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May 25, 2016

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., *et al.*
Docket No. C-2014-2422723

Dear Secretary Chiavetta:

On behalf of Uber Technologies, Inc., et al., enclosed for electronic filing is the Petition for Rehearing and Reconsideration, 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/bb
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., ET AL.	:	

PETITION FOR REHEARING AND RECONSIDERATION

The Commission overreached in issuing an $11.3 million dollar civil penalty to Uber Technologies, Inc., *et al.* ("Respondents").[1] Respondents provided the residents of Allegheny County access to reliable, affordable and safe transportation services through the Uber smartphone application from February to August 2014. Commission Witmer correctly noted in her dissent that "there is little evidence to demonstrate that Uber's actions resulted in actual harm."[2] Nonetheless, the Commission penalized Respondents $11.3 million, which is ***over five times greater*** than any penalty that the Commission has ***ever*** imposed, including in cases that involved fatalities, serious physical harm, property damage, and financial harm. By comparison, the Commission penalized Lyft, Inc. ("Lyft") $250,000 for providing the same service, in the same time period, and in the same county.

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[1] Pursuant to Section 703(g) of the Public Utility Code ("Code"), 66 Pa. C.S. § 703(g), and 52 Pa. Code §§ 5.572-5.573 of the regulations of the Pennsylvania Public Utility Commission ("Commission"), by and through its counsel, Karen O. Moury and Buchanan Ingersoll & Rooney PC, Uber Technologies, Inc., *et al.* ("Respondents") hereby file this Petition for Rehearing and Reconsideration in the above-captioned proceeding relative to the Opinion and Order of the Commission entered on May 10, 2016 ("Order").

[2] Statement of Commissioner Pamela A. Witmer at 2 (attached to Order).

The Governor, the Mayor of Pittsburgh, the Allegheny County Executive, the Pennsylvania Chamber of Business and Industry, the Greater Pittsburgh Chamber of Commerce, and private citizens wrote to the Commission to state that an $11.3 million dollar civil penalty struck their conscience as being unreasonable. Members of the General Assembly voiced similar concerns about the Commission's decision. In fact, the Governor, Mayor of Pittsburgh, and Allegheny County Executive asked the Commission to "reconsider its decision and settle this issue once and for all in a fair manner."[3] Respondents agree and respectfully ask the Commission to reconsider.

The Commission should grant reconsideration and reopen the record on a limited basis to hear additional evidence related to Respondents' business operations in the Commonwealth.[4] For example, the Commission's penalty calculation relies heavily on the contention that Respondents collected, on average, $7 for the 122,998 trips at issue.[5] This contention is false. In fact, drivers collected the full fare from riders and then remitted 20% to Respondents.[6] Therefore, if the average fare for the 122,998 trips-at-issue was $7, then Respondents only received, on average, $1.40 per trip. In addition, 7,063 of the 122,998 trips at issue were provided to riders free of charge and therefore were not subject to the Commission's jurisdiction.[7] These two facts, if properly accounted for, would lead to a substantially different penalty calculation. Moreover, new evidence would establish that the civil penalty is more than 110 times greater than the net revenues that Rasier-PA, LLC ("Rasier") earned through its Transportation Network Company("TNC") operations in the Commonwealth of Pennsylvania

[3] http://www.puc.pa.gov/pcdocs/1437240.pdf.
[4] New or additional evidence proffered by this Petition are set forth in the Affidavit of Jonathan J. Feldman, attached hereto as Appendix A ("Feldman Affidavit").
[5] Order at 58.
[6] Feldman Affidavit ¶ 9.
[7] Feldman Affidavit ¶ 10.

during the period between July 2, 2014 and August 20, 2014 when the cease and desist period was in effect.[8] Simply put, penalizing a company ***110 times*** its total revenues when it caused no harm is unreasonable.

Reconsideration is further warranted because the Commission failed to consider evidence establishing that Respondents were not treated in the same manner as Lyft for the same alleged violations. Specifically, Respondents made numerous attempts to fairly settle this matter before and after the Commission settled with Lyft for $250,000. For example, after a hearing in May 2015 in which the Commission received all relevant information that it sought in discovery, Respondents made a good faith offer to settle this matter for $399,000. Evidence showing that the Commission rebuffed Respondents' offer to settle the case over a year ago for an amount that exceeded the Lyft settlement further demonstrates that the Commission unfairly and improperly held Respondents to a far different standard than Lyft.[9]

Reconsideration would also allow the Commission to review numerous legal errors in the Order. Specifically, the $11.3 million dollar civil penalty violates long-standing Commission precedent, the Public Utility Code, the Pennsylvania Constitution, and the United States Constitution. For example:

- The $11.3 million dollar civil penalty is based on a per trip penalty. However, as described below in detail, given the nature of Respondents' conduct, the Commission was required to treat the alleged violations as a "continuing offense," rather than treating the trips at issue as a discrete series of separate offenses. Pennsylvania law, at 66 Pa. C.S. § 3301, provides that Respondents

[8] Feldman Affidavit ¶ 11.
[9] *See* Respondents' Exceptions at 1-2; Respondents' Motion for Settlement Conference filed October 13, 2015.

may not be penalized more than $1,000 for a continuing offense for "[e]ach and every ***day's continuance*** in the violation." Therefore, a penalty based on the number of trips that is greater than $1,000 per day exceeds the Commission's statutory penalty authority. More concerning is that the Commission's decision is a stark departure from precedent. Because the Commission had never before considered the *total number* of unauthorized trips in calculating a penalty, Respondents were not on reasonable notice that their conduct could result in a per trip fine on the basis of the total number of trips that were furnished. This lack of notice violates fundamental due process guarantees.

- An $11.3 million dollar civil penalty violates basic federal and state constitutional guarantees against "excessive fines," as well as the fundamental due process guarantee against penalties that are "wholly disproportionate to the offense and obviously unreasonable." *See St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919).
- An $11.3 million dollar civil penalty does not fit the nature of the conduct and strikes at one's conscience as being unreasonable. The Commission relied on its Policy Statement at 52 Pa. Code § 69.1201, which sets forth factors to consider in calculating a civil penalty. The factors are unreasonably vague and allow for extensive subjective interpretation and application. The result was the Commission imposing a civil penalty on Respondents that is more than 45 times the amount imposed on Lyft for engaging in the same service, in the same time period, and in the same county. An $11.3 million dollar civil penalty cannot be

justified in terms of the listed criteria; therefore, the Order fails as a matter of law to provide support for the $11.3 million civil penalty.

For these reasons, and for additional reasons set forth below, the Commission should grant reconsideration and "settle this issue once and for all in fair manner."[10] In support of this Petition for Rehearing and Reconsideration, Respondents further aver as set forth below.

I. INTRODUCTION

1. On May 3, 2016, Governor Tom Wolf, Allegheny County Executive Rich Fitzgerald and Pittsburgh Mayor William Peduto called upon the Commission to reconsider its $11.3 million civil penalty in view of the significant investments Respondents have made and are poised to make in Pennsylvania.[11] Urging the Commission to recognize the importance of innovation and the sharing economy in Pennsylvania, these government leaders aptly observed that the fine imposed by the Commission "constitutes a penalty on innovation, threatening the company's ability to harness new technologies and create the jobs of tomorrow." As Governor Wolf, Executive Fitzgerald and Mayor Peduto also noted, Pennsylvanians welcomed Respondents with open arms when operations were launched in 2014, understanding that the Commonwealth's future would depend on a "willingness to embrace innovation and its potential to meaningfully improve people's lives."[12]

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[10] http://www.puc.pa.gov/pcdocs/1437240.pdf.

[11] http://www.puc.pa.gov/pcdocs/1437240.pdf.

[12] Respondents also refer to similar letters of support that have been sent to the Commission by the Pennsylvania Chamber of Business and Industry and private citizens, which are published on the Commission's website in this proceeding, which are available at: http://www.puc.pa.gov/about_puc/consolidated_case_view.aspx?Docket=C-2014-2422723. Likewise, Respondents note that Members of the General Assembly has vocally expressed opposition to the Commission's $11.3 million civil penalty. *See* http://www.witf.org/news/2016/05/. In addition, several major newspapers throughout Pennsylvania have weighed in to encourage a significant reduction in the Commission's civil penalty. *See, e.g.,* http://thetimes-tribune.com/opinion/puc-uber-fine-is-excessive-1.2035024.

2. The sentiments shared by Pennsylvania's government, business leaders and private citizens are consistent with the messages contained in the Commission's own mission statement, of seeking to promote competition, foster developments in technology and enabling consumers to make independent and informed choices.[13] Yet, the Commission appears to have overlooked and departed from those priorities in imposing an $11.3 million civil penalty on Respondent that is anti-consumer, anti-business, anti-technology, and anti-competition.

3. The fine imposed here is more than five times the highest fine ever assessed by the Commission and more than 45 times the civil penalty imposed on Respondents' major competitor resulting from identical activity and appears to be driven by a desire to "send a message."[14] But the unfortunate message that the Commission is sending, as noted by Governor Wolf, Mayor Peduto and Executive Fitzgerald, is that it desires to stifle competition, drive away innovation and disregard the compelling benefits that TNC services offer to consumers, small businesses and Pennsylvania's economy.[15]

4. Respondents have enabled Pennsylvanians to obtain access to reliable, affordable and safe transportation services. This was particularly true in Allegheny County where, in 2014, massive voids existed in the transportation infrastructure, making it impossible for consumers to obtain the transportation they needed to move around the region. Because of this immediate and compelling need, recognized by the Commission in granting ETA in 2014, consumers overwhelmingly responded to the introduction of TNC services. Notably, not a single consumer has complained to the Commission, or was harmed by the TNC services provided by

[13] http://www.puc.pa.gov/about_puc.aspx.

[14] Order at 59.

[15] For some additional perspective, the civil penalty of $11.3 million is nearly 1/6 of the Commission's approved budget for Fiscal Year 2015-16. http://www.puc.state.pa.us/about_puc.aspx.

Respondents in Allegheny County, from February 11, 2014 through August 20, 2014, the time period that forms the basis for the civil penalty here. Moreover, the Bureau of Investigation and Enforcement ("I&E") introduced no evidence of any departures from safe business practices and has uncovered no such violations during its audits and inspections. Indeed, I&E never even conducted any vehicle inspections until September 2015, after Rasier-PA, LLC ("Rasier-PA") had been operating under ETA for over a year.

