



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

November 7, 2014

Via Electronic 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. Lyft, Inc.
Docket No. C-2014-2422713

Dear Secretary Chiavetta:

Enclosed for filing is the original copy of the Bureau of Investigation and Enforcement's (I&E) Motion to Take Official Notice of Commission Order. I&E deems the instant filing necessary and appropriate as a result of the recent Answer to Motion to Compel filed by Lyft, Inc. dated October 29, 2014 (Lyft's Answer).

I&E is troubled and disappointed by the accusations set forth in Lyft's Answer which demean the credibility of the Commission's prosecutory arm. In an effort to cure the erroneous and deceptive accusations launched against I&E, I&E seeks to provide clarity regarding its position relative to seeking a protective order in this matter by moving that Administrative Law Judges Long and Watson take official notice of a recently entered Commission Order in a separate but related docket, which is pivotal to understanding I&E's position, but which was completely ignored in Lyft's Answer.

Copies have been served on the parties of record in accordance with the Certificate of Service. A responsive pleading shall be filed within 20 days of the date of service of the motion. Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Michael L. Swindler".

Michael L. Swindler
Prosecutor
PA Attorney ID No. 43319

Enclosures

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

v.

Lyft, Inc.

:
:
:
:
:
:

Docket No. C-2014-2422713

**BUREAU OF INVESTIGATION AND ENFORCEMENT'S
MOTION TO TAKE OFFICIAL NOTICE OF COMMISSION ORDER**

TO ADMINISTRATIVE LAW JUDGES MARY D. LONG AND JEFFREY A.
WATSON:

NOW COMES the Pennsylvania Public Utility Commission's (Commission), Bureau of Investigation and Enforcement (I&E), by its prosecuting attorneys, pursuant to Section 332(e) of the Public Utility Code, 66 Pa.C.S. § 332(e), and Sections 5.103 and 5.408 of the Commission's regulations, 52 Pa. Code §§ 5.103 and 5.408, and moves that Administrative Law Judges Long and Watson, the Presiding Officers in the above-captioned matter (ALJs), take official notice of a Commission Order in its consideration of Lyft, Inc.'s Answer to Motion to Compel the Response of Lyft, Inc. to the Bureau of Investigation and Enforcement's Interrogatories and Requests for Production of Documents – Set II. In support of its Motion, I&E avers as follows:

I. Background

1. On October 3, 2014, I&E served its Interrogatories and Requests for Production of Documents – Set II (I&E Set II) on Lyft, Inc. (Lyft or Company). Set II Nos. 1 and 2 merely supplement the discovery sought in I&E’s Set I Nos. 1 and 2.¹ Set II Nos. 3-6 seek information relevant to Lyft’s propensity to comply with regulatory authorities, which I&E alleges is relevant to the determination of an appropriate civil penalty to assess against Lyft, should a civil penalty be deemed appropriate.

2. On October 14, 2014, Lyft filed objections to I&E Set II.

3. On October 24, 2014, I&E filed a Motion to Compel Lyft’s responses to I&E Set II, which set forth the bases for I&E’s discovery requests, noting that the presiding ALJs had granted a similar motion compelling Lyft to respond to those remaining portions of I&E Set I that it had not yet answered.

4. On October 29, 2014, Lyft filed an Answer to I&E’s Motion to Compel. This answer was, in many ways, not responsive to I&E’s motion. However, instead of focusing on answering the issues specifically set forth in I&E’s Motion, Lyft tangentially engaged in an attack on I&E’s credibility, including the following:

- a) “In [I&E’s Motion to Compel responses to Set II] I&E made it clear that it had no objection to entering into a protective order....” Lyft Answer at 2;
- b) “However, in a shocking reversal, I&E informed Lyft on October 28, 2014, that it was no longer willing to support the protective order....” Lyft Answer at 3;

¹ Notably, Lyft did not object to Set I, No. 1 and subsequently provided the information sought.

- c) “I&E waited until the day before Lyft’s response to the Motion to Compel Set II was due to share that information.” Lyft Answer at 3;
- d) “But the recent conduct by I&E in this matter raises serious concerns with Lyft regarding the credibility of I&E.” Lyft Answer at 3;
- e) “Lyft is simply unable to provide I&E with highly confidential documents when I&E is willing to so wantonly abandon its prior representations....” Lyft Answer at 3-4; and
- f) “Given that I&E is apparently unwilling to commit....” Lyft Answer at 4.²

II. Official Notice of a Commission Order

5. A party may make a request by motion for relief desired in writing at any time. 52 Pa. Code §§ 5.103.

6. In addition, Section 5.408(a) of the Commission’s regulations states:

- (a) Official notice or judicial notice of facts may be taken by the Commission or the presiding officer.

52 Pa. Code § 5.408(a).

7. On October 23, 2014, the Commission entered its *Order Regarding Proprietary Claims* at Docket Nos. A-2014-2415045, P-2014-2442001 and A-2014-2415047 (*October 23 Order*) which addressed Lyft’s Petition for Interlocutory Review wherein Lyft posed the following question:

Does the trip data of [transportation network companies] constitute proprietary information and/or a trade secret that must be restricted from public disclosure?

² Lyft made similar accusations attacking I&E’s credibility in the Company’s Answer to I&E’s Motion to Strike the Petition of Lyft, Inc. for Interlocutory Review and Answer to a Material Question, which Lyft filed on October 30, 2014 at the instant docket.

