

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement

v.

Uber Technologies, Inc., Rasier-PA, LLC
Rasier, LLC and Gegen, LLC

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C-2014-2422723

**INTERIM ORDER
GRANTING IN PART, BIE'S SECOND MOTION FOR SANCTIONS**

On June 6, 2014, the Commission's Bureau of Investigation and Enforcement (BIE), filed a complaint against Uber Technologies, Inc. (Uber). The complaint alleged, among other things, that Uber was acting as a broker of transportation without a certificate of public convenience and that its actions constitute a violation of the Public Utility Code. 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. Uber filed an answer on June 23, 2014.

On August 8, 2014, BIE served interrogatories and a request for documents upon Uber, intended to elicit the information directed by a July 28, 2014 Secretarial Letter wherein the parties were directed to provide trip data and other information for consideration as part of the record in the enforcement proceedings. (Set I)

Uber did not respond to the discovery. BIE filed a motion to compel. By order dated October 3, 2014 the motion was granted and Uber was directed to answer discovery within 10 days of entry of the order.

On October 24, 2014, BIE served additional interrogatories and request for production of documents on Uber. (Set II). Uber objected to the discovery and on

November 13, 2014, BIE filed a motion to compel. By Order dated November 25, 2014, the motion was granted and Uber was directed to answer the Set II discovery on or before December 5, 2014.

On November 7, 2014, BIE filed a motion for sanctions because Uber refused to respond to BIE's discovery as directed by the October 3 Order. BIE contended that Uber's continued refusal to provide the trip data and other information sought in discovery, BIE has been unable to discover the scope of Uber's transportation activities and has not been able to fully prepare its case. Uber filed a response to the motion.

By order dated November 26, 2014, we granted the motion for sanctions and required that Uber serve full and complete answers to all outstanding discovery requests on or before December 12, 2014. The order further provided that, in the event that Uber would fail to serve answers to discovery on or before December 12, 2014, it shall be assessed a civil penalty in the amount of \$500 per day for each day it fails to answer until the conclusion of the evidentiary hearing on the complaint. The penalties were made due and payable each day. We concluded that the assessment of a civil penalty was appropriate pursuant to Section 3301 of the Public Utility Code, which permits the assessment of a civil penalty when a party refuses "to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the Commission" and Section 5.372(a)(4) of the Commission's regulations, which permits us to impose any sanction which is just in the circumstances. We indicated that we would provide Uber with one more opportunity to comply with the October 3 Order, however, if it continued to refuse to comply, we shall impose a civil penalty of \$500 per day for each day thereafter that it fails to serve discovery responses until the conclusion of the evidentiary hearing on the complaint. The order entered on November 26, 2014 further provided that the \$500 per day civil penalty, as a sanction for failing to provide the requested discovery information would be assessed, in addition to any penalties which we may impose if BIE is successful in proving the violations of the Public Utility Code alleged in its complaint.

On January 9, 2015, BIE filed an amended complaint, which replaced its complaint filed on June 5, 2014, in order to identify additional respondents affiliated with Uber

Technologies to this proceeding which are averred to be responsible for or involved in facilitating and/or providing unauthorized passenger motor carrier services within the Commonwealth. In addition, the amended complaint updates and quantifies the alleged violations alleged by BIE by removing the “per day” violation component and replacing it with a “per ride” violation component and recalculating the appropriate civil penalty as the relief requested. BIE also calculated a proposed civil penalty based upon a “proxy” number of trips. On February 2, 2015, Uber filed an answer to the amended complaint, and requested that the amended complaint be dismissed with prejudice.

Also, on January 9, 2015, BIE filed its second motion for sanctions. BIE avers that Uber has failed to provide answers to discovery requests pursuant to the interim order on the motion to compel and motion for continuance entered on October 3, 2014 and that Uber failed to comply with the interim order motion for sanctions entered on November 26, 2014. BIE has averred that Uber has openly refused to comply with the orders and regulations of the Commission and has failed to abide by the November 26, 2014 order requiring Uber to serve full and complete answers to all outstanding discovery requests on or before December 12, 2014, or pay the civil penalty. BIE avers that Uber has neither served the outstanding discovery, nor paid the daily civil penalty, and requests that new, more severe sanctions be imposed upon Uber.