5. Despite all of the positive aspects of Respondents' TNC services, Respondents' adherence to safe business practices before receiving authority from the Commission and their exemplary track record in complying with the Commission's requirements since being authorized to operate in Allegheny County in 2014, the Commission characterized Respondents' operations for a brief period in 2014 as being of "a most serious nature which presented a significant risk to the safety of the Uber passengers and drivers and to other travelers and pedestrians."[16] This conclusion ignored the evidence of record clearly demonstrating otherwise and contradicts the Commission's own findings in granting experimental services authority to Rasier-PA in December 2014, when it found "that Rasier-PA has sustained its burden of proving public demand or need for the proposed service and that it possesses the requisite technical and financial fitness and propensity to operate safely and legally."[17] Given the Commission's finding of Rasier-PA's propensity to operate safely in December 2014 (months after Rasier-PA was no longer engaged in unauthorized operations in Allegheny County), and in view of Rasier-PA's subsequent showing of a sustained ability to follow safe business practices since that time, it is

[16] Order at 52.

[17] *Application of Rasier-PA, LLC for Experimental Service Authority*, Docket No. A-2014-2424608 (Order entered December 5, 2014), at 73 ("*December 5th Order*").

inconceivable that the Commission would now retroactively determine that the TNC services provided in 2014 jeopardized public safety. In fact, no one was harmed by those operations.

6. Indeed, the Commission's unwillingness to recognize that Respondents' services were provided in a safe manner in 2014, and that they were following all of the requirements that would apply upon receiving authority from the Commission, is particularly troubling given the Commission's assertion that Rasier-PA is estopped in this proceeding from objecting to its status under a motor carrier pursuant to Code Section 1103(a), 66 Pa. C.S. § 1103(a). The Commission specifically found that because Rasier-PA received a certificate of public convenience granting ETA, it "is prohibited from objecting to the Commission's jurisdiction of its service."[18] However, it is well-settled that subject matter jurisdiction is required in order for an administrative agency to take action and that a party may not waive this requirement. As a creature of the General Assembly, the Commission's powers arise solely from the Public Utility Code, 66 Pa. C.S. §§ 101 *et seq.* ("Code"). *Gasparro v. Pa. PUC*, 814 A.2d 1282, 1285 (Pa. Cmwlth. 2003) ("the PUC is a creature of statute and may exercise only those powers that are expressly conferred upon it by the legislature," citing *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (1978)). Therefore, by accepting the certificate of public convenience enabling it to operate under the Commission's authority, Rasier-PA could not have conferred subject matter jurisdiction on the Commission. Accordingly, Respondents are fully within their rights to continue objecting to the Commission's statutory authority to regulate TNC services. Yet, the Commission outright rejected Respondents' jurisdictional arguments without considering the merits of the arguments presented.

[18] Order at 22-23.

7. In the same way that the Commission has precluded Respondents from asserting arguments based on their prior actions, the Commission should likewise take into consideration its own prior findings about Rasier-PA's fitness to operate safely in determining a civil penalty in this proceeding. By finding that Rasier-PA was fit to operate in a safe manner in 2014 -- a finding that was recently confirmed by the Commonwealth Court -- and now having an evidentiary record demonstrating that Respondents' track record of operating safely has continued since then, the Commission should recognize that Respondents did not jeopardize public safety during their brief period of unauthorized operations in 2014. With that recognition, the excessiveness of the $11.3 million civil penalty becomes clear.

8. Perhaps the factor that most vividly illustrates the excessiveness of the $11.3 million civil penalty imposed on Respondents is its comparison to the $250,000 fine imposed on Lyft for identical activities in the identical geographic region in the identical time period. While the Commission has sought to discount as meaningless any comparisons between the civil penalties due to the *Lyft* case being resolved through settlement, the fact remains that the Commission evaluated both fines on the basis of the same criteria in its Policy Statement at 52 Pa. Code § 69.1201(c). Indeed, the Commission was obligated in reviewing the *Lyft* settlement to determine whether it was in the public interest.

9. Given the identical factual scenarios and legal issues, it is impossible to reconcile the imposition of a $250,000 civil penalty on Lyft as being in the public interest in July 2015 with the levying of an $11.3 million civil penalty against Lyft's major competitor nine months later. Such a disparity in the fines demonstrates a complete disregard of the highly competitive nature of the TNC industry and the effect of regulatory actions on the continued viability of a business' operations when a competitor receives such favorable treatment. Since the key facts

were not in dispute in *Lyft* and the legal issues presented by that case mirrored those ruled upon by the Commission here, the enormous disparity between the fines cannot be explained on the basis of the evidence in the record and clearly demonstrates the excessiveness of the civil penalty imposed on Respondents.

10. As to the viability of business operations, the massive fine imposed on Respondents in this proceeding raises questions about how other entities regulated by the Commission providing critical infrastructure could be expected to continue providing essential electric, natural gas and water services if the Commission would respond similarly to violations of the Code. By way of example, a public utility that commits a violation affecting the safety of services to its entire customer base could easily face a multi-million (or multi-billion) dollar civil penalty if the fine was calculated on the basis of potential harm or even actual harm for every single customer was affected or for every single instance in which the service was used – for example, every time a customer turns on the faucet or turns on the heat in their home. Yet, even for the most egregious and dangerous violations that an entity regulated by the Commission can commit -- departures from established gas pipeline safety standards -- the Commission is capped by law to levying a *total* fine of $2 million.

11. In its mission statement, the Commission proclaims that it seeks to promote economic development, and to allow consumers to make independent and informed choices. Those considerations counsel strongly in favor of reducing the oppressive civil penalty that the Commission has ordered here. Respondents have invested in the technology ("tech") economy in Pennsylvania and have afforded Pennsylvanians an opportunity to start and grow their own small businesses, to earn money to pay their monthly bills and to support their families. At the same time, Respondents have provided consumers access to a new, safe and efficient

transportation option, one that frees consumers from hailing a cab from a street corner, often at night, in the cold, standing in traffic or in an otherwise unsafe manner, or needing to carry money to pay cab fares, and an option that consumers can use to return home after a night on the town, without putting themselves or others in danger by driving after consuming alcohol.

12. In light of the facts here, the penalty that the Commission has imposed is both unprecedented and excessive. The penalty does not serve the public interest -- nor does the Order even purport to offer any explanation as to how it does. The penalty unfairly singles out Respondents vis-à-vis their competitor Lyft, violates the state and federal constitutions in multiple ways, exceeds the Commission's authority under its enabling statutes, runs contrary to the Commission's own penalty guidelines, and flies in the face of the record evidence adduced at the hearings in this case. For all of these reasons, and as further discussed below, Respondents respectfully urge the Commission to reopen the record, reconsider the Order and arrive at a civil penalty that is proportionate to the nature of the violations it has found that Respondents committed and that fairly considers all of the mitigating factors identified in this proceeding.

II. BACKGROUND

13. On June 5, 2014, I&E filed a Complaint against Uber Technologies, Inc. ("Respondent"), alleging that Respondent was engaged in unauthorized transportation services in Allegheny County. I&E alleged that Respondent had launched the App on March 13, 2014 in Pittsburgh and that Enforcement Manager Bowser had arranged transportation between points in Pittsburgh on eleven occasions between March 31, 2014 and April 21, 2014 through the App. Seeking a civil penalty in the amount of $95,000, I&E proposed that $84,000, or $1,000 per day, be assessed from March 13, 2014 through June 5, 2014, in addition to $11,000, or $1,000 per trip, for the eleven occasions on which Officer Bowser arranged transportation through the App.

I&E further requested that the Commission add a $1,000 civil penalty for each and every day that Respondent continued to operate without authority after June 5, 2014.

14. On January 9, 2015, I&E filed an Amended Complaint against Respondents. Through the Amended Complaint, I&E expanded the respondent parties to include subsidiaries of Respondent. I&E also alleged five additional occasions between June 24, 2014 and July 10, 2014 on which Enforcement Officer Bowser arranged transportation through the App.[19] Further, using "proxy data" of 190,000 trips to represent the total number of trips I&E believed that Respondents provided without Commission authority, I&E revised its request for relief to seek a proposed civil penalty of $100 per trip for a total of $19,000,000. The Amended Complaint was the first time in which I&E sought to impose a civil penalty on every trip allegedly arranged through the Respondents' App.

15. Evidentiary hearings on the Amended Complaint were held on May 6, 2015. I&E's Brief was filed on July 8, 2015; Respondents' Brief was filed on August 7, 2015; and I&E's Reply Brief was filed on August 14, 2015. By Interim Order dated August 17, 2015, the hearing record was closed.

16. An Initial Decision was served on November 17, 2015. The ALJs found that Respondents had provided transportation for compensation without authority in violation of the Code and violated discovery orders. The ALJs recommended the imposition of a civil penalty in the amount of $49,924,800, which included a civil penalty for every trip facilitated by Respondents' App during the relevant six-month period.

[19] At the evidentiary hearing, I&E produced evidence in support of three of those trips. I&E Exh. 4 (May 6, 2015).

17. Respondents filed Exceptions on December 7, 2016 and I&E filed Reply Exceptions on December 17, 2016. I&E also filed a Motion to Strike Respondents' Exceptions, claiming that they exceeded the page limitation in the Commission's regulations.

18. The Commission entered its Order on May 10, 2016. Through the Order, the Commission denied I&E's Motion to Strike and granted in part and denied in part Respondents' Exceptions. Agreeing with the ALJs that Respondents had provided transportation services for compensation without authority and violated discovery orders, but recognizing some mitigating factors, the Commission imposed a civil penalty in the amount of $11,364,736 -- again calculated on a per trip basis.

19. Respondents now file this Petition for Rehearing and Reconsideration, seeking a significant and meaningful reduction in the civil penalty levied by the Commission.

III. SUMMARY OF ARGUMENT

20. In reviewing this Petition, it is critical to keep in mind several important facts, as follows:

- *Fact*: The Commission imposed an average civil penalty of over $90 for each trip facilitated by the App, as compared to an estimated average fare of $7, of which Respondents retained $1.40;[20]
- *Fact*: When Respondents launched TNC services in Allegheny County in February 2014, a week after Lyft entered the market, the traveling public had inadequate access to reliable, affordable and safe transportation services;[21]
- *Fact:* At the time Respondents entered the TNC market in Allegheny County, Gegen, LLC ("Gegen") held a brokerage license issued by the Commission in 2013 authorizing it to arrange transportation services throughout Pennsylvania;[22]

[20] Order at 58 ($7 fines were imposed for each trip furnished from February 11, 2014 through July 1, 2014 and $257 penalties were assessed on each trip provided from July 2, 2014 through August 20, 2014); Feldman Affidavit ¶ 9.
[21] *Application of Rasier-PA for Emergency Temporary Authority,* Docket No. A-2014-2429993 (Order entered July 24, 2014) ("*ETA Order*").