8. The *October 23 Order* answered Lyft's question in the negative and held, in pertinent part:

Notwithstanding the foregoing, even considering Lyft's Petition in total, we do not find the allegations presented therein persuasive. PPG argues, and we agree, that the affidavit is conclusive and speculative and fails to meet the standards established at 52 Pa. Code § 5.365 for proprietary treatment. The information at issue, the aggregate number of trips Lyft provided prior to receiving authority to operate in Pennsylvania, is of obvious concern to the public and would only be protected from disclosure for extraordinary reasons. Lyft has failed to provide such reasons.

The information is simply aggregate data, as noted above. It is not a trade secret or an operational methodology and, in the Commission's judgment, is not of significant value to Lyft's competitors sufficient to warrant non-disclosure. 52 Pa. Code § 5.365(a)(3). Under these circumstances, we reject Lyft's argument.

Transparency is critical and will not be compromised on specious grounds. Under these circumstances, we reject Lyft's application to seal the record regarding trip data.

October 23 Order at 17-18.

9. I&E requests that the ALJs take official notice of the Commission's *October 23 Order*, specifically, the Commission's determination that aggregate trip data does not warrant proprietary treatment.

10. "Official notice" is an exception to the exclusiveness of the record doctrine and permits an agency to take official notice of facts that are obvious and notorious to an expert in the agency's field and those facts contained in reports and records in the agency's files, in addition to those facts that are obvious and notorious to the average person. *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1928);

Falasco v. Commonwealth of Pa. Bd. of Probation and Parole, 521 A.2d 991, 994 (Pa. Cmwlth. 1987).

11. In *Nolan v. Pa. Power & Light Company*, Docket No. C-00956756, 1996 Pa. PUC LEXIS 127 (Order entered October 10, 1996), the Commission noted that administrative law judges may notice facts under 66 Pa.C.S. § 332(e).

12. Presiding officers have, on numerous occasions, taken official notice of facts not otherwise in the record when rendering decisions. *Titus Wright v. Philadelphia Gas Works*, 2014 WL 5424278 Pa.P.U.C. October 23, 2014 (Docket No. C-2013-2368462); *Pa.P.U.C., Law Bureau Prosecutory Staff v. Columbia Gas of PA, Inc.*, 2009 WL 2913676 Pa PUC 2009 Docket No. C-20077249 (Order entered September 4, 2009).

13. In Lyft's Answer, the Company characterizes I&E's election to not support a protective order regarding the alleged proprietary nature of Lyft's trip data and related documents as, among other things, a "shocking reversal" even though prior to the filing of Lyft's Answer, I&E advised Lyft's counsel that I&E's position was based on the *October 23 Order*.

14. Consistent with and as a result of the Commission's holding in the *October 23 Order*, I&E determined that it was no longer necessary or appropriate to support a motion for protective order regarding the "trip data" sought by I&E in its Sets I and II discovery to Lyft since the Commission found in its *October 23 Order* that the identical trip data did not warrant proprietary treatment and would be made available to the public.

15. Lyft's Answer disingenuously fails to include any reference to I&E's explanation or the *October 23 Order* and inappropriately castigates I&E for its position.

16. Despite the fact that the *October 23 Order* is entered in a docket separate from I&E's complaint proceeding, the matters both involve the fate of the identical trip data and, therefore, reliance upon the Commission's pronouncement in its *October 23 Order* is appropriate. In fact, it would be inappropriate to ignore the *October 23 Order* since it provides the Commission's position regarding the information sought.

III. No Protective Order Sought

17. Lyft's Answer claims that I&E "made clear that it had no objection to entering into a protective order...." Lyft Answer at 2. I&E's Motion to Compel does not support Lyft's claim. Rather, I&E's Motion expressly stated the following:

Simply, Lyft could easily designate its responses as "Confidential" and provide the information pursuant to a Protective Order that limits the availability and public disclosure of such information. To date, Lyft has not requested a Protective Order in this proceeding.

I&E Motion at 8, ¶ 21.

Additionally, the production of the requested documents in I&E Interrogatory No. 2 – Set II can be made subject to a Protective Order that limits the availability and public disclosure of such information. Releasing the documents subject to a Protective Order will negate any burden, expense or investigation associated with the removal or redaction of confidential information.

I&E Motion at 10, ¶ 27.

18. In neither instance did I&E expressly state that it would join in a motion for protective order nor did I&E state that it would support Lyft's motion for protective order. Lyft was not precluded then – and is not precluded now - from filing its own motion for protective order, whether or not Lyft has I&E's support.

19. To date, Lyft has not filed a motion for a protective order in the above-docketed matter.

20. Lyft is free to file a motion for protective order without regard to whether I&E joins the motion or agrees to support the motion.

WHEREFORE, the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement respectfully requests that the ALJs take official notice of the Commission's *Order Regarding Proprietary Claims* at Docket Nos. A-2014-2415045, P-2014-2442001 and A-2014-2415047 (*October 23 Order*) for the purpose of allowing a full and complete review of Lyft's Answer and fully appreciating the misinformation espoused by Lyft therein.

Respectfully submitted,



Michael L. Swindler
Prosecutor
PA Attorney ID No. 43319

Stephanie M. Wimer
Prosecutor
PA Attorney ID No. 207522

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

Dated: November 7, 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:

James P. Dougherty, Esq.
Barbara A. Darkes, Esq.
Adeolu A. Bakare, Esq.
McNees Wallace & Nurick LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
jdougherty@mwn.com
bdarkes@mwn.com
abakare@mwn.com



Michael L. Swindler
Prosecutor
PA Attorney ID No. 43319

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

Date: November 7, 2014