



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

IN REPLY PLEASE
REFER TO OUR FILE

November 26, 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

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Answer of the Bureau of Investigation and Enforcement to the Motion of Uber Technologies, Inc. for Judgment on the Pleadings in the above-referenced proceeding.

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

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

Sincerely,

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

Enclosure

cc: ALJ Mary D. Long and ALJ 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	:	

**ANSWER OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT
TO THE MOTION OF UBER TECHNOLOGIES, INC.
FOR JUDGMENT ON THE PLEADINGS**

TO THE HONORABLE MARY D. LONG AND HONORABLE JEFFREY A. WATSON:

Pursuant to 52 Pa. Code §§ 5.102 and 5.103, the Bureau of Investigation and Enforcement (I&E) of the Pennsylvania Public Utility Commission (Commission), Complainant in the above-docketed matter, by and through its prosecuting attorneys, hereby files this Answer to the Motion of Uber Technologies, Inc. (Uber or Respondent) for Judgment on the Pleadings. For the reasons explained below, Uber's Motion should be denied.

I. INTRODUCTION

1. 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), without Commission authority. The Complaint seeks civil penalties in the amount of \$95,000 and an additional \$1,000 per day for each day that Uber continues to operate after the date of filing.

2. Uber filed an Answer on June 26, 2014, in which it disputed numerous factual allegations in I&E's Complaint, including the allegation that Uber, through the Uber app, is acting as a broker of transportation in Pennsylvania without Commission authority. Uber Answer at ¶ 6.

3. During the course of a proceeding, a party is permitted to submit a petition for an interim emergency order, pursuant to 52 Pa. Code § 3.6. Accordingly, on June 16, 2014, I&E filed a Petition for Interim Emergency Relief at Docket No. P-2014-2426846, seeking a Commission Order requiring Uber to immediately cease and desist from brokering transportation for compensation between points within Pennsylvania. Following an evidentiary hearing, the petition was granted by Order dated July 1, 2014,¹ and Uber was directed to cease and desist its operations in Pennsylvania utilizing its digital platform to facilitate transportation for compensation to passengers using non-certificated drivers in their personal vehicles.

4. Notably, the July 1 Order concluded the following:

I&E has established that its right to relief is clear. That is, the Petition raises a substantial legal question and I&E adduced sufficient evidence to conclude that it has a reasonable expectation of success on the merits of a proceeding on the underlying complaint.

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 (Order entered July 1, 2014) (hereinafter referred to as July 1 Order).

July 1 Order at 11.

5. The July 1 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.²

6. On November 6, 2014, Uber filed the instant Motion for Judgment on the Pleadings. Uber filed the Motion on the day before it was required to provide alternative hearing dates to the presiding Administrative Law Judges (ALJs) to be used to schedule an evidentiary hearing in this matter. *See Interim Order on Motion to Compel and Motion for Continuance* (Order entered on October 3, 2014).

7. In the Motion, Uber alleges that the Commission lacks jurisdiction over the licensing of software by a software company. Uber's Motion also alleges that I&E's Complaint contains no factual allegations to support that Uber is violating Sections 1101 and 2501 of the Public Utility Code, 66 Pa.C.S. §§ 1101, 2501.³

8. Pleadings in this proceeding have not been closed. I&E's Complaint, which was filed on June 5, 2014, is pending and the numerous factual allegations therein have not been resolved.

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 24, 2014) (hereinafter referred to as July 24 Order).

³ Interestingly, Uber raises these arguments for the first time now, when the matter is ready to be scheduled for a hearing. Uber did not file Preliminary Objections to I&E's Complaint, pursuant to 52 Pa. Code § 5.101, asserting a lack of Commission jurisdiction nor did it allege that I&E's Complaint lacked sufficient specificity.

9. Further, on November 7, 2014, I&E filed a Motion for Sanctions due to Uber's failure to provide answers to discovery requests pursuant to the presiding ALJs' directive in their Interim Order on Motion to Compel and Motion for Continuance that was entered on October 3, 2014. Among the outstanding discovery requests that were court-ordered to be disclosed to I&E is name of the Uber affiliate that may have provided the unlawful passenger transportation in the Commonwealth of Pennsylvania, if not the Uber parent company. Incredibly, through the instant Motion for Judgment on the Pleadings, Uber seeks dismissal of I&E's Complaint based on its denial of I&E's allegation that Uber facilitated or provided the unlawful transportation and yet, Uber refuses to provide the name of the licensee or affiliate responsible for the provision or facilitation of such transportation, despite being directed to do so.

