, 2014, UTI announced the launch of UberX, a ride-sharing transportation service, in Pittsburgh, Pennsylvania, and that on eleven occasions between March 31, 2014 and April 21, 2014, I&E Officer Charles Bowser used the App to request and receive passenger service between points in Pittsburgh. On the basis of these allegations, the Complaint claims that UTI violated Code Section 1101, 66 Pa.C.S. § 1101, by offering to broker the transportation of persons for compensation and in fact brokered the

transportation of persons for compensation in Allegheny County, Pennsylvania. The Complaint proposes a civil penalty of $95,000 and indicates that future violations may result in criminal prosecution pursuant to Code Section 3302, 66 Pa.C.S. § 3302. Finally, the Complaint requests that the Commission add a $1,000 civil penalty for each and every day that UTI continues to operate after June 5, 2014.

On August 8, 2014, I&E served Interrogatories and Requests for Production of Documents-Set I on UTI. I&E's discovery specifically requested UTI to identify the number of rides provided to persons via connections made with drivers through the App during distinct time periods; to identify the entity that "provided rides to persons" via connections through the App if the entity was not UTI; and to provide invoices, receipts, e-mails, records and documents sent to passengers in relation to rides they received via connections through the App. In addition, I&E asked UTI to identify the affiliate or entity that provided rides to persons through the App if it was not UTI.

In objecting to the interrogatories on August 18, 2014, UTI argued that they sought trade secrets that are privileged material, as well as information that would not be admissible at hearing or reasonably calculated to lead to the discovery of admissible evidence. UTI further objected on the grounds that compliance with the Commission's regulatory and statutory requirements has been achieved through the *ETA Order* and continued efforts to gather additional information about past practices caused unreasonable annoyance and burden to UTI. Finally, UTI contended that information about other transactions beyond those alleged in the complaint was irrelevant and that the discovery was an impermissible fishing expedition.

I&E filed an Amended Motion to Compel on August 29, 2014, to which UTI filed an Answer on September 3, 2014. The ALJs issued the *Interim Order* on October 3, 2014 granting I&E's Amended Motion to Compel.

III. ARGUMENT

A. The *Interim Order* Directs the Production of Privileged Material that Constitutes UTI Trade Secrets and Confidential Customer Information.

Under the Commission's regulations, a party may not ask interrogatories that "relate to matter which is privileged." 52 Pa. Code § 5.361(a)(2). *See also* 52 Pa. Code § 5.321 (relating to permissible scope of discovery). Exceeding the bounds of permissible discovery, the *Interim Order* directed the disclosure of privileged material relating to confidential customer information, including email addresses and payment information, as well as privileged material relating to rides provided through the App, which qualifies as a trade secret and is protected from unlawful taking under the Fifth and Fourteenth Amendments of the United States Constitution.

First, the release of personal information about riders poses serious dangers for the public and liability concerns for UTI. *See Interim Guidelines for Eligible Customer Lists*, Docket No. M-2010-2183412 (Final Order on Reconsideration adopted on November 10, 2011) ("*ECL Order*"). In deciding on the scope of information that electric distribution companies should provide to electric generation suppliers about customers, the Commission found that customers should be permitted to restrict the release of all personal information about their account. The Commission observed that "[m]any customers have valid reasons for not wanting to disclose their customer information, and in terms of reasonable privacy expectations, customers should have the right and a reasonable means to maintain the confidentiality of their account information." *ECL Order* at 10. In this proceeding, customers would not even have a say about the information regarding their accounts that might be shared or with whom it might be shared.

Second, it is well established in Pennsylvania that a trade secret consists of a compilation of information which is used in one's business, and which gives one's business an advantage over competitors who do not know or use it. *See Sperry Rand Corp. v. Pentronix, Inc.*, 311 F.