- *Fact*: The public in Allegheny County embraced the entry of TNC services;[23]

- *Fact:* By imposing a per trip civil penalty on Respondents, the Commission penalized Respondents for fulfilling the unmet immediate need for transportation before the launch of TNC services;[24]

- *Fact*: In levying penalties on the basis of each trip, the Commission imposed fines for trips that were provided free of charge and for trips taken by repeat riders;[25]

- *Fact*: No rider complained to the Commission about the TNC services provided by Respondents from February through August 2014;[26]

- *Fact*: No rider has ever complained to the Commission about the safety of Respondents' TNC services, or about the adequacy of liability insurance coverage;[27]

- *Fact*: The public was not harmed by Respondents' TNC services;[28]

- *Fact*: Rasier-PA, one of the named Respondents, has held authority in Pennsylvania for nearly two years and has achieved an exemplary compliance record during that time, complying with every condition imposed by the Commission;[29]

- *Fact*: Despite the Commission's emphasis on being deprived of the ability to inspect vehicles during a six-month period in 2014, enforcement officers conducted no vehicle inspections until September 2015 -- over a year after Rasier-PA received ETA;[30]

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[22] *Application of Gegen, LLC for Brokerage License*, Docket No. A-2012-2317300 (Order entered January 24, 2013).

[23] Order at 58; Tr. 87-89 (May 6, 2015).

[24] *ETA Order*.

[25] Feldman Affidavit ¶¶ 10 and 12.

[26] Tr. 142 (May 6, 2015).

[27] This statement can be confirmed through a utility search on the Commission's website, using Rasier-PA's carrier ID of 6416478. The results of such a search performed on May 17, 2015 are available at: http://www.puc.state.pa.us/about_puc/search_results/utility/authority_search/utility_detail_view.aspx?Utility=6416478

[28] Tr. 138-139, 143. (May 6, 2015)

[29] Tr. 139-142 (May 6, 2015); Respondents' Exh. No. 1.

[30] Feldman Affidavit ¶ 13. This timing is consistent with I&E's normal practice of reviewing documents of certificated providers every one or two years. Tr. 36-37 (June 24, 2014).

- *Fact*: The Commission's enforcement officers have not uncovered a single instance in which any vehicles or drivers posed any public safety concerns;[31]

- *Fact:* During this proceeding, an I&E enforcement officer testified that he observed no safety issues during the trips arranged through Respondents' App;[32]

- *Fact*: The Commission imposed a civil penalty of only $250,000 on Respondents' key competitor Lyft for engaging in identical activities during the same time period in Allegheny County, including continuing to operate after the issuance of a cease and desist order;[33]

- *Fact*: The ALJs rejected three different requests from Respondents to hold a structured settlement conference, including their most recent attempt in October 2015, which was declined without any explanation;[34]

- *Fact:* In requesting the initial settlement conference in January 2015, Respondents offered to share the trip data with I&E, which had already been furnished to the Commission in December 2014;[35]

- *Fact*: The Commission's statutory authority to impose a civil penalty on a public utility that engages in a related series of violations of gas pipeline safety standards in the transportation of flammable or toxic gas is capped at *$2 million*, which is about one-sixth of the civil penalty imposed on Respondents;[36]

- *Fact*: I&E did not seek a civil penalty based on the *total* number of trips that were facilitated by the App until seven months after filing its original complaint and nearly five months after Rasier-PA had obtained ETA;[37]

- *Fact*: The Commission has never before imposed a civil penalty anywhere close to the one here. Indeed, the civil penalty here is more than ***five times greater*** than the next highest civil penalty – and in that case, unlike here, the regulated entity had engaged in conduct that created a grave risk of harm to others;[38] and

- *Fact*: The penalty here is more than 110 times greater than the net revenues that Rasier-PA earned through its TNC operations in the Commonwealth of

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[31] Feldman Affidavit ¶ 13.
[32] Tr. 39 (June 24, 2014).
[33] *Pa. PUC v. Lyft, Inc.*, Docket No. C-2014-2432304 (Initial Decision served June 5, 2015; Final Order entered July 15, 2015).
[34] Interim Order dated January 23, 2015; Initial Decision at 2 and 4.
[35] Respondents' Motion for Scheduling of Settlement Conference filed on January 14, 2015.
[36] 66 Pa. C.S. § 3301(c).
[37] Original Complaint, Request for Relief; Amended Complaint ¶ 48.
[38] Respondents' Exceptions at 12-15.

Pennsylvania during the period between July 2, 2014 and August 20, 2014 when the cease and desist period was in effect.[39]

21. While Respondents will continue to challenge other aspects of the Order if this Petition for Rehearing and Reconsideration is denied, through the filing of a Petition for Review with the Commonwealth Court of Pennsylvania, this Petition focuses on the civil penalty portion of the Order. Critical to a sizeable and meaningful reduction in the civil penalty is for the Commission to recognize that the imposition of a penalty on every single unauthorized trip facilitated by Respondents' digital platform departs from long-standing Commission precedent. In the past, the Commission has based its penalties on the specific instances of unauthorized operations alleged in the complaint, as either admitted by the respondent or proven by I&E, and *has not even inquired* as to the total number of trips furnished by a carrier without authority. Under all of the circumstances, a per day civil penalty that is consistent with past practices of the Commission would adequately and reasonably address Respondents' unauthorized operations.

22. In levying an excessive civil penalty that is based on every trip, the Commission is essentially penalizing Respondents for successfully filling a void that existed in Allegheny County's transportation infrastructure in 2014. Specifically, under the Commission's flawed penalty structure, the fine would be lower if fewer members of the traveling public had needed and used Respondents' TNC services. Besides being wholly at odds with the Commission's mission statement and the evidentiary record here, the fine is inconsistent with the Commission's own findings in December 2014 regarding Rasier-PA's propensity to operate safely and legally, which has recently been affirmed by the Commonwealth Court.[40]

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[39] Feldman Affidavit ¶ 11.

[40] *December 5th Order* at 73. *Capital City Cab Service, et al. v. Pa. PUC*, Nos. 238 C.D. 2015, 240 C.D. 2015 and 253 C.D. 2015 (Pa. Cmwlth. April 19, 2016).

23. The Commission's unsubstantiated claim, which forms the basis for the excessive civil penalty -- that "it must be recognized that Uber has deliberately engaged in the most unprecedented series of willful violations of Commission Orders and Regulations in the history of this agency"[41] -- demonstrates a baseless bias against Respondents that is not consistent with the Commission's quasi-judicial role or its obligation to make findings based upon substantial evidence in the record.

24. The key legal issues raised by this Petition are that: (i) the $11.3 million civil penalty imposed by the Commission violates the Excessive Fines Clause of the Pennsylvania Constitution and the U.S. Constitution because it is grossly disproportionate to the gravity and severity of the conduct it is intended to address; (ii) the Commission's civil penalty is arbitrary and capricious because it bears no rational relation to the conduct at issue and was determined on the basis of unreasonably vague criteria that were subjectively interpreted and applied to the conduct; (iii) the penalty exceeds the Commission's statutory authority as Respondents' conduct amounted to, at most, a "continuing offense" for which civil penalties must be calculated on a per day basis, rather than a per trip basis, (iv) interpreting the Commission's statutory authority to allow per trip penalties for continuing offenses like those alleged here would violate the Due Process clause; (v) the civil penalty conflicts with a long line of transportation cases in which civil penalties were imposed without any consideration of how many *total* trips were provided in violation of the Code or Commission regulations or order, and is grossly disproportionate when compared to the $250,000 fine imposed on Lyft last year for identical activities, including continued operation after the issuance of the cease and desist order; (vi) the Order is unlawful as the Commission failed to conduct the required *de novo* review of the record and legal arguments,

[41] Order at 59.

but instead started from the presumption that it must justify any departures from the ALJs' Initial Decision, thereby depriving Respondents of an objective and impartial approach to the civil penalty determination; (vii) imposing a higher civil penalty for trips facilitated after the issuance of a cease and desist order is unlawful because the Commission (and the ALJs) lacked statutory authority to grant injunctive relief; and (viii) the civil penalty is not based on substantial evidence and ignores the evidence in the record including many mitigating factors regarding Respondents' safe business practices, the lack of actual harm to the public arising from the unauthorized operations and consumer demand for Respondents' services.

25. By this Petition, Respondents request that the Commission significantly reduce the civil penalty by adopting an approach that is consistent with its long-standing precedent of levying a per day penalty for each day from February 11, 2014 through August 20, 2014 that Respondents made the digital platform available for riders and drivers to arrange passenger transportation service in Allegheny County (187 days). Using this approach, the civil penalty cannot exceed $187,000 for unauthorized operations. Moreover, even to the extent that a per trip fine is authorized, that fine should be limited to the fourteen instances of transportation that were alleged in the Complaint and Amended Complaint and proven at hearing, for a total fine (including the per day fine set forth above) of $201,000.[42]

26. Alternatively, if the Commission continues to be persuaded that a civil penalty based on every trip is warranted, including trips not alleged in the Complaint or Amended Complaint, the Commission should impose a per trip civil penalty that is based upon Respondents' share of the average estimated fare per trip of $7, which amounts to $1.40 per trip.

[42] Based on the Commission's penalty history, this amount is very substantial, especially for the transportation industry. Respondents' Exceptions at 10-15 (discussion includes highest civil penalties ever imposed by Commission).

As 80% of the fares were earned by drivers and Respondents subsidized free trips for which drivers were paid in full, Respondents' net revenues from these trips are far lower than assumed by the Commission. And importantly, any per trip civil penalty should also be reduced by the 7,063 trips that were provided free of charge, since they do not qualify as transportation for compensation under Code Section 102's definition of "common carrier by motor vehicle." 66 Pa. C.S. § 102. Since 7,063 free trips were furnished, any per trip fine of $1.40 should be assessed on the basis of the 115,935 "for-hire" trips or in the total amount of $162,309. Additionally, the Commission should take into consideration the total number of 31,218 paying riders since it makes no sense to impose a fine for subsequent trips that individual riders took. Eliminating subsequent trips taken by riders further reduces any per trip fine imposed by the Commission.

