

Karen O. Moury
717 237 4820
karen.moury@bipc.com

409 North Second Street
Suite 500
Harrisburg, PA 17101-1357
T 717 237 4800
F 717 233 0852
www.buchananingersoll.com

November 12, 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 Answer of Uber Technologies, Inc. to Motion for Sanctions 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.	:	

ANSWER OF UBER TECHNOLOGIES, INC. TO MOTION FOR SANCTIONS

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

Pursuant to Section 5.371(b) of the Commission’s regulations, 52 Pa. Code § 5.371(b), Uber Technologies, Inc. (“UTI”), by and through its counsel, Karen O. Moury and Buchanan Ingersoll & Rooney PC, files this Answer opposing the Motion for Sanctions filed by the Commission’s Bureau of Investigation and Enforcement (“I&E”) on November 7, 2014, and in support thereof, avers as follows:

I. INTRODUCTION

1. I&E’s Motion for Sanctions must be denied in its entirety because: a) UTI has lodged valid objections to the discovery, which have not been reviewed by the Commission; b) UTI’s discovery responses are not necessary for I&E to prosecute the complaint it filed on June 5, 2014; c) the sanctions proposed by I&E go well beyond what is permitted for failure to comply with a discovery order; and d) the imposition of the proposed sanctions would exceed the Commission’s statutory authority and violate fundamental principles of due process. The proposed sanction to use arbitrary “proxy” evidence, without objection or cross-examination by UTI, is unprecedented, tramples UTI’s rights in defending the complaint and exceeds the harshest allowable sanction condoned by courts for failure to comply with a discovery order.

2. By Order adopted on July 24, 2014, the Commission granted emergency temporary authority (“*ETA Order*”) to Rasier-PA LLC (“Rasier-PA”), a UTI subsidiary, to provide ridesharing network services in Allegheny County in response to a critical and immediate public need arising from the complete inadequacy of existing transportation alternatives. *Application of Rasier-PA LLC for Emergency Temporary Authority*, Docket No. A-2014-2429993. On August 21, 2014, following the certification of adequate liability insurance coverage by UTI’s insurance carrier, the Commission issued a certificate of public convenience to Rasier-PA. As a result, UTI’s subsidiary is lawfully providing the same ridesharing network services in Allegheny County that are the subject of the complaint.

3. With Rasier-PA providing Commission-approved ridesharing network services, the pressing concerns highlighted by I&E regarding public safety and adequate liability insurance have been fully addressed. No useful public purpose is served by dwelling on past practices and attempting to expand the parameters of the complaint that was filed on June 5, 2014. It is fully within I&E’s control to move forward with prosecution of that complaint or to engage in settlement discussions with UTI to bring this matter to a prompt disposition.¹

II. BACKGROUND

4. On June 5, 2014, I&E filed a complaint against UTI alleging that it announced the launch of ridesharing services in Pittsburgh, Pennsylvania on March 13, 2014 and that I&E Motor Carrier Enforcement Manger Charles Bowser (“Office Bowser”) arranged eleven rides using UTI’s Internet, mobile application or digital software (“App”) between March 31, 2014 and April 21, 2014. UTI filed an answer on June 26, 2014, admitting the licensing of its App,

¹ I&E has refused to engage in settlement discussions without having access to the confidential trip data requested through discovery.

which connects passengers and drivers in select cities throughout the world, and denying that the licensing of software by a software company requires a brokerage license from the Commission.

5. On August 8, 2014, I&E served Interrogatories and Requests for Production of Documents – Set I (“Interrogatories”) upon UTI. These Interrogatories sought the number of transactions/rides provided to passengers in Pennsylvania via connections made with drivers through the App during specific time periods, and customer data including invoices, receipts, e-mails, records and documents sent to individuals in relation to rides they received via the App.

6. On August 18, 2014, UTI filed objections to the Interrogatories, noting that the customer and trip information is protected from disclosure by the Commission’s discovery rules and well-established case law. UTI argued that the customer information is confidential and that the commercially sensitive and proprietary trip data constitutes a trade secret, especially due to its narrow focus with respect to time periods and the limited geographic region. UTI also highlighted concerns with the broad scope of Pennsylvania’s Right-to-Know Law, 65 P.S. §§ 67.101-67.3104. Additionally, UTI contended that the discovery was not relevant to the allegations in the complaint and that its production would not lead to the discovery of admissible evidence.