BIE proposes several possible sanctions for our consideration, including the imposition of civil penalties of \$1,000 for each day Uber continues to fail to answer the discovery from October 17, 2014 to the date that Uber complies with the discovery order; grant BIE permission to use a “proxy” number of trips taken while Uber lacked Commission authority without objection or cross-examination; prohibiting Uber from asserting the defense that transportation was provided by an affiliate of Uber Technologies, rather than by Uber itself; as well as any other sanction deemed appropriate.

On January 14, 2015, Uber filed an answer to the motion. In its answer to the second motion for sanctions, Uber reiterated that it opposed the motion for the same reasons set forth in its response filed to the first motion for sanctions.

On January 29, 2015, an interim order on the second motion for sanctions was entered. The motion for sanctions was held in abeyance, and we scheduled oral argument on the motion for February 18, 2015.

The oral argument on the second motion for sanctions convened as scheduled on February 18, 2015. After initial argument by counsel and prior to adjourning the proceeding, the parties entered into discussions in an attempt to resolve the outstanding issues in this matter. Counsel for the parties expressed a desire to continue their discussions subsequent to the February 18, 2015 proceeding. By order dated February 24, 2015, the matters agreed upon were memorialized. Specifically, the parties were directed to submit a proposed stipulation of fact on or before March 4, 2015. In the event that the parties were not able to enter into a stipulation, Uber was again directed to serve full and complete answers to all outstanding discovery requests and the parties were directed to provide proposed dates for the scheduling of the evidentiary hearing in this matter.

The parties engaged in productive discussions, but were not able to meet the March 4, 2015 deadline. A joint request for an extension of time was granted. The parties filed a timely joint status report on March 18, 2015. The parties report that Uber had filed partial discovery responses on March 6, 2015. However, they were unable to agree on proposed stipulations. Therefore, they provided dates for an evidentiary hearing on the complaint. Accordingly, in the ordering paragraphs below, an evidentiary hearing will be scheduled.

As noted above, BIE has sought permission to use a “proxy” number of trips for the time periods set forth for investigation by the Commission in its Secretarial Letter dated July 28, 2014. BIE served discovery requests seeking trip data for these periods of time. Uber refused to provide the trip data. By orders dated October 3, 2014, and November 25, 2014, November 26, 2014, and February 24, 2015, we directed Uber to serve full and complete answers to this discovery. To date, Uber has refused to do so. Therefore, BIE wishes to advocate for the calculation of a civil penalty on a “per trip” basis rather than a “per day” basis. In BIE’s view, this will result in a civil penalty calculation that more appropriately reflects the gravity of Uber’s alleged unlawful conduct. This proxy data is “derived from information from

multiple sources that compares statistical data of Uber to that of Uber's primary competing ride sharing entity." BIE takes the position that by comparing Uber and Uber's competitor, Uber has likely provided more rides than its competitor. Therefore, it proposes to apply a multiplier for the trip data provided to the Commission by Uber's competitor.¹ As part of the proposed sanction, BIE contends that we should preclude Uber from cross-examination or objection to the proxy number.²

Uber opposes the use of proxy data. First, Uber contends that use of proxy data in an enforcement proceeding is unprecedented. Further, Uber argues that any decision by the Commission must be based on substantial evidence. Uber asserts that a proxy number, by definition, cannot be substantial evidence.

Second, Uber takes the position that BIE does not need the proxy data because it is not relevant until a determination has been made that there was a violation of the Public Utility Code. BIE should have been prepared to make all of the allegations that it was going to make when it filed the complaint initially. Uber should not have to "assist" BIE by providing the trip data which may result in a substantially higher penalty than the penalty sought in the original complaint.³ In Uber's view, the parties can make the legal argument regarding the imposition of a penalty on a "per trip" or a "per day" basis after an evidentiary hearing without Uber providing the actual trip data in discovery.

We share BIE's frustration with Uber's recalcitrance in the conduct of this matter. We further share First Deputy Chief Prosecutor Wayne Scott's concern that the Commission's enforcement role will be much harder in the future if Uber's repeated refusal to comply with orders of the presiding Administrative Law Judges and the Commission is without consequence:

You know, Your Honor, I have been amazed over my years about how many times things get out. If big companies do something,

¹ Amended Complaint ¶¶ 42-45.

² The proposed proxy number is 19,000 trips. Amended Complaint ¶ 45.

³ Transcript of February 18, 2015, N.T. 21.

another big company knows about it. Maybe they know about it through the board room, the courtroom, whatever.

If a tiny, little trucking company knows about it, other little trucking companies find out. I don't know if it's the region; I don't know if it's the barroom. I don't know where they find out, but they find out, and guess what, people are looking at this.