IV. ARGUMENT

A. Applicable Legal Standards for Post-Decision Relief

27. Code Section 703(f) permits a party, after an order has been made by the Commission, to petition for rehearing (or reopening) with respect to *any* matters determined in such proceedings and specified in the request for rehearing. 66 Pa. C.S. § 703(f).[43] A petition for rehearing does not operate as a stay or postpone the enforcement of any existing order, except as the Commission may direct. *Id.* The Commission's regulations provide that petitions for

[43] By contrast, under the Commission's regulations, petitions to reopen that are filed after the record is closed but before a final decision is issued must set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing. 52 Pa. Code § 5.571. Although Code Section 703(f) permits petitions for rehearing to seek the inclusion of any information, this Petition provides a justification for each new piece of evidence proffered herein, by explaining either that it was not available previously or that circumstances have changed to now make it material to the fair adjudication of this proceeding.

rehearing, reargument, reconsideration, clarification and supersedeas shall be filed within 15 days after the Commission order is entered. 52 Pa. Code § 5.572(c).

28. In *Pa. PUC v. PECO Energy Company*, 1998 WL 975762 (Pa. P.U.C.), Docket No. M-00960820 (Order entered November 10, 1998), the Commission ruled on a Petition to Rescind Order and Reopen Investigation, noting that a proceeding will be reopened "for the receipt of new evidence which was not ascertainable through the exercise of due diligence." *Id.* In that case, the Commission denied the petition because it was filed two years later to facilitate discovery in pending civil proceedings in federal and state courts.

29. Similarly, the Commonwealth Court of Pennsylvania has recognized that the reopening of the record is appropriate for the consideration of new evidence. *Crooks v. Pa. PUC*, 1 Pa. Cmwlth. 583, 276 A.2d 364 (1971). In *Crooks*, the Court noted the Code permits the Commission to reopen the record and modify orders when a situation has changed, but not as a way of allowing a party to circumvent the time limitations for an appeal.

30. As to the standards for granting reconsideration, the Commission explained in *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553, 559 (1982), that a petition for reconsideration may properly raise any matter designed to convince the Commission that it should exercise its discretion to amend or rescind a prior order, in whole or part. The Commission further explained that petitions are likely to succeed only when they raise new and novel arguments not previously heard or considerations that appear to have been overlooked or not addressed by the Commission. *Duick* at 559.

31. In the arguments set forth below, Respondents demonstrate why both reopening and reconsideration are warranted in this proceeding. These arguments further explain why the

Commission should reconsider and rescind its May 10, 2016 Order and adopt an Order significantly reducing the civil penalty.

B. Grounds for Reopening and Description of Proffered Evidence

32. Respondents seek to have the Commission reopen the record to permit additional evidence to be considered in addressing the request for reconsideration of the amount of the civil penalty. The additional evidence proffered by Respondents is shown in Appendix A, which is a sworn and notarized affidavit of Jonathan J. Feldman, Manager, Uber Pennsylvania ("Feldman Affidavit").

a. Grounds Justifying Reopening

33. Grounds justifying a reopening of the record include the importance of the Commission understanding the full impact of the payment of an $11.3 million civil penalty on Respondents' Pennsylvania operations, the traveling public, drivers and the technology ("tech") economy. Given the unprecedented size of the civil penalty imposed by the Commission, Respondents could not have been aware of the need to present evidence of this nature during the evidentiary hearing. Also, much of this information is recent and was not available prior to the close of the record.

34. The receipt of additional evidence is also warranted due to the Commission's focus on the *total* number of trips arranged through Respondents' App from February 11, 2014 through August 20, 2014 and its imposition of a substantial civil penalty for each trip, which constituted a departure from its past practices where fines were based on the number of days of unauthorized service and did not exceed $1,000 per day. Specifically, information about free trips and the amount of revenues earned by Respondents are now relevant to this proceeding. In

addition, Respondents are now disclosing publicly the total number of trips that were provided during the relevant time period.

35. Also, the Commission's heavy reliance in the Order on the potential for harm resulting to the public from Respondents' unauthorized operations justify a reopening of the record to describe the efforts of the Commission's enforcement officers to date, as well as the results of those efforts. Particularly given the Commission's findings of Rasier-PA's propensity to operate safely in connection with the grant of 2-year experimental authority in the *December 5th Order* and the evidentiary record developed in this proceeding, Respondents were not aware that the Commission would assert serious concerns now about the safety of their operations two years ago.

36. Finally, new evidence is available demonstrating the benefits of Respondents' presence in the Commonwealth, which should be viewed as additional mitigating factors driving down the size of the civil penalty.

b. Description of Proffered New Evidence

i. Impacts

37. Payment of an $11.3 million civil penalty for unauthorized TNC operations that occurred two years ago in Allegheny County would cause financial distress to Rasier-PA's operations and threaten the continued provision of Respondents' TNC services in Pennsylvania. At a minimum, Respondents would be forced to divert funds that might otherwise be available to provide additional benefits to the riding public through the introduction of new and innovative services and products to serve greater numbers of Pennsylvanians. Such measures would deprive Respondents of the ability to compete on a level playing field in a highly competitive industry

with other TNCs, most notably Lyft whose activities mirrored those of Respondents in 2014 and who was only subjected to a $250,000 fine.[44]

38. Respondents' ability to continue to operate as a viable entity in Pennsylvania will affect over 677,000 Pennsylvanians who have already come to rely on Respondents' TNC services. And it will have a very meaningful impact on the 18,000 Commonwealth residents who operate on the platform, running their own businesses to earn money to pay their monthly bills or support their families, and are dependent on Respondents' ability to continue operating in Pennsylvania.[45]

39. Additionally, payment of such a massive fine will jeopardize Respondents' ability to continue supporting the tech economy in Pennsylvania. Respondents have chosen Pittsburgh, Pennsylvania to be the hub for testing of self-driven vehicles and their worldwide headquarters for advanced technology, offering significant benefits to Pittsburgh's economy. Respondents also have plans to expand over the next few months by breaking ground on an additional ATC research facility in the Hazelwood neighborhood of Pittsburgh.[46]

ii. Trip Data

40. Of the 122,998 trips facilitated by Respondents' App during the relevant time period, it is relevant for the Commission to be aware that 7,063 were provided free of charge. As those trips do not constitute transportation for compensation within the definition of "common carrier by motor vehicle" in Code Section 102, 66 Pa. C.S. § 102, they support a reduction of the number of trips on which the penalty is based.

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[44] Feldman Affidavit ¶ 6.

[45] Feldman Affidavit ¶¶ 7 and 8. These numbers were also not available as of the conclusion of the hearings in this proceeding.

[46] Feldman Affidavit ¶ 8.

41. Since the Commission's fine calculation appears to have been premised on a misunderstanding that Respondents retain 100% of the fares charged for the transportation services,[47] it is important to provide additional evidence showing that Respondents collected only 20% of the total fare charged to the rider, with 80% transmitted to drivers.[48] This means that any per trip penalty should be 20% of the $7 estimated average fare calculated by the Commission, or $1.40.

42. As many trips were taken by repeat riders, it is also relevant for the Commission to consider evidence showing that 31,218 paying riders used the App during the relevant period. In other cases the Commission has considered the number of customers affected by a respondent's conduct. Also, if a rider chose to take additional trips, no basis exists for imposing a civil penalty for each subsequent trip.

43. Respondents' revenues of $89,993.20 from the period of time following the issuance of the cease and desist order on July 1, 2014 and the grant of ETA authority on August 20, 2014 are also relevant to the civil penalty determination. That period of time represents over $10.4 million of the total fine levied against Respondents, which is more than 110 times the amount of revenues earned by Respondents during that period.

iii. Inspections

44. Also relevant to Respondents' request for reconsideration is evidence about I&E's inspection and enforcement activities after Rasier-PA obtained authorization. Specifically, the Commission should consider evidence revealing that: (a) I&E's enforcement officers did not contact Rasier-PA until April 2015 to review driver documents and did not conduct any vehicle

[47] Order at 58.
[48] Feldman Affidavit ¶ 9.

inspections until September 2015 (more than one year after the Commission's grant of ETA and over seven months after the grant of experimental services authority); and (b) those reviews showed that Rasier-PA was in full compliance with the Commission's driver integrity and vehicle safety standards.[49] This evidence directly contradicts a key underlying premise of the fine: Pennsylvania residents were harmed because I&E enforcement officers could not conduct vehicle inspections and perform driver document reviews when respondent operated without authorization.[50]

iv. Benefits of Respondents' Presence

45. The admission of new evidence showing the benefits of Respondents' presence in the Commonwealth, which was not previously available, offer additional mitigating factors and are therefore germane to the Commission's determination of an appropriate civil penalty.

46. New studies have recently been released about the impact of TNC services on driving under the influence ("DUI") arrests and fatalities. Specifically, these studies have linked the introduction and growth of TNC services in Pittsburgh to an *18% decline in DUI arrests in 2015*. In addition, the Commonwealth has experienced a 2% decline in DUI arrests in 2015 following the entry of statewide transportation network services. Similar results have been observed by Virginia's Department of Motor Vehicles Commissioner, who credits TNC services as playing a major role in a 22% reduction in alcohol-related fatalities in 2015. These results track the data maintained by Respondents, which shows peak usage times in Pennsylvania,

[49] Feldman Affidavit ¶ 13.
[50] Order at 52, 57.

including Allegheny County, as being Friday and Saturday nights (into the early morning hours on Saturday and Sunday) and the most common destinations as being bars and restaurants.[51]

47. Recent statistics show that passengers in underserved neighborhoods benefit from the introduction and growth of TNC services. One of every six trips is requested to or from areas in Pittsburgh that have been traditionally underserved.[52]

48. Respondents have become actively involved in local communities throughout Pennsylvania, forming partnerships with a number of organizations, including the Girl Scouts of Western Pennsylvania, UPMC Health Plan, the Pittsburgh Pirates Baseball Club, and Pennsylvania SPCA. Through a partnership with Lexus, Respondents will facilitate transportation in June 2016 to the U.S. Open in Oakmont, which is a difficult destination for the traveling public to reach in Allegheny County.[53]

49. On the basis of the foregoing, Respondents respectfully request that the Commission reopen the record in this proceeding to consider this additional evidence in determining an appropriate civil penalty that reasonably addresses the brief period of unauthorized operations in 2014.