7. I&E filed an Amended Motion to Compel on August 29, 2014, and UTI filed an Answer to I&E’s Motion to Compel on September 3, 2014. In its Answer to the Motion to Compel, UTI reiterated its earlier objections, while also arguing that production of the data would cause an unreasonable burden, particularly when UTI’s subsidiary, Rasier-PA, has complied with the Commission’s *ETA Order* and is lawfully providing ridesharing network services in response to a critical and immediate public need in Allegheny County. As compliance

with the Commission's regulatory and statutory requirements has been achieved, UTI contended that the production of documents relating to past practices is unduly burdensome.

8. On October 3, 2014, the presiding administrative law judges ("ALJs") issued an Interim Order granting I&E's Motion to Compel ("*Interim Discovery Order*") and directing UTI to serve responses to the Interrogatories within ten days.

9. On October 6, 2014, UTI filed a Petition for Certification requesting interlocutory review by the Commission of the *Interim Discovery Order*.

10. On October 14, 2014, UTI filed a Brief in Support of the Petition for Certification and I&E filed a Brief in Opposition to the Petition.

11. On October 17, 2014, the ALJs issued an Interim Order denying the Petition for Certification. On the same date, the ALJs issued an Interim Order amending the *Interim Discovery Order* to permit UTI to redact credit card numbers, social security numbers, e-mail addresses, telephone numbers or other personal identifying information for the trip-related documents requested by I&E.

12. UTI has not served responses to the Interrogatories on I&E for the same reasons as expressed in its Objections, Answer to Motion to Compel, Petition for Certification and Brief in Support of Petition for Certification. These filings are fully incorporated herein by reference.

13. By the pending Motion for Sanctions, I&E seeks: a) imposition of a civil penalty in the amount of \$1,000 per day for each day going forward from October 17, 2014 to the date when UTI complies with the *Interim Discovery Order*; b) permission to use a proxy number of rides taken using the App during the specified time periods without objection or cross examination; c) prohibition on UTI from asserting a defense that a subsidiary brokered or provided transportation services; and d) any other sanction that the ALJs deem appropriate.

14. By this Answer opposing the Motion for Sanctions, UTI contends that the proposed sanctions are inappropriate because: a) UTI has lodged valid objections to the discovery, which have not been reviewed by the Commission; b) UTI's discovery responses are not necessary for I&E to prosecute the complaint it filed on June 5, 2014; c) the sanctions proposed by I&E go well beyond what is permitted for failure to comply with a discovery order; and d) the imposition of the proposed sanctions would exceed the Commission's statutory authority and violate fundamental principles of due process.

III. APPLICABLE LEGAL STANDARDS

15. Under Section 5.371(a)(1) of the Commission's regulations, the presiding officer may make an appropriate order if a party fails to respond to discovery requests. 52 Pa. Code § 5.371(a)(1). Section 5.371(d) of the Commission's regulations provides that a failure to comply with an order may not be excused on the ground that the discovery sought is objectionable, unless the party failing to act has filed an appropriate objection. 52 Pa. Code § 5.371(d).

16. The specific sanctions available to presiding officers include those set forth in Section 5.372(a) of the Commission's regulations, as follows:

- (1) An order that the matters regarding which the questions were asked, the character or description of the thing or land, the contents of the paper, or other designated fact shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.
- (2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing in evidence designated documents, things or testimony.
- (3) An order striking out pleadings or parts thereof, staying further until the order is obeyed, or entering a judgment against the disobedient party or individual advising the disobedience.
- (4) An order with regard to the failure to make discovery as is just.

52 Pa. Code § 5.372(a).

17. Sections 5.371 and 5.372 of the Commission’s regulations, 52 Pa. Code §§ 5.371-5.372, are patterned after Pennsylvania Rules of Civil Procedure (“Pa.R.C.P.”) Rule 4019. Section 5.372(a)(4) of the Commission’s regulations, 52 Pa. Code § 5.372(a)(4), which allows a presiding officer to issue and order “as is just,” mirrors Pa.R.C.P. 4019(c)(5).