10. In addition to the Complaint and Motion for Sanctions filed by I&E, there is one more pending pleading. On November 13, 2014, I&E filed a Motion to Compel responses to its Set II Interrogatories and Requests for Production of Documents. Uber objected to answering the entirety of I&E's Set II discovery requests and I&E seeks to compel those responses.

II. LEGAL STANDARD

11. Section 5.102(a) of the Commission's regulations, 52 Pa. Code § 5.102(a), permits any party to move for judgment on the pleadings after the pleadings are closed, but within such time as not to delay a hearing. The presiding officer will grant a motion for judgment on the pleadings if the record shows that there is no genuine issue as to a

material fact and that the moving party is entitled to judgment as a matter of law. 52 Pa. Code § 5.102(d)(1).

12. The Commission must view the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. *Painter v. Aqua Pennsylvania, Inc.*, Docket No. C-2011-2239556 (Order entered May 22, 2014) (citing *First Mortgage Co. of Pennsylvania v. McCall*, 459 A.2d 406 (Pa. Super. 1983); *Mertz v. Lakatos*, 381 A.2d 497 (Pa. Cmwlth. 1976)). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Thomson Coal Company v. Pike Coal Company*, 412 A.2d 466 (Pa. 1979). Judgment will be granted only where the right to relief is clear and free from doubt. *Painter v. Aqua Pennsylvania, Inc.*, Docket No. C-2011-2239556 (Order entered May 22, 2014).

13. The Commission has interpreted Section 5.102(c) of its regulations in conformity with Rule 1035 (now Rule 1035.1) of the Pennsylvania Rules of Civil Procedure. *South River Power Partners, L.P. v. West Penn Power Company*, Docket No. C-00935287 (Order entered November 6, 1996). Accordingly, a non-moving party may not rest upon mere allegations or denials of the pleadings, but must submit some materials to establish that a genuine issue of material fact exists. Pa.R.C.P. No. 1035.3; *Stover v. The United Telephone Co. of Pennsylvania*, Docket No. C-00923833 (Order entered July 21, 1992); see also *Nicastro v. Cuyler*, 467 A.2d 1218 (Pa. Cmwlth. 1983); *Pennsylvania Gas & Water Co. v. Nenna & Frain, Inc.*, 467 A.2d 330 (Pa. Super. 1983); *Geriot v. Council of Borough of Darby*, 457 A.2d 202 (Pa. Cmwlth. 1983).

14. The Commission's regulations at 52 Pa. Code § 5.102(c) serve judicial economy

by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa.C.S. § 703(a); *Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n*, 563 A.2d 557 (Pa. Cmwlth. 1989); *S.M.E. Bessemer Cement, Inc. v. Pa. Pub. Util. Comm'n*, 540 A.2d 1006 (Pa.Cmwlth. 1988).

III. ARGUMENT

A. Uber's Motion for Judgment on the Pleadings should be Denied Because Genuine Issues of Material Fact are in Dispute

15. In its Complaint, I&E alleges that Uber, through its app, acts as a broker of transportation for compensation in Pennsylvania without proper Commission authority. *See* Complaint at ¶ 4. The facts averred in I&E's Complaint demonstrate that but for the use of the Uber app, I&E Motor Carrier Enforcement Manager Charles Bowser (Officer Bowser) would not have been able to obtain transportation for compensation from Uber and Uber drivers. *See* Complaint at ¶¶ 9-10. Therefore, I&E alleges that Uber's app facilitated and arranged the transportation services that were furnished to Officer Bowser by drivers associated with Uber.

16. Uber misconstrues the allegations in I&E's Complaint and states that "the allegations, if accepted as true, demonstrate that Uber announced a launch of ridesharing services and licensed its App that allowed passengers to connect with drivers." Uber Motion at ¶ 11. Uber then asserts that the Commission lacks jurisdiction over the licensing of software by a software company. *Id.*

17. I&E's Complaint contains no factual allegation or reference to a purported licensing of Uber software.

18. If Uber's role in the unlawful transportation was limited to licensing software, then it would seem that Uber would be anxious to provide responses to I&E's discovery, which seeks the name of the Uber affiliate, if not Uber, that facilitated and provided transportation, because such information may aid Uber in its defense. This simply illustrates how disingenuous Uber's actions continue to be in this case.