C. Grounds for Reconsideration

a. Introduction

50. This Petition identifies several legal grounds upon which the Commission should grant reconsideration and significantly reduce the amount of the civil penalty. Although these arguments are set forth in detail below, each key issue is identified in summary fashion in this section.

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[51] Feldman Affidavit ¶ 16.
[52] Feldman Affidavit ¶ 15.
[53] Feldman Affidavit ¶ 17.

51. The Commission should reconsider its $11.3 million civil penalty because it violates the Excessive Fines Clause in Article I, Section 13 of the Pennsylvania Constitution, and the corresponding provision in the Eighth Amendment to the United States Constitution. The penalty further violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution as the penalty is wholly disproportioned to the offense and obviously unreasonable.

52. In determining the appropriate penalty structure and civil penalty amount in this case, the Commission should have conducted a *de novo* review. Such an approach would have ensured that the Commission impartially and objectively reviewed the evidentiary record and the legal arguments advanced by Respondents.

53. Separately, the Commission erred by levying a civil penalty on the basis of the *total number of trips* arranged through the App, rather than the amount of days that Respondents were allegedly in violation. In reaching this result given the nature of the conduct alleged here, the Commission overstepped the statutory bounds of its penalty authority, or, alternatively, the statutory penalty authority is so vague as to violate the Due Process Clause under the Fourteenth Amendment.

54. Moreover, even if the statute arguably allowed the Commission to impose a per trip penalty for the conduct here, the Commission abused its discretion and acted unreasonably in imposing such a penalty by overlooking a long line of cases in the transportation industry where civil penalties were based on the number of days of unauthorized service, with no consideration given to the *total* number of trips that were furnished. Indeed, even on those few occasions when the Commission imposed a civil penalty based on each instance in which the carrier was alleged and proven to have provided unauthorized service, the trips at issue had occurred on

separate days, meaning there was no distinction between a per trip or per day civil penalty. Assessing a civil penalty on the basis of the total number of trips, using data supplied by Respondents that covers the entire period of unauthorized operations and includes trips that were not specifically alleged in the Complaint or Amended Complaint, is unprecedented. [54]

55. Imposing a higher civil penalty for trips facilitated after the issuance of a cease and desist order is unlawful since the Commission, and the ALJs, lacked statutory authority to grant injunctive relief. Code Section 502 makes it clear that the Commission is obligated to initiate appropriate legal proceedings in a court of competent jurisdiction requesting the issuance of a cease and desist order. Authority that the Commission does not have under the statute cannot be conferred by regulations. Due to the lack of enforceability of the cease and desist order issued by the ALJs, which was later ratified without statutory authority by the Commission, it is inappropriate to factor noncompliance into the determination of a civil penalty.

56. The Commission's penalty here is also impermissibly high under the Commission's own guidelines. The Commission has adopted a Policy Statement that sets forth the applicable factors that the Commission will consider in setting the penalty amount. The penalty here is excessive when measured against those criteria. Separately, if the criteria can be interpreted so broadly as to support the result here, then the criteria are unreasonably vague and provide far too much discretion to the Commission, producing vastly inconsistent, disproportionate, and unfair results across comparable cases. This outcome is vividly illustrated

[54] Similarly, in fixed utility settings, the Commission has likewise refrained from assessing the penalties on the basis of every customer affected by a public utility's departure from the Code or Commission regulations. For instance, in determining appropriate civil penalties for natural gas utilities engaged in unsafe business practices, the Commission has considered the number of affected customers as a factor in its analysis but has not concluded that every gas customer, or for that matter every member of society located within a danger zone of these unsafe business practices, constitutes a separate violation for which the company must be penalized. *See, e.g., Pa. PUC v. Peoples Natural Gas Co.,* Docket No. M-2009-2086651 (Order entered May 6, 2010).

here by comparing the $11.3 million civil penalty that the Commission imposed on Respondents against the $250,000 fine that the Commission assessed against Lyft for identical activities in the same region over the exact time period, including the continuation of operations after the issuance of a cease and desist order.

57. The Commission overlooked many mitigating material factors, as well as applicable case law, in applying the guidelines set forth in its Policy Statement at 52 Pa. Code 69.1201, resulting in an this excessive and unprecedented civil penalty. As such, the Order is not based on substantial evidence and ignores the evidence in the record regarding Respondents' safe business practices, the lack of actual harm to the public arising from the unauthorized operations and compelling consumer demand for Respondents' services.

58. By this Petition, Respondents request that the Commission significantly reduce the civil penalty by: (i) treating Respondents' alleged violation of providing a digital platform for parties to use in arranging TNC services as a "continuing offense," warranting a per day fine penalty than a per trip penalty; or (ii) to the extent that the Commission concludes it has authority for a per trip penalty based on the conduct here, adopting an approach to that penalty that is consistent with the Commission's long-standing precedent of levying a fine for each proven instance of transportation that was alleged in the Complaint and Amended Complaint (fourteen trips) and imposing a penalty for each day from February 11, 2014 through August 20, 2014 that Respondents made the digital platform available in Allegheny County (187 days). Using the former approach, the civil penalty should not exceed $187,000 for unauthorized operations, and under the latter should not exceed $201,000.

b. The $11.3 million civil penalty imposed by the Commission violates the Excessive Fines Clause of the Pennsylvania Constitution.

59. The Commission should reconsider its $11.3 million civil penalty because it violates the Excessive Fines Clause in Article I, Section 13 of the Pennsylvania Constitution, and the corresponding provision in the Eighth Amendment to the United States Constitution. The penalty further violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution as the penalty is wholly disproportioned to the offense and obviously unreasonable.

i. Applicable legal standards

60. The Excessive Fines Clause of the Pennsylvania Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Pennsylvania Constitution, Article I, Section 13. The Eighth Amendment of the United States Constitution, made applicable to the Commonwealth by the Fourteenth Amendment, contains similar language. U.S. Const., Amend. VIII. *See Cmwlth. of Pa. v. Brunk*, Nos. 235 C.D. 2015 and 236 C.D. 2015, 2015 WL 7200937 (Pa. Cmwlth. Nov. 16, 2015). The prohibition against excessive fines applies to fines levied against corporations, just as to individuals. *See Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 286, 109 S.Ct. 2909 (1989) (Eighth Amendment). Moreover, the proscription against excessive fines applies to a "civil penalty" if the penalty is designed, at least in part, to serve "either retributive or deterrent purposes." *Austin v. United States*, 509 U.S. 602, 610 (1993).

61. The "dispositive inquiry in determining whether a mandatory fine is violative of Article I, Section 13 of the Pennsylvania Constitution revolves solely around the question of whether, under the circumstances, the fine is 'irrational or unreasonable.'" *Commonwealth v.*

Gipple, 418 Pa.Super. 119, 123, 613 A.2d 600 (1992). Similarly, under the Eighth Amendment, a fine "violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 337 (1998).

62. The Supreme Court of Pennsylvania recently relied on these principles to invalidate a fine imposed under the Gaming Act, 4 Pa. C.S. § 1518(b), holding that the civil penalty there violated the Excessive Fines Clause of the Pennsylvania Constitution because it was grossly disproportionate to the severity or gravity of the offense. *Cmwlth. of Pa. v. Eisenberg*, 98 A.3d 1268 (Pa. 2014). The Court described the Excessive Fines Clause as limiting the government's power to extract payments as punishment for some offense, and noted that whether a fine is excessive under the Pennsylvania Constitution is a question of law, rendering the standard of review *de novo* and the scope of review plenary. In undertaking the proportionality test, the Pennsylvania Supreme Court relied on the test that the U.S. Supreme Court put forth under *Solem v. Helm*, 463 US. 277 (1983), which requires the Court to compare the magnitude of the fine to the gravity of the offense to the treatment of other offenders in the same jurisdiction, and to the treatment of the same offense in other jurisdictions. *Eisenberg*, 626 Pa. at 536. The Pennsylvania Supreme Court further noted the special need for "intra-Pennsylvania" proportionality, and stated that "comparative and proportional justice is an imperative within Pennsylvania's own borders." *Id.* at 537.

ii. <u>The penalty here is grossly disproportionate to the gravity of the alleged conduct and to the Commission's treatment of other alleged offenders.</u>

63. In the Order, the Commission seeks to justify the magnitude of the civil penalty by stating that "*it must be recognized* that Uber has deliberately engaged in the most unprecedented series of willful violations of Commission orders and regulations in the history of

this agency."[55] This unsubstantiated claim single-handedly demonstrates that the civil penalty bears no rational connection to the relevant factors in this proceeding and is grossly disproportionate to the conduct it is intended to address. In its effort to send a message that Respondents are not "too big to fine,"[56] the Commission overlooked the bigger picture -- that Respondents provided services that were demanded by consumers and delivered them in a reliable, affordable and safe manner, with consumers by all accounts getting exactly the services they requested. Rather than viewing Respondents' conduct from the perspective of "no harm, no foul," the Commission structured a penalty designed to extract massive payments that bear no resemblance to the alleged violations. In short, the "harshness of the penalty" vastly exceeds "the gravity of the offense," *see Eisenberg*, 626 Pa. at 536, rendering the penalty unconstitutionally excessive.

64. Moreover, while claiming that Respondents' actions were "unprecedented" in magnitude, the Commission provided no support showing that was in fact true. Specifically, it referred to no evidence in the record to support that claim and offered no citations to demonstrate its accuracy. Nor could it do so, as other offenders have engaged in conduct that caused serious physical harm and/or substantial property damage, factors entirely absent here.

65. Even within the context of motor carriers, Respondents are by no means an outlier. Accepting for purposes of argument that the Commission's legal conclusions about Respondents' conduct are correct (*i.e.*, the Respondents in fact violated the code in making their digital platform available to facilitate passenger transportation service in Pennsylvania), at most Respondents violated the code for a period of 187 days, starting February 11, 2014 and ending

[55] Order at 59 (emphasis added).

[56] Joint Motion of Commissioner John F. Coleman, Jr. and Chairman Gladys M. Brown at 2.

August 20, 2014. During that time, the public was not harmed; in fact, the public overwhelmingly used the services that filled a void in the existing transportation infrastructure. Moreover, during that time, Respondents fully complied with Commission regulations applicable to TNC services.