18. In determining whether lower courts properly exercised judicial discretion to formulate an appropriate sanctions order pursuant to Pa.R.C.P. 4019(c)(5), reviewing courts consider whether the lower court struck the appropriate balance between the procedural need to move the case to prompt disposition and the substantive rights of the parties. A central question in those cases is whether the party’s noncompliance is egregious enough to warrant the harshest allowable sanction of a “default” or final determination, or if a lesser sanction strikes a better balance. *See Marshall v. SEPTA*, 76 Pa.Cmwlth. 205, 463 A.2d 1215 (1983) (failure of a party to respond to interrogatories in over five months, without making an objection, warranted a sanction order prohibiting the party from entering a defense and presenting evidence); *Gonzales v. Procaccio Brothers Trucking Company*, 268 Pa. Super. 245, 407 A.2d 1338 (1979) (failure to answer an interrogatory that asks for information that is not determinative of the entire controversy would seldom, if ever, warrant the harshest allowable sanction of a default judgment); *Brown v. Ferroni*, 25 Phila. 580 (Pa. Com. Pl. 1993) (precluding a party from offering testimony of a particular expert witness is an appropriate sanction for failure to provide sufficient responses to interrogatories since it does not prevent party from presenting other evidence).²

² *See also The Florida Bar Journal*, May 2009, Volume 83, No. 5, “Review of Orders Dismissing or Defaulting for Discovery Violations: The Evolution of the Abuse of Discretion Standard,” citing *Mercer v. Raine*, 443 So. 2d 944 (Fla. 1983) (mere failure to comply with discovery order, by itself, is insufficient to justify a default or dismissal, which is a severe sanction that should be employed only in extreme circumstances).

IV. ARGUMENT

19. I&E has failed to demonstrate that any sanctions are warranted, including the harshest allowable sanction of sustaining the complaint, let alone the sanctions that it has proposed which go well beyond the permissible and appropriate range of sanctions. I&E's Motion for Sanctions must be denied in its entirety because: a) UTI's responses are not necessary in order for I&E to prosecute the complaint it filed on June 5, 2014; b) UTI has lodged valid objections to the Interrogatories, which have not been reviewed by the Commission; c) the sanctions proposed by I&E go well beyond what is permitted for addressing a failure to respond to discovery; and d) the imposition of the proposed sanctions would exceed the Commission's statutory authority and violate fundamental principles of due process. The proposed sanction to use arbitrary "proxy" evidence, without objection or cross-examination by UTI, is unprecedented, tramples UTI's rights in defending the complaint and exceeds the harshest allowable sanction condoned by courts for failure to comply with a discovery order.

20. At the outset, I&E has not shown that a sanctions order is necessary. The purpose of a sanctions order is to move a case to prompt disposition. *Marshall, supra*. A sanctions order is not needed to move this case to prompt disposition and would trample UTI's substantive rights. This is especially true given UTI's pending Motion for Judgment on the Pleadings, which demonstrates that the complaint does not even set forth factual allegations that, if proven, would result in a finding that UTI has violated the Public Utility Code, 66 Pa.C.S. §§ 101 *et seq.* ("Code").

21. I&E does not need the responses to the Interrogatories to move forward with the prosecution of the complaint, which alleged the announcement of a launch of ridesharing services in Allegheny County and eleven rides obtained by Officer Bowser using the UTI App.

Presumably when I&E filed its complaint on June 5, 2014, it was prepared to substantiate those allegations. A complaining party is expected to put forth the support for its allegations or have the complaint dismissed. The Commission expects no less even of *pro se* complainants. *See, e.g., Scheffer v. Columbia Gas of Pennsylvania, Inc.*, Docket No. C-2010-2153353 (September 22, 2011).

22. Further, a party that has initiated a legal proceeding through the filing of a complaint should be prepared at the time the complaint is filed to substantiate those allegations and move forward with the proceeding. *See Pa. Public Util. Comm., Bureau of Investigation and Enforcement v. Glacial Energy of Pennsylvania, Inc.*, Docket No. C-2012-2297092 (Order Granting Motion for Prehearing Conference dated November 1, 2012 and Prehearing Order #2 dated January 2, 2013). Rather than fulfill its burden to prosecute the complaint that it filed over five months ago, and present the evidence it gathered to substantiate those allegations, I&E is improperly seeking to obtain additional information from UTI that goes well beyond the parameters of the complaint. If I&E is not prepared to prosecute the complaint it filed, it should be dismissed outright.