Supp. 910 (1970), 1970 U.S. Dist. LEXIS 12473; *see also* Restatement of Torts, Section 757. The crucial indicia for determining whether certain information constitutes a trade secret are "substantial secrecy and competitive value to the owner." *Den-Tal-Ez, Inc. v. Siemens Capital Corp.*, 389 Pa. Super. 219, 566 A.2d 1214, 1228 (1989). Lists containing customer names and contact information have been found to be trade secrets. *See O.D. Anderson, Inc., d/b/a Anderson Coach and Tour, and Anderson Coach and Travel v. Benjamin Cricks, Richard Koewacich and Premier Tour & Travel Inc.*, 2003 Pa. Super 13, 815 A.2d 1063 (2003) (customer lists containing names addresses and phone numbers of customers were valuable assets since they helped to target the most likely customers for future tours); *Morgan's Home Equip. Corp. v. Martucci*, 390 Pa. 618, 624, 136 A.2d 838, 842 (1957) (lists of confidential and valuable customer data constituted trade secrets).

The trip and customer data that is the subject of the *Interim Order* is information that UTI has spent considerable time and effort to collect. As such, it is a valuable asset that belongs to UTI, the disclosure of which would diminish its market value. Particularly since the data would reveal the number of trips provided through the UTI App in a very limited geographic area of Allegheny County over distinct relatively short time periods, it would be possible for UTI's competitors to determine the size of the business and how lucrative it is. UTI uses this information for making decisions about growth or expansion of the business. If it ends up in the hands of competitors, it could be used as a basis for allocating their resources differently or changing their business models in a way that is injurious to UTI's business.

The Fifth and Fourteenth Amendments prohibit the government from depriving anyone of "property, without due process of law," or taking property "for public use, without just compensation." U.S. Const. Amend V; U.S. Const. Amend. XIV. The United States Supreme Court has long recognized that the Fifth Amendment protects intangible property. *See The West*

River Bridge Company v. Dix et al., 77 U.S. 507, 533 (1848) (no meaningful distinction between real property and "incorporeal property" for the purposes of the takings clause.) Specifically, trade secrets have been recognized as property under the Fifth Amendment. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984). The regulatory taking of a trade secret causes the value of the asset to diminish, which results in awards of damages in the form of compensation. *See Gully v. Sw. Bell Tel. Co.*, 774 F.2d 1287, 1293 (5th Cir. 1985).

Given the broad scope of Pennsylvania's *RTK Law*, disclosure of the information that is the subject of the *Interim Order*, even subject to a protective order, may eventually lead to the public release of this highly proprietary information in a way that is harmful to both UTI and its customers. The sweeping amendments to the Right-to-Know Law that went into effect on January 1, 2009 were designed to promote access to official government information in order to prohibit secrets and establish a rebuttable presumption that documents in the possession of a Commonwealth agency are public records. *See Commonwealth of Pennsylvania, Pennsylvania Gaming Control Board v. Office of Open Records*, 48 A.3d 503, 2012 Pa. Commw. LEXIS 174 (2012); 65 P.S. §67.305. The burden of proving that a record is exempt from public access is on the Commonwealth agency. 65 P.S. § 67.708(a)(1).

A "record" is broadly defined by the *RTK Law* to include "information" that is created in "connection with a transaction, business or activity of the agency." 65 P.S. §67.102. Although the *RTK Law* also contains several exemptions to the definition of "record," any applicable exemptions would protect UTI and its customers only if the Commission and the Pennsylvania Office of Open Records or appellate courts ultimately agree.

The language of the *RTK Law* and its recent application by the Office of Open Records demonstrate that even providing information on a confidential basis subject to a protective order is not sufficient to guard against disclosure of that information. To have any hope of ultimately

protecting information marked as proprietary from disclosure by the Commission, UTI would have five business days after receiving notice of the *RTK Law* request to "provide input on the release of the record." 65 P.S. § 67.707(b). The Commission would not be bound by that input, and even if the Commission would decline to produce the information on the basis of its confidentiality, the Office of Open Records could require its disclosure. *See In the Matter of Scott Kraus and the Morning Call v. Pennsylvania Public Utility Commission,* Docket No. AP 2013-1986 (documents submitted confidentially as part of a Commission staff investigation were ordered to be publicly released).[1]

The Commission has previously found that a party is not required to provide commercially sensitive data as part of discovery. In the *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Their Default Service Programs*, Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669 and P-2011-2273670, ALJ Barnes issued an Order Denying the Retail Energy Supply Association's Motion to Compel on that very basis (Order dated March 16, 2012). Refusing to require the companies to disclose confidential information, ALJ Barnes prevented the mining of historical data by competitors to in an effort to obtain a competitive advantage in the future. Order at 6. The ALJ emphasized that even the existence of a protective order did not provide a basis for the companies to disclose confidential information. Order at 8.