66. The Commission has addressed many situations in its history in which motor carriers have been charged with unauthorized operations on multiple occasions and have continued to operate, sometimes even after their certificates were cancelled. In some situations, these unauthorized operations have gone on *for years*, far longer than the violation period here. *See, e.g., Pa. PUC v. Daniel and Darlene Applegate t/a Independent Security Cab*, 2016 WL 1559265 (Pa. PUC), Docket No. C-2015-2451749 (Initial Decision served April 12, 2016); *Pa. PUC v. Brungard t/d/b/a Protean Potentials*, 97 Pa.P.U.C. 189, 2002 WL 31007842 (Pa.P.U.C.), Docket No. A-00113098C0101 (Order entered June 3, 2002).

67. Indeed, unauthorized operations in the transportation industry are an age-old challenge for the Commission dating back to early in the twentieth century when groups of entrepreneurs launched unauthorized taxicab services in Pittsburgh and Philadelphia. *See Yellow Cab Co. v. Cab Drivers Local No. 294A*, 79 P.L.J. 242 (1931); *Pa. PUC v. Israel*, 52 A.2d 317 (Pa. 1947). In *Israel*, an organization named G.I. Taxicab Association sought authority from the Commission in September 1945 to operate 100 taxicabs in Philadelphia. After the Commission denied the application, the group launched unauthorized services, offering to charge passengers less than they would pay a regular taxicab. Although the Court ultimately enjoined the group from continuing to operate without authority, this example demonstrates that the Commission's long and rich history includes scenarios involving issues that are very similar to those raised in this proceeding, belying the Commission's claim that the events here are "unprecedented."

68. Outside the transportation industry, the Commission has also found it necessary to address repeated offenses and series of violations of the Code and regulations. For example, the Commission imposed what it described as a "high civil penalty" of $1 million on a natural gas company after observing that it was "the ninth time in approximately five years in which a matter containing allegations of gas safety violations by a UGI-owned distribution utility has come before this Commission." *Pa. PUC v. UGI Penn Natural Gas, Inc.*, Docket No. M-2013-2338981 (Order entered September 26, 2013), at 18. Describing that unprecedented series of gas safety violations, the Commission noted in *UGI Penn Natural Gas* that a natural gas explosion caused by a circumferential crack in a cast iron main in 2011 had resulted in the *deaths of five individuals* in two residences, an injury to one individual, and destruction and significant damage to six other residences. In *UGI Penn Natural Gas*, the Commission also referenced a natural gas explosion had occurred in 2006 during removal of a gas meter, resulting in personal injury and significant property damage. Another violation in the series committed by the same company was a 2008 natural gas explosion resulting from a leak in the gas line that destroyed a residence. Other incidents mentioned by the Commission in *UGI Penn Natural Gas* endangered the lives of the company's crew and the public, involved improper marking of pipelines and pertained to a failure to properly respond to an explosion once notified by 911.

69. Clearly, the Commission's characterization of the Respondents' activities for a brief period in 2014 as an "unprecedented series of willful violations" is, at best, subjective, and is both unsubstantiated and unsupported by the record. This assessment also fails to consider the gravity and severity of other violations that come before the Commission, particularly as they compare to the allegedly unauthorized services here that were furnished in reliable, affordable and safe manner and resulted in no harm to the public. As such, the Commission's stated

rationale fails to justify the massive and oppressive civil penalty that the Commission imposed here.

70. A review of the record evidence further confirms that the $11.3 million civil penalty that the Commission imposed is grossly disproportionate to the severity or gravity of the offense, and to the Commission's treatment of other offenses and other offenders, rendering the $11.3 million an unconstitutionally excessive fine. Starting with the severity or gravity of the offense, it is important to note that Respondents' provision of allegedly unlawful TNC services over two years ago responded to overwhelming public demand and resulted in no harm to the public.[57] No customers complained to the Commission about Respondents' TNC services, and Respondents followed practices designed to ensure driver integrity, vehicle safety and adequate liability insurance.[58] Moreover, despite TNC services falling in a grey area under the Commission's regulatory framework, Respondents voluntarily submitted to the Commission's jurisdiction, and obtained emergency temporary authority and experimental services authority.[59] Since obtaining that authority in August 2014, Respondents have established an exemplary compliance record and have been model corporate citizens, timely filing several quarterly reports showing continued compliance with the Commission's requirements.[60] In imposing a record-setting civil penalty, the Commission appears to have overlooked these facts.

71. A particularly compelling factor showing the grossly disproportionate nature of the civil penalty is how the fine imposed here compares to the Commission's statutory authority under Code Section 3301(c) for violations of gas pipeline safety standards relating to the

[57] Tr. 138-139, 143 (May 6, 2015). *See* Statement of Commissioner Robert F. Powelson at 2.
[58] Tr. 142, 139-142; Respondents' Exh. No. 1; Respondents' Exceptions at 18-19.
[59] *ETA Order; December 5th Order.*
[60] Respondents' Exceptions at 31-33; Feldman Affidavit ¶ 14.

transportation of natural gas, flammable gas or toxic gas. While the Commission is empowered by Code Section 3301(c) to impose civil penalties not to exceed $200,000 for each day that a violation exists, the maximum civil penalty may not exceed $2 million for any related series of violations.[61] In other words, the Commission is expressly capped at $2 million in penalizing conduct that departs from gas pipeline safety standards, conduct that has the potential to cause severe, or even disastrous, consequences for a large number of people as the result of a single incident. Yet, here, the Commission imposed a civil penalty that is nearly *six times that level* to address unauthorized passenger transportation services provided for a six-month period two years ago that resulted in no harm to the public. Since the General Assembly found it prudent to cap the Commission's statutory authority in the industry that has the most potential for catastrophic losses resulting from violations, it is impossible to reconcile the $11.3 million civil penalty imposed here with that statutory cap.

72. Also demonstrating the gross disproportionality of the civil penalty here is how it compares to the highest civil penalty that the Commission previously imposed, a penalty in the amount of $1.8 million in *Pa. PUC v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Initial Decision served August 21, 2015; Order entered December 3, 2015). There, the Commission found that the electric generation supplier had committed an egregious violation of the law when it made an executive level decision to intentionally overcharge customers and not honor a written savings guarantee, and the Commission imposed a $125 civil penalty for each violation of its regulations.[62]

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[61] 66 Pa. C.S. § 3301(c).

[62] The *HIKO Energy Order* is currently awaiting review by the Commonwealth Court. *HIKO Energy, LLC v. Pa. PUC*, No. 5 C.D. 2016.

73. When the Commission levied the record-setting $1.8 million civil penalty against *HIKO Energy*, it justified the magnitude of the penalty by referencing the correlation between the $125 fine per violation and the $124 in overcharges to each of the consumers. In this proceeding, the average fare per trip was estimated to be $7 (an amount, it should be noted, that was not an "overcharge" in any sense, but rather a voluntary payment for transportation services that the riders receive, and that were less expensive than alternative transportation services), and the amount that Respondents received of that $7 was roughly $1.40. Yet, the Commission assessed an average civil penalty of over $90 per trip, nearly 13 times the average trip fare, and *over 60 times the amount that Respondents received* from the fare. This civil penalty is a far cry from the one the Commission imposed in *HIKO Energy*.

74. Further showing the disproportionate nature of the civil penalty imposed on Respondents are several examples of fines that the Commission assessed on electric and natural gas companies based on allegations of unsafe business practices that had resulted in fatalities, serious bodily injury and significant property damage. In *UGI Central Penn Gas*, discussed above, for example, the Commission imposed a $1 million fine on the natural gas company where I&E had identified numerous departures from established gas safety standards, following *five years* of repeated gas safety violations, which is ten times the time period at issue here. Moreover, the highest civil penalty that the Commission has *ever* imposed for unlawful business practices that caused fatalities is $500,000. *Pa. PUC v. UGI Utilities, Inc.-Gas Division*, Docket No. C-2012-2308997 (Order entered February 19, 2013). In fact, in three separate proceedings against electric and natural gas companies for violations involving eight fatalities, the Commission imposed a total civil penalty of $1.3 million on the three companies. *Pa. PUC v. PPL Electric Utilities Corp.*, Docket No. M-2008-2057562 (Order entered March 31, 2009); *UGI*

Utilities; *Pa. PUC v. Philadelphia Gas Works*, Docket No. C-2011-2278312 (Order entered July 26, 2013). This total amount represents less than one-eighth of the civil penalty that the Commission imposed here for conduct that did not involve any fatalities or any property damage, and did not lead to even a single consumer complaint.

75. Perhaps even more telling on the proportionality front, in a proceeding involving Respondents' primary competitor, Lyft, the Commission found that a $250,000 civil penalty was in the public interest.[63] The Commission imposed that penalty even though Lyft engaged in identical activities in the identical geographic region over the identical time period, including engaging in operations after the Commission issued a cease and desist order. Yet, the Commission's fine in this proceeding is over 45 times greater than the fine the Commission imposed on Lyft. That disparity unequivocally shows the lack of "intra-Pennsylvania" proportionality that the Pennsylvania Supreme Court described as "an imperative."[64] *See Eisenberg* (comparison of penalties imposed on other respondents for similar offenses). And, if the fact that the Lyft fine occurred as a result of a settlement somehow means that it has no persuasive value in ascertaining an appropriate civil penalty in an identical litigated proceeding, as the Commission has suggested, then the Commission's claim that it evaluates civil penalties from the perspective of whether or not they are in the "public interest" is meaningless -- if the public interest supports a $250,000 civil penalty for Lyft, it cannot also support an $11.3 million civil penalty against Respondents for the same conduct.

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[63] *Lyft.*

[64] Lyft's period of unauthorized operations spanned from February 7, 2014 through August 14, 2014, which is 182 days, compared to Respondents' 187 days of operations prior to obtaining authority. *Lyft* Initial Decision at 4 and 18. Although Respondents do not know Lyft's total number of trips, even if they were three times the number of total trips facilitated by Respondents, a civil penalty that is nearly fifty times the amount is clearly excessive.