23. Seeking to expand the scope of the complaint is unwarranted and does not justify a sanctions order, especially since I&E's original objectives have been fulfilled. When I&E filed its complaint on June 5, 2014, it followed shortly thereafter with the filing of a Petition for Interim Emergency Order at Docket No. P-2014-2426846 on June 20, 2104. In that Petition, I&E focused on public safety and adequate liability insurance as its key concerns for initiating the prosecution. As those issues have been fully addressed by the Commission through the *ETA Order*, the continued use of enforcement resources by I&E is futile and is a waste of utility

ratepayer resources, especially when those efforts are geared at expanding rather than concluding the pending complaint proceeding.

24. Besides being unnecessary to move the case to a prompt disposition, a sanctions order is inappropriate at this time because UTI has lodged valid objections to the Interrogatories. *See* 52 Pa. Code § 5.371(d). Although the ALJs dismissed those objections in granting I&E's Motion to Compel, the Commission has not reviewed this ruling because the ALJs refused to certify the *Interim Discovery Order* to the Commission. Moreover, by raising objections to the Interrogatories and seeking Commission review of the *Interim Discovery Order*, UTI has not simply ignored the Interrogatories, as did the noncompliant party in *Marshall, supra*, but rather has attempted in good faith to utilize the tools that are available when Interrogatories are objectionable.

25. Even if any sanctions are appropriate at this stage of the proceeding, the sanctions proposed by I&E are unprecedented, unauthorized and inconsistent with the letter or spirit of Section 5.372 of the Commission's regulations. 52 Pa. Code § 5.372. The regulations specify sanctions that involve limitations on the ability of the noncompliant party to participate in the proceeding and contemplate the possible issuance of a final determination against a noncompliant party. Although Section 5.372(a)(4) of the Commission's regulations, 52 Pa. Code § 5.372(a)(4), is a more general provision, a review of the case law interpreting the same civil procedural rule demonstrates that it simply affords a court or presiding officer some flexibility to fashion an appropriate sanction that may not be specifically mentioned in the rule. In fashioning an appropriate sanction, courts and presiding officers are expected to avoid where possible imposing the harshest sanction available – *i.e.* the issuance of a final determination against a noncompliant party. *See Marshall, Gonzales, and Brown, supra.*

26. The sanctions proposed by I&E exceed the harshest sanction condoned by courts for failure to comply with a discovery order. Neither the Commission's regulations nor the case law interpreting the same rule of civil procedure authorize or contemplate the issuance of a sanction order that allows the moving party to expand the allegations of its complaint, to have proxy evidence admitted into the record or to have civil penalties imposed for each day when responses to Interrogatories are not served.

27. Particularly when UTI's subsidiary has been providing critically needed Commission-approved ridesharing services to the public in Allegheny County due to the complete inadequacy of existing transportation options pursuant to the *ETA Order*, it is puzzling why I&E is seeking greater sanctions than are envisioned by the Commission's regulations or permitted by the courts. I&E explains that it is seeking a "severe" sanction because of UTI's alleged "blatant disregard and continued defiance of the orders of the presiding ALJs and the Commission." Motion at p. 1. However, despite making that bald assertion at the outset of the Motion, I&E never provides any support for it – because it is simply not true. To the contrary, UTI has not been found to be in violation of any Commission order. Further, as noted above, the purpose of a sanctions order is to move the case to prompt disposition (*Marshall, supra*), not to penalize a party for any prior (or ongoing) alleged transgressions.

28. In addition to exceeding the harshest sanction condoned by courts for failure to comply with a discovery order, any sanction which would allow the complaining party to expand the allegations and rely on arbitrary proxy evidence in support of them, particularly without any ability of the respondent to object to its introduction or cross examine the witness providing the testimony, violate fundamental principles of due process. It is well settled that for matters coming before an administrative agency, a party must be afforded reasonable notice of the issues

raised and have an opportunity to present any response or objection. *Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utility Commission*, 763 A.2d 440 (Pa. Cmwlth. 2000); *Honey Brook Water Co. v. Pennsylvania Public Utility Commission*, 167 Pa. Cmwlth. 140, 647 A.2d 653 (1994). The use of proxy evidence, or allowing I&E to arbitrarily decide the number of rides that were arranged through the App, is antithetical of due process principles. I&E has offered no case law to support such a proposition, and the Commission would have no lawful basis upon which to impose civil penalties.