19. In essence, Uber's Motion for Judgment on the Pleadings recognizes that factual allegations remain in dispute. Merely denying I&E's factual allegations does not entitle Uber to obtain judgment on the pleadings. In fact, the arguments in Uber's Motion for Judgment on the Pleadings present a stronger case for holding an evidentiary hearing because genuine issues of material fact are in dispute. In addition, I&E has submitted materials into record evidence which establish that genuine issues of material fact exist.

20. At the evidentiary hearing regarding I&E's Petition for Interim Emergency Relief, I&E presented evidence to support its contention that Uber offered and provided Officer Bowser with transportation. I&E's evidence was accepted by the presiding ALJs and the Commission in their determination that I&E satisfied its burden of proving that its right to interim emergency relief against Uber is clear.

21. In the July 24 Order, the Commission stated as follows:

The ALJs concluded that I&E's Petition raised a substantial legal question and adduced sufficient evidence to conclude there is a reasonable expectation of success on the merits on the underlying Complaint. July 1st Order at 11. According to the record evidence, neither Uber nor its drivers, who provided rides to Officer Bowser after he initiated service requests using the Uber app, hold authority from the Commission to provide transportation services. *Id.*

The ALJs rejected Uber's contention that it is not a broker, but a software

company licensing a smartphone application to its wholly owned subsidiary Gegen, which was granted a statewide brokerage license. Uber offered no evidence to support the notion that Gegen offered any of the transportation used by Officer Bowser. Rather, the ALJs determined that the facts support I&E's argument that Uber offered the transportation.

Officer Bowser testified that he downloaded the Uber app on his smart phone and was required by Uber to register his credit card information with Uber and to provide an e-mail address in order to complete the download of the Uber app. Officer Bower testified that he then requested service, which was provided on approximately eleven occasions. After the service was provided, Officer Bowser was advised of the charge and made payment with the credit card information previously provided. He testified the invoices indicated the charge was made by Uber.

Id. at 12.

July 24 Order at 11.

22. Therefore, the factual allegations in I&E's Complaint are soundly supported by evidence entered into the record regarding I&E's Petition for Interim Emergency Relief proceeding, Docket No. P-2014-2426846. Because genuine issues of material fact exist, Uber's Motion for Judgment on the Pleadings should be denied.

B. Uber's Motion for Judgment on the Pleadings should be Denied Because the Pleadings in this Matter are not Closed

23. Section 5.102(a) of the Commission's regulations provides the following:

- (a) *Generally.* After the pleadings are closed, but within a time so that the hearing is not delayed, a party may move for judgment on the pleadings or summary judgment

52 Pa. Code § 5.102(a).

24. The pleadings in this matter have not been closed. I&E's Complaint, Motion for

Sanctions and Motion to Compel responses to I&E's Set II discovery requests are pending. I&E's Complaint was filed on June 5, 2014. I&E's Motion for Sanctions was filed on November 7, 2014 and I&E's Motion to Compel was filed on November 13, 2014.

25. I&E's Motion for Sanctions recommends sanctions for Uber's deliberate withholding of pertinent evidence directly related to factual issues in this proceeding, *i.e.*, the name of the Uber affiliate or licensee that may have facilitated or provided the unlawful passenger transportation in the Commonwealth of Pennsylvania, if not the Uber parent company.

26. I&E's Motion to Compel seeks to compel Uber to respond to I&E's Set II Interrogatories and Requests for Production of Documents. I&E's Set II discovery requests were designed to gather knowledge and information to establish the precise corporate entity responsible for each aspect of the transportation arranged through the Uber software application. I&E's discovery is necessary because Uber has repeatedly raised the contention that Uber Technologies, Inc. purely licenses software and does not broker or provide the transportation of persons – a factual issue in the Complaint that remains disputed.

27. Because the pleadings have not been closed, Uber's Motion for Judgment on the Pleadings should be denied in accordance with the clear language in Section 5.102(a) of the Commission's regulations, 52 Pa. Code § 5.102(a).

WHEREFORE, for the reasons set forth above, the Bureau of Investigation and Enforcement respectfully requests that the Motion for Judgment on the Pleadings of Uber Technologies, Inc. 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

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

Dated: November 26, 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 and Rooney, P.C.
409 North Second Street
Suite 500
Harrisburg, PA 17101-1357
karen.moury@bipc.com



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

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 772-8839
stwimer@pa.gov

Dated: November 26, 2014