The *Interim Order* suggests that the information sought by I&E's discovery is similar to the daily log sheets that call and demand carriers are required to complete and make available to the Commission upon request under the Commission's regulations at 52 Pa. Code § 29.313(c) and that limousine carriers must maintain under the Commission's regulations at 52 Pa. Code §

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[1] Decision is available on Office of Open Records website. http://dced.state.pa.us/open-records/final-determinations/FileHandler.ashx?FileID=12318. Decision is currently on appeal in *Pennsylvania Public Utility Commission v. Scott Kraus/The Morning Call*, 2254 C.D. 2013.

29.335. However, these regulations have nothing to do with whether UTI should be directed to provide aggregate trip data in a narrow geographic region over distinct relatively short-time periods. Clearly, the purpose of the requirement for call and demand and limousine carriers to maintain log sheets, which contain information about origin and destination, the number of passengers and the fares collected, is to ensure that they are following their tariffs and other Commission rules applicable to such carriers. Recognizing the benefits of bringing needed transportation alternatives to riders in Allegheny County, the Commission has granted emergency temporary authority, on an experimental basis, for Rasier-PA to operate a ride-sharing network service and has accepted a tariff that explains the rate calculation methods without specifying actual rates.[2]

Additionally, the log sheets maintained by existing carriers are far different than the information that is the subject of the *Interim Order*. Most notably, the Commission's regulations do not require the carriers to compile or provide information showing the total number of trips over distinct time periods or to provide private customer data. In any case, by the very nature of the service being new and innovative, thereby qualifying for classification as experimental service that is separate and apart from call and demand service and limousine service, data about rides arranged through the App is commercially sensitive, and its disclosure would be harmful to UTI and its customers.

B. Producing the Information That Is the Subject of the *Interim Order* Interrogatories Would Cause Unreasonable Annoyance and Burden to UTI.

The Commission's regulations do not permit discovery which "[w]ould cause unreasonable annoyance, embarrassment, oppression, burden or expense." 52 Pa. Code §

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[2] Rasier-PA's proposed tariff is available on the Commission's website: http://www.puc.pa.gov/pcdocs/1302328.pdf, along with the Secretarial Letter noting its acceptance: http://www.puc.pa.gov/pcdocs/1306394.doc.

5.361(a)(2). Producing transaction data and customer information would cause unreasonable annoyance and burden to UTI. This is particularly true when UTI's subsidiary, Rasier-PA, has complied with the Commission's *ETA Order* and is lawfully providing ride-sharing network services in response to an immediate public need in Allegheny County. Compliance with the Commission's regulatory and statutory requirements has been achieved, and efforts to gather additional information through discovery in this proceeding about past practices is unduly burdensome. The documentation requested by I&E would be voluminous and would require UTI to commit significant resources to compile every single communication to passengers regarding rides offered in Pennsylvania. In order to ensure protection of customer information, UTI would be required to proactively review any document to be produced in order to remove or redact such privileged information. This would be an unduly burdensome exercise, especially in view of the limited, if any, probative value this information would produce.

C. The *Interim Order* Requires the Production of Information That Is Not Admissible at Hearing Or Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

Under the Commission's regulations, a party may only seek discovery that is relevant to the subject matter involved in the pending action and which appears reasonably calculated to lead to the discovery of admissible evidence. 52 Pa. Code §5.321(c). The transactions that are subject of the *Interim Order* go well beyond the specific allegations of the complaint. The complaint filed by I&E in this proceeding contains allegations about a launch of Uber X on March 13, 2014 and eleven occasions on which Officer Bowser was allegedly transported by drivers that he requested using the UTI App. Information about any other transactions is irrelevant to those specific allegations, and would constitute an impermissible fishing expedition. The Commission has previously concluded that the standard for discovery is relevance, not curiosity. *See Pennsylvania Public Utility Commission, et al. v. Pennsylvania American Water*

Company, Docket No. R-2011-2232243 (Order on Motion to Compel dated July 21, 2011 at 21-22).