29. As the complainant, I&E bears the burden of proving its case. 66 Pa.C.S. § 332(a). To establish a sufficient case and satisfy its burden of proof, I&E must demonstrate by a preponderance of the evidence that UTI engaged in the activities set forth in the complaint and that it is entitled to the relief it is seeking. *Patterson v. Bell Telephone Company*, 72 Pa. P.U.C. 196 (1990); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. den.* 602 A.2d 863 (Pa. 1992). To meet its burden of proof, I&E must present evidence more convincing, by even the smallest amount, than that presented by UTI. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950). Nothing in the Code, the Commission regulations or prior Commission decisions allow a party to use proxy evidence to carry its burden of proof. In fact, since I&E's complaint does not even allege ongoing activities (other than to seek a civil penalty for any additional days on which UTI is found to have violated the Code), the proxy evidence I&E is seeking to permission to present - without objection or challenge - would result in an inappropriate expansion of the complaint's allegations. *See O'Toole v. Metropolitan Edison Company*, Docket No. C-2008-2045487, 2009 Pa. PUC LEXIS 907 (2009) (issues not raised in complaint may not be raised in hearing).

30. Further, I&E's proposed sanction for a civil penalty of \$1,000 per day for each day that UTI does not serve responses to the Interrogatories is not authorized by Code Section 3301, which empowers the Commission to impose a \$1,000 civil penalty only for a violation of the Code, Commission regulations or Commission orders. 66 Pa.C.S. § 3301(a). As the *Interim Discovery Order* is not a Commission order, a civil penalty for failure to comply with it is not permitted by the statute. Moreover, the proposed sanction fails to consider the factors and standards for evaluating the amount of a civil penalty that is imposed for the violation of a Commission order, regulation or statute, as prescribed by the Commission's policy statement at 52 Pa. Code § 69.1201. *See also Scheffer, supra.*

31. The only sanction proposed by I&E that is of the nature contemplated by the Commission's regulations and that is consistent with the case law is the request for UTI to be prohibited from asserting a defense that a UTI subsidiary actually brokered or provided transportation services. However, even that sanction is inappropriate since I&E, as a Commission representative, has access to the transcript that was produced as part of the application proceedings of Rasier-PA LLC ("Rasier-PA"), a UTI subsidiary, for experimental authority to provide ridesharing network services throughout the Commonwealth and between points in Allegheny County, at Docket Nos. A-2014-2424608 and A-2014-2416127. In that transcript, Rasier-PA's witness identified the name of the UTI subsidiary that was contracting with operators to provide transportation service through the UTI App in Allegheny County prior to the grant of emergency temporary authority. Therefore, contrary to I&E's assertions that UTI is seeking to prevent it from naming the correct party in the complaint, I&E could have opted at any time since that testimony was offered on August 18, 2014 to amend the complaint to name that entity.

32. As I&E filed the complaint on June 5, 2014 and it is within I&E's control to move this case forward to a prompt disposition, without responses to the Interrogatories from UTI, a sanctions order is unwarranted. Given that I&E does not need this information to prosecute the complaint, neither the Commission's regulations nor the case law support the imposition of any sanctions on UTI for declining to provide responses to Interrogatories that go well beyond the parameters of the complaint.

V. **CONCLUSION**

WHEREFORE, for the foregoing reasons, Uber Technologies, Inc. respectfully requests that the Commission deny the Motion for Sanctions filed by the Bureau of Investigation and Enforcement and grant such other relief as may be just and reasonable under the circumstances.

Respectfully submitted,

Dated: November 12, 2014



Karen O. Moury
BUCHANAN INGERSOLL & ROONEY PC
409 North Second Street, Suite 500
Harrisburg, PA 17101-1357
(717) 237-4820

Attorneys for Uber Technologies, Inc.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**PENNSYLVANIA PUBLIC UTILITY
COMMISSION, BUREAU OF
INVESTIGATION AND ENFORCEMENT**

v.

UBER TECHNOLOGIES, INC.

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Docket No. C-2014-2422723

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).

Via Email and First Class Mail

Michael L. Swindler, Esquire
Stephanie M. Wimer, Esquire
Wayne T. Scott, Esquire
Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265
mwindler@pa.gov
stwimer@pa.gov
wascott@pa.gov

Mary D. Long
Jeffrey A. Watson
Administrative Law Judges
Pennsylvania Public Utility Commission
301 5th Avenue, Suite 220
Pittsburgh, Pennsylvania 15222
malong@pa.gov
jeffwatson@pa.gov

Dated this 12th day of November, 2014.



Karen O. Moury, Esq.