....

What do you tell the next company who ignores you? What do you tell the next company that comes into Pennsylvania, disregards the law and just goes forward and does whatever they want to do? What do you tell the next company that you say, give this information to this party, and they say, no?⁴

We have already ruled that the information sought by BIE in discovery is discoverable and relevant in these proceedings. Uber has represented that it is willing to offer the trip data at the evidentiary hearing. However, this is not a proper response to BIE's discovery,⁵ nor does it constitute compliance without numerous orders directing full and complete answers to discovery. The arguments made by Uber for why it should not be required to comply with our orders are not an adequate defense to BIE's requests for sanctions.

However, we are constrained to deny BIE's request to use proxy numbers in place of trip data and to preclude any objection or cross-examination of the proxy number. Although there must be a consequence to Uber for its conduct in these discovery proceedings, any decision we make on the merits of BIE's complaint must be founded on substantial evidence. In order to assure that the proxy number is reasonable, inquiry must be made into the mathematical and statistical analysis used by BIE to develop the number. This inquiry risks the integrity of a proprietary order which was properly sought by and granted to Uber's competitor.⁶ Further, to preclude Uber from objecting to the method that was used to develop the number, is a substantial violation of due process.

⁴ N.T. 15-16.

⁵ Answer to BIE Application for Subpoena of Johnathan Feldman dated March 23, 2015.

⁶ BIE does not make any averment that Uber's competitor consented to or was made aware that BIE used its trip data to make assumptions about Uber's activity and developed a multiplier based upon it.

In its amended complaint, BIE seeks a civil penalty to be assessed against Uber and to be calculated on a “per ride” of “per trip” basis, as opposed to a “per day” basis. The Secretarial Letter dated July 28, 2014 and subsequent Orders of the undersigned presiding officers required Uber to address “[t]he number of transactions/rides provided to passengers in Pennsylvania via the connections made with drivers through Internet, mobile applications, or digital software” during the specified periods. Uber was ordered, on more than one occasion, to provide this information to BIE and Uber has refused to comply with these orders. Under the circumstances, and based upon Uber’s defiance of the Orders of the undersigned, BIE is prevented from fairly and adequately preparing and prosecuting this matter.

Section 5.372(a)(2) of the Commission’s regulations,⁷ provides that a presiding officer may enter 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. Accordingly, based upon Uber’s refusal to comply with the October 3, 2014, November 25, 2014, November 26 Orders, or the February 24, 2015 Order, Uber shall be prohibited from providing any evidence, including any testimony or evidence of any kind, and shall be prohibited from presenting any challenge or conducting any cross examination of any witness or evidence, in any way related to any evidence presented regarding the dates, times, drivers, vehicles, relationship to Uber, number of rides taken, and related facts or issues, while Uber lacked operating authority from the Commission. Uber shall further be prohibited from providing any evidence, including any testimony or evidence of any kind, and shall be prohibited from presenting any challenge or conducting any cross examination of any witness or evidence, in any way related to any evidence presented related to any discovery requests propounded by BIE and unanswered by Uber. Uber shall also be prohibited from asserting any claim, position or defense that Rasier, LLC; Rasier-PA, LLC; Gegen, LLC; or any other affiliate under the Uber Technologies, Inc., corporate umbrella, or otherwise, is the actual broker or provider of the passenger transportation services which are the subject of this proceeding.

⁷ 52 Pa.Code § 5.372(a)(2).

Finally, based upon the conduct of Uber, at the hearing of this matter, consistent with the Secretarial Letter dated July 28, 2014, the parties shall be prepared to address “[w]hether either evidence of prior unlawful operations or contumacious refusal to obey Commission orders negates the need for the proposed service and/or the fitness of [Uber Technologies and its affiliates]” to continue to hold a certificate of public convenience issued by the Commission.

As to BIE’s remaining request regarding the imposition of civil penalties, we will grant BIE’s request to increase the civil penalty imposed by the November 26 Order. The November 26, 2014 order directed that “penalties are due and payable each day.” However, Uber has failed or refused to provide BIE with full and complete discovery responses, as ordered, and has failed or refused to pay any of the civil penalty, in defiance of the November 26 Order. We agree with BIE that, in consideration of Uber’s blatant defiance of the November 26 Order, more severe sanctions and an increased civil penalty must be imposed upon Uber. Accordingly, in addition to the sanctions previously imposed, an additional civil penalty in the amount \$500 per day shall be imposed from December 12, 2014, the date the discovery responses were due to BIE in accordance to the November 26 Order imposing sanctions, to the date that Uber fully complies with the discovery orders dated October 3, 2014 (compelling answers to the Set I discovery), and November 25, 2014 (compelling answers to the Set II discovery), or the date of the conclusion of the evidentiary hearing in the above captioned complaint, whichever is first met. The penalties imposed herein are due and payable each day.