The *Interim Order* finds that the information requested by the interrogatories is relevant to the request for relief in the complaint – namely that a civil penalty of $1,000 be imposed on UTI for each day it has allegedly illegally operated since March 13, 2014. However, the complaint does not contain any allegations about continued operations. Moreover, the Commission has yet to adjudicate whether it has jurisdiction over an entity licensing a software product or that any activities violated the Code. In short, the *Interim Order* offers no rationale for expecting UTI to provide information to support and supplement allegations in the complaint that I&E filed and has the burden to proof to sustain.

Moreover, since UTI is protected by the Fifth Amendment of the United States Constitution from disclosing this information, the *Interim Order* directs the production of data that would neither be admissible at hearing nor reasonably calculated to lead to the discovery of admissible evidence. Because UTI could not be compelled to offer testimony about the number of rides that were provided through the App or to disclose any affiliated or wholly-owned entities to which it licensed its App, it is inappropriate to require production of this data through discovery.

The United State Supreme Court has found that the Fifth Amendment privilege may be asserted in an administrative proceeding and protects against disclosures that the party reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. *See Kastigar et al. v. United States*, 406 U.S. 441 (1972). Section 3310 of the Public Utility Code ("Code") provides that any person or corporation operating as a broker, without a license issued by the Commission "shall be guilty of a summary offense, and any subsequent offense by such person or corporation shall constitute a misdemeanor of the third

degree." 66 Pa.C.S. § 3310. Given the allegations in the complaint about unlawful brokering, which have not been proven and the Commission has not yet adjudicated, disclosure of information about rides that were arranged through the UTI App could result in prosecution under Code Section 3310 and therefore it is protected by the Fifth Amendment.

D. Commission Review of *Interim Order* Is Essential to Avoid Substantial Prejudice.

For the reasons noted above, Commission review of the *Interim Order* is essential to avoid substantial prejudice to both UTI and its customers. Due to the *RTK Law* in Pennsylvania, the production of privileged and confidential information could result in its public disclosure. Moreover, I&E does not need the information that is the subject of the *Interim Order* to prosecute the complaint. To the contrary, I&E has sought this information for the purpose of amending the complaint and seeking the imposition of a higher civil penalty on a company whose subsidiary has entered the Allegheny County market with an innovative technology-enabled product that is filling a void in the existing transportation infrastructure and meeting a critical and immediate need for safe, reliable and affordable transportation options.

Consistent with the Commission's Secretarial Letter dated July 28, 2014 issued at this docket, UTI is prepared to share information about the number of rides arranged between points in Allegheny County through the UTI App during specific time periods with the Commissioners. Due to the pending complaint proceeding, UTI has not yet identified a time and means for disclosure of this information in a manner that would not violate the rules regarding *ex parte* communications and that would allow UTI to avoid leaving documents behind that that could later be requested and possibly retrieved through a request submitted to the Commission under Pennsylvania's *RTK Law*. Receipt of the information following the conclusion of the complaint proceeding should not hinder the Commission's ability to adjudicate the allegations set forth in

the complaint concerning the alleged launch of UberX in March 2014 and use of the App to arrange eleven rides in Allegheny County from then until June 5, 2014.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, Uber Technologies, Inc. respectfully requests that the Administrative Law Judges certify the question raised by the Interim Order to the Commission for interlocutory review to avoid substantial prejudice to UTI.

Respectfully submitted,

Dated: October 14, 2014

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Attorneys for Uber Technologies, Inc.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY COMMISSION, BUREAU OF INVESTIGATION AND ENFORCEMENT	:	
	:	**Docket No. C-2014-2422723**
v.	:	
UBER TECHNOLOGIES, INC.	:	

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 § 1.54 (relating to service by a party).

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Dated this 14th day of October, 2014.

Karen O. Moury, Esq.