76. Comparing the size of the civil penalty to the revenues earned from July 2, 2014 through August 20, 2014 (following issuance of the cease and desist order) further confirms that the penalty is unconstitutionally excessive. Specifically, the civil penalty is more than 110 times the amount of revenues earned by Respondents during that time period. A civil penalty of this magnitude will cause financial distress to Pennsylvania's operations and threaten the continued provision of TNC services in Pennsylvania, upon which over 677,000 Pennsylvanians have come to rely for transportation and 18,000 drivers are dependent upon to pay their monthly bills or support their families.[65]

77. Clearly, an $11.3 million civil penalty is grossly disproportionate when it is compared to other civil penalties imposed by the Commission and when it is viewed in light of all of the circumstances, including many mitigating factors. It simply bears no rational relation to the offense or the record in this proceeding. In imposing such an excessive fine, the Commission appears to have become embroiled in the details of how many total trips Pennsylvanians availed themselves of through these new and innovative services during a six-month period in Allegheny County and overlooked the bigger picture of how Respondents' TNC services benefit consumers and Pennsylvania's economy. Accordingly, the civil penalty violates the excessive fines provisions of both the Pennsylvania and United States Constitutions.

78. Separately, the civil penalty also violates the Due Process Clause of the Fourteenth Amendment. The United States Supreme Court has held that state-ordered monetary penalties violate the Due Process Clause's guarantee against unlawful deprivation of property when the penalties are "wholly disproportioned to the offense and obviously unreasonable." *See St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919). Here, for all of the same

[65] Feldman Affidavit ¶ 7.

reasons that the civil penalty is grossly disproportionate for Eighth Amendment purposes, it is also wholly disproportioned to the offense for Due Process purposes. And the "unreasonableness" is patently obvious. Respondents engaged in the allegedly violative conduct for a short period of time, causing no one any harm, while in the process of voluntarily submitting themselves to Commission jurisdiction and seeking Commission authorization. Their competitor, who engaged in virtually identical conduct, was fined $250,000. Yet, Respondents are ordered to pay over $11 million. This wholly disproportionate and patently unreasonable civil penalty violates the Due Process Clause, and, accordingly, Respondents respectfully urge the Commission to reduce the penalty. *See also* Pennsylvania Constitution, Article I, Sections 1, 9 and 11.

c. The Commission should have conducted a *de novo* review to determine the amount of the civil penalty.

79. In determining the appropriate penalty structure and civil penalty amount in this case, the Commission should have conducted a *de novo* review. Such an approach would have ensured that the Commission impartially and objectively reviewed the evidentiary record and the legal arguments advanced by Respondents.

80. Instead of undertaking the required *de novo* review that Respondents had urged in their Exceptions,[66] the Commission instead treated its review as in the nature of an appeal, where it could only depart from the recommendations of the ALJs if it found specific errors and or for good cause.[67] Indeed, the Commission appears to have ignored Respondents' Exception advocating for the Commission to set aside the ALJs' initial decision and conduct a *de novo* review to determine the appropriate structure and amount of civil penalty. As a result, the

[66] Respondents' Exceptions at 7-22.

[67] Order at 58-59; Joint Motion of Commissioner John F. Coleman, Jr. and Chairman Gladys M. Brown at 1.

Commission offered no explanation for why it felt compelled to offer a rationale for departing from the ALJs' recommendations.

81. As Respondents argued in the Exceptions, the Commission was not required to justify departures from the ALJs' recommended civil penalty. To the contrary, Code Section 335(a) expressly provides that "[o]n review of the initial decision, the commission has all the power which it would have in making the initial decision." 66 Pa. C.S. § 335(a). Well-established Pennsylvania law confirms that the Commission is free to wholly disregard and supersede an initial decision. *See, e.g., City of Philadelphia v. Pa. PUC*, 73 Pa. Cmwlth. 355, 361, 458 A.2d 1026 (1983) (a "broader grant of power to the Commission in the disposition of initial decisions…can scarcely be imagined").

82. In fact, the Commonwealth Court of Pennsylvania recently reiterated this point, noting that the Commission's decision only needs to be based on substantial evidence. *Capital City Cab Service, et al. v. Pa. Pub. Util. Comm'n*, 238 C.D. 2015 (Slip Opinion issued April 19, 2016). The Court went on to describe evidence as substantial when it is "relevant and of a nature that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 19, citing *Lancaster County v. Pennsylvania Labor Relations Board*, 82 A.3d 1098, 1109-10 (Pa. Cmwlth. 2013). Indeed, in *Capital City Cab*, the Court affirmed the Commission's decision, which had wholly rejected the ALJs' recommended decision and arrived at its own factual findings and legal conclusions to approve the statewide experimental authority application of Rasier-PA. *Application of Rasier-PA, LLC for Experimental Authority*, Docket No. A-2014-2424608 (Order entered December 3, 2014).

83. Conducting a *de novo* review would have facilitated a consideration of the bigger picture -- that Pennsylvanians embraced Respondents' TNC services in 2014 because those

services filled voids in the existing transportation infrastructure, and that the public benefited from having reliable, affordable and safe alternatives for obtaining needed transportation. Such a review would have also recognized that the existing regulatory framework did not address the concept of TNCs, as demonstrated by the Commission's grant of ETA and experimental services authority. Rather than getting bogged down by the ALJs' record of ruling against Respondents that dates back to 2014, when the ALJs presided over Rasier-PA's application proceeding, a *de novo* review would have enabled the Commission to take a fresh look at the record and fairly apply the factors in the Commission's Policy Statement at 52 Pa. Code §69.1201(c) guiding determinations about civil penalties.

d. The Commission exceeded its statutory authority, or in the alternative abused its discretion, when it departed from long-standing precedent and imposed a civil penalty based on the total number of trips that were provided, rather than the number of days that Respondents allegedly were operating in violation of the Code.

84. The Commission also erred by levying a civil penalty on the basis of the *total number of trips* arranged through the App, rather than the amount of days that Respondents were allegedly in violation. Indeed, imposing a per trip penalty here violates due process guarantees, as a reasonable person would not be on notice that the conduct at issue here could give rise to per trip liability. In reaching this result given the nature of the conduct alleged here, the Commission overstepped the statutory bounds of its penalty authority, or, alternatively, the statutory penalty authority is so vague as to violate the Due Process Clause under the Fourteenth Amendment. *See also* Pennsylvania Constitution, Article 1, Sections 1, 9 and 11.

85. Moreover, even if the statute arguably allowed the Commission to impose a per trip penalty for the conduct here, the Commission abused its discretion and acted unreasonably in imposing such a penalty by overlooking a long line of cases in the transportation industry where

civil penalties were based on the number of days of unauthorized service, with no consideration given to the *total* number of trips that were furnished. Indeed, even on those few occasions when the Commission imposed a civil penalty based on each instance in which the carrier was alleged and proven to have provided unauthorized service, the trips at issue had occurred on separate days, meaning there was no distinction between a per trip or per day civil penalty. Assessing a civil penalty on the basis of the total number of trips, using data supplied by Respondents that covers the entire period of unauthorized operations and includes trips that were not specifically alleged in the Complaint or Amended Complaint, is unprecedented. [68] Indeed, Respondents are not aware of a single instance in which the Commission has assessed a civil penalty on the basis of the *total* number of individual unauthorized trips, including trips that were not specifically alleged in the complaint.

i. Section 3301

86. The Commission's statutory authority to assess civil penalties for continuing offenses is both express and unambiguous. Under Code Section 3301, the Commission may assess a penalty of up to $1,000 per offense, with "each and every ***day's*** continuance of the violation constituting a separate and distinct offense." 66 Pa. C.S. § 3301(b) (emphasis added). In other words, the maximum penalty is $1,000 *for each day* of a continuing offense.

87. In *Newcomer Trucking, Inc. v. Pennsylvania Public Utility Comm.*, 109 Pa. Commw. 341 (1987), the Court set forth the test for determining whether a given pattern of

[68] Similarly, in fixed utility settings, the Commission has likewise refrained from assessing the penalties on the basis of every customer affected by a public utility's departure from the Code or Commission regulations. For instance, in determining appropriate civil penalties for natural gas utilities engaged in unsafe business practices, the Commission has considered the number of affected customers as a factor in its analysis but has not concluded that every gas customer, or for that matter every member of society located within a danger zone of these unsafe business practices, constitutes a separate violation for which the company must be penalized. *See, e.g., Pa. PUC v. Peoples Natural Gas Co.,* Docket No. M-2009-2086651 (Order entered May 6, 2010).

conduct is a series of separate offenses, or instead constitute continuing offenses. According to the court, "'continuing offenses' are proscribed activities that are of an ongoing nature and cannot be feasibly segregated into discrete violations so as to impose separate penalties." *Id.* at 345. Under that test, the alleged conduct here constitutes continuing offenses.

88. In its Order, the Commission incorrectly found that the violation here is not a continuing offense, but rather a series of independent violations. That determination, however, overlooks the fact that this case was not about individual trips, but rather about whether Commission authority is needed for Respondents to make a digital platform available to facilitate the transportation of passengers.[69] As Respondents argued, the Commission's cease and desist order did not focus on individual passenger trips but rather addressed the use of the Respondents' "digital platform to facilitate transportation of passengers utilizing non-certificated drivers in their personal vehicles." *Petition of Bureau of Investigation and Enforcement for Interim Emergency Order*, Docket No. P-2014-2426846 (Order entered July 24, 2014), at 26 (Ordering Paragraph 3). Given the allegations in the original Complaint and the Amended Complaint, and the relief sought by the original Complaint, it is clear that it was the use of the digital platform, not the total number of individual trips that were obtained, which was the focus of this proceeding.[70]

89. Further evidence of the nature of the violations as being the use of the digital platform is that Gegen, LLC -- one of the named Respondents -- had a broker's license during this time that allowed it to arrange transportation between points in Pennsylvania for

[69] Order at 31-34.

[70] Original Complaint, Request for Relief; Amended Complaint ¶ 46.

compensation.[71] What the Commission has determined is that Gegen's use of the platform to arrange those services violated the Code. As a broker, Gegen had no ability to furnish individual trips.

90. That is further confirmed by the role that Respondents played in facilitating the transportation services that occurred. Respondents do not own motor vehicles, nor do they employ drivers. Their only role is to license and operate a digital platform through which riders who desire transportation services can connect with independent drivers who are willing to provide that service. That digital platform is in ongoing and continuous operation, and it is entirely artificial to somehow segregate that platform into separate discrete "pieces" that correspond to the rides that are arranged through that platform. To be sure, individual riders and individual drivers may engage in individual instances of transportation services, but Respondents' activities are limited to maintaining the digital platform itself.