We are aware that BIE has filed a petition with the Commission⁸ to release the trip data which was submitted to the Commission on a confidential basis in the context of the compliance filing in the application proceeding of Rasier-PA, LLC at Docket Nos. A-2014-2424608 and A-2014-2416127. Rasier-PA, LLC, has filed an answer to that petition. In the event that BIE is successful and the Commissioners grant its request, our ruling on the proxy data will become moot. However, the parties will be permitted to argue what impact the date of that the disclosure of the trip data to BIE, may have on our civil penalty assessment, and the evidentiary preclusion imposed upon Uber, as previously discussed, if any.

⁸ Docket No. P-2014-2466136.

THEREFORE,

IT IS ORDERED:

1. That an evidentiary hearing on the above complaint shall be scheduled for Wednesday, May 6, 2015 at 9:00 a.m. in an available hearing room in Pittsburgh.

2. That BIE's request to use "proxy" trip data for the purpose of calculating a civil penalty as a sanction for Uber Technologies' failure to provide full and complete answers to discovery as ordered by the presiding officers is denied.

3. That, in addition to the sanctions previously imposed, an additional civil penalty in the amount of five hundred (\$500) dollars per day shall be imposed from December 12, 2014, the date the discovery responses were due to BIE, to the date that Uber fully complies with the discovery orders dated October 3, 2014 (compelling answers to the Set I discovery), and November 25, 2014 (compelling answers to the Set II discovery), or the date of the conclusion of the evidentiary hearing in the above captioned complaint, whichever is first met. The penalties are due and payable each day. Payment shall be made by certified check or money order payable to the Commonwealth of Pennsylvania and sent to:

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

4. That Uber shall be prohibited from providing any evidence, including any testimony or evidence of any kind, and shall be prohibited from presenting any challenge or conducting any cross examination of any witness or evidence, in any way related to any evidence presented regarding the dates, times, drivers, vehicles, relationship to Uber, number of rides taken, and related facts or issues, while Uber lacked operating authority from the Commission. Uber shall further be prohibited from providing any evidence, including any testimony or evidence of any kind, and shall be prohibited from presenting any challenge or conducting any

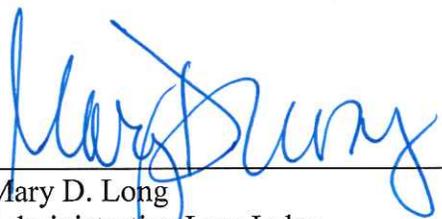
cross examination of any witness or evidence, in any way related to any evidence presented related to any discovery requests propounded by BIE and unanswered by Uber.

5. That Uber shall be prohibited from asserting any claim, position or defense that Rasier, LLC; Rasier-PA, LLC; Gegen, LLC; or any other affiliate under the Uber Technologies, Inc., corporate umbrella, or otherwise, is the actual broker or provider of the passenger transportation services which are the subject of this proceeding.

6. That, consistent with the Secretarial Letter dated July 28, 2014, the parties shall be prepared to address “[w]hether either evidence of prior unlawful operations or contumacious refusal to obey Commission orders negates the need for the proposed service and/or the fitness of [Uber Technologies and its affiliates]” to continue to hold a certificate of public convenience issued by the Commission.

7. That, consistent with the Secretarial Letter dated July 28, 2014, the parties shall be prepared to address whether transportation services rendered prior to the issuance of the certificate of public convenience to Rasier-PA, LLC constitute a violation of the Public Utility Code and “whether refunds or credits to customers would be an appropriate remedy.”

8. No further continuances of the hearing or any other deadlines provided in this order will be granted absent extraordinary circumstances.



Mary D. Long
Administrative Law Judge

Date: March 25, 2015



Jeffrey A. Watson
Administrative Law Judge

C-2014-2422723- PENNSYLVANIA PUBLIC UTILITY COMMISSION, BUREAU OF INVESTIGATION AND ENFORCEMENT V. UBER TECHNOLOGIES, INC.

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