91. As the Commission found that Respondents' use of the digital platform in this manner violated Code Section 1101, 66 Pa. C.S. § 1101, Respondents' continued use of the digital platform on each day constituted separate and distinct offense. *See* 66 Pa. C.S. § 3301(b). As such, the maximum penalty for each *day's* violation of Code Section 1101 is $1,000.

92. Indeed, consistent with the statutory language, the Commission has previously found that its authority to impose a civil penalty is capped by Code Section 3301(a) and (b) at $1,000 per day for violations of the statute, regulations and orders. *See Rosi v. Bell-Atlantic – Pennsylvania, Inc., and Sprint Communications, L.P.*, Docket No. C-00992409 ("Since §3301 states clearly that this is a maximum amount, presumably a penalty of $1,000.00 per day should

[71] *Application of Gegen, LLC for Brokerage License*, Docket No. A-2012-2317300 (Order entered January 24, 2013).

be imposed only for the most egregious violations."), at 10. *See also Pa. PUC, Bureau of Investigation and Enforcement v. Daniel and Darlene Applegate t/a Independent Security Cab*, 2016 WL 1559265 (Pa. PUC), Docket No. C-2015-2451749 (Initial Decision served April 12, 2016) (Code Section 3301 authorizes the Commission to impose a sum not exceeding $1,000 per day on an entity providing unauthorized transportation services). Notably, in *Newcomer* and in every other decision relied upon by the Commission and cited in this Petition, the Commission has not assessed a civil penalty of more than $1,000 per day on a motor carrier. Even though the Commission fined the property carrier on a per incident rather than per day basis, the civil penalty imposed was $100 per violation and far below the statutory cap of $1,000 per day.

ii. Per Day Approach in I&E Complaint and Due Process Violations

93. A per day penalty for ongoing violations is also supported by I&E's Complaint filed on June 5, 2014. Therein, I&E sought the imposition of a civil penalty for each day that Respondents held out as brokers of transportation and requested that a civil penalty be imposed for each specific trip alleged in the Complaint as having been obtained by I&E's enforcement staff.[72] Beyond those specific trips, the original Complaint requested that a civil penalty be assessed per day for *each day* that Respondents continued to operate after the date of filing the Complaint. Using the specific trips alleged in the original Complaint (and proven by I&E at the hearing) and the penalty formula set forth in the original Complaint, Respondents' total civil

[72] While this approach has been followed in other transportation proceedings involving unauthorized service, Respondents are not aware of a prior situation where I&E or the Commission has gone beyond the parameters of the specific trips set forth in the complaint to impose a civil penalty for the total number of trips that the respondent provided during the relevant time period. In fact, as shown below, the Commission has in some instances expressly disregarded the actual trip data in the past and imposed a per day civil penalty for such offenses.

penalty should not exceed $198,000. If the additional three trips alleged in the Amended Complaint and proven by I&E are added, the potential civil penalty rises to $201,000.[73]

94. At the time the ALJs issued their cease and desist order on July 1, 2014, which was ratified by the Commission on July 24, 2014, the original Complaint had not been amended and, in fact, was not amended until several months later. Nor was a new proceeding initiated after issuance of the cease and desist order to seek the imposition of any additional civil penalties beyond those requested by the original Complaint.

95. I&E amended the original Complaint to seek a per trip civil penalty based on the total number of trips on January 9, 2015, nearly six months after issuance of the cease and desist order and almost five months after Respondents were authorized to provide TNC services in Allegheny County. Only then, after Respondents had continued operating following the issuance of the cease and desist order and after compliance had been achieved, did I&E *retroactively* seek to have a per trip civil penalty assessed against Respondents based on the *total* number of trips.

96. Indeed, interpreting Code Section 3301 as allowing per trip penalties on the facts here violates due process. It is well settled that a respondent is entitled to full due process rights when an action seeks to impose civil penalties. *Northview Motors, Inc. v. Cmwlth., Attorney Gen.*, 562 A.2d 977, 980 (Pa. Cmwlth. 1989). Receiving notice and an opportunity to be heard on the proposed structure of a civil penalty after the activities have been conducted, particularly

[73] The Complaint sought a civil penalty of $95,000 consisting of: (i) $84,000 or $1,000 per day for each day since from March 13, 2014, or the date on which TNC services were launched, and (ii) $11,000 for the eleven trips obtained by I&E enforcement staff. Given the evidence furnished by Respondents that the services were launched on February 11, 2014, the original Complaint's request would be for an additional 29 days or $29,000 for a civil penalty of $124,000. The Complaint also requested a $1,000 civil penalty for each day that Respondents continued to operate after the filing of the Complaint, which would encompass the period from June 6, 2014 through August 20, 2014, or 75 more days, adding another $75,000 to make the total exposure $198,000. In the Amended Complaint, I&E alleged five more individual trips, and proved three of them at the hearing, taking the total amount to $201,000.

when the original notice sought the imposition of per day penalties for ongoing violations and did not seek civil penalties based on the total number of trips, is not meaningful due process. *See Pocono Water Co. v. Pa. PUC*, 630 A.2d 971 (Pa. Cmwlth. 1993) (reversing a penalty imposed by the Commission for failure to comply with a prior order on due process grounds).

97. Moreover, a per trip penalty structure violates due process in another way as well. As a federal court of appeals has explained, a statute that imposes penalties must "inform [regulated entities] of the potential penalties that accompany noncompliance, and provide explicit standards for those who apply the law." *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1311 (11th Cir.2009) (*citing Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)). Here, a reasonable person confronting the language in 66 Pa. C.S. § 3301(b), and in particular the language stating that "[e]ach and every day's continuance in the violation … shall be a separate and distinct offense" would have concluded that the "potential penalties that accompany noncompliance" in operating a digital platform would have consisted of a maximum per day penalty of $1,000. At the very least, given the dramatic differences between per day and per trip penalties, the statute would need to "provide explicit standards for those who apply the law" to distinguish when the former are available and when the latter are. Here, there are no discernible standards for ascertaining when the Commission would treat the ongoing and continuous activity of maintaining a digital platform as instead constituting providing each of the trips that is arranged through that platform.

98. Even aside from the issue of whether the Commission's interpretation and application of Code Section 3301 implicate due process principles, the Commission's imposition of a civil penalty on every trip facilitated by the App highlights two other specific violations of Respondents' due process rights. In the context of regulatory penalties, the Due Process Clause

imposes two separate constraints: (1) a party must be on reasonable notice of what conduct will constitute a violation; and (2) a party must be on reasonable notice of the magnitude of the penalty that will accrue for a violation. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126 (1926) ("That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.") (citations omitted). *See also Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1311 (11th Cir 2009) ("Vagueness within statutes is impermissible because such statutes fail to put potential violators on notice that certain conduct is prohibited, inform them of the potential penalties that accompany noncompliance, and provide explicit standards for those who apply the law.") (*citing Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

99. Here, when Respondents launched in February 2014, based on an objectively reasonable reading of the Code, they were not on notice that operating a digital platform would have required any authority beyond Gegen's brokerage license. Thus, it is a violation of the first due process constraint noted above to penalize Respondents from the launch until I&E filed the Complaint in June 2014, first making its interpretation known, which was not binding on or an announcement by the Commission. By that time, Respondents had been operating for three months and Allegheny County residents had come to rely on Respondents' service for safe and reliable transportation and important economic opportunities.

100. Even once I&E announced its interpretation, it still did not place Respondents on notice that continuing to operate would expose it to per trip penalties for *all* trips facilitated by the platform. Rather, its proposed civil penalty structure entailed $1,000 per trip for the specific instances alleged in the Complaint and an additional $1,000 per day for each day that Respondents continued using the digital platform to facilitate passenger services. Therefore, at the time Respondents made the decisions to continue operating after filing of the Complaint, they did so based on their understanding of the regulatory framework and believing that if they were ultimately proven wrong, their maximum exposure was $1,000 per day. Even after issuance of the cease and desist order, Respondents' penalty exposure remained the same, with I&E not revising its request for civil penalties based on total trips until January 2015 -- almost six months later. Given the lack of notice by I&E at the relevant time and the lack of Commission precedent for imposing civil penalties for unauthorized service on the basis of the total number of trips provided by a carrier during the relevant time period, it is unfair, indeed violative of due process, to retroactively impose a civil penalty for every trip.

101. If Respondents had received notice that their decisions not to shut down operations could expose them to a per trip fine on the basis of all trips facilitated by the App, Respondents would have undertaken a very different risk assessment and very well may have ceased operations. The fundamental purpose of due process is to provide parties with notice of the potential consequences of their conduct. Here, Respondents had no notice that it could be subject to fine for every trip that was furnished and thus had no opportunity to make an informed decision on whether to continue operations.

102. Moreover, consistent with the notion that Respondents' activities constitute continuing offenses, the decision that Respondents made to continue operating was not made on

a per trip basis. For example, Respondents did not decide to facilitate each individual trip after July 1, 2014. Rather, the sole business decision was the single decision to continue making the digital platform available for others to use in facilitating passenger transportation services. Indeed, even in I&E's Amended Complaint filed on January 9, 2015, when it first introduced the concept of assessing a civil penalty based on the *total* number of trips, its allegations continued to be focused on facilitating passenger transportation through the digital platform.[74]

103. By retroactively imposing a civil penalty on the basis of every trip that occurred during that prior timeframe, of which penalty structure Respondents were not given notice at the relevant time, the Commission is effectively penalizing Respondents for being successful. It is penalizing Respondents for the public's overwhelming use of their TNC services. It is also punishing Respondents for the wholly inadequate transportation infrastructure that existed prior to their entry in Allegheny County, such that the public clamored for TNC services and readily embraced them. Simply stated, using the Commission's formula, if fewer members of the public had needed and voluntarily opted to use Respondents' TNC services, the civil penalty would be lower. Similarly, had Respondents not been able to supply drivers to meet the demands of the traveling public, the civil penalty would be lower. The magnitude of civil penalties should not be driven by the demands of the public or the success of the entity's operations.

iii. Commission's Past Practice of Imposing Per Day Fines

104. Moreover, even putting all of that aside, the analysis in the Order that results in the imposition of a civil penalty on a per trip basis constitutes an abuse of the Commission's discretion as it overlooks the way that the Commission has assessed civil penalties in the transportation industry for many years. In the past, the Commission has levied fines for

[74] Amended Complaint, ¶ 46.

unauthorized service on the basis of the number of days on which the carrier was operating without authority. Even in those situations when the civil penalties were based on the number instances on which unauthorized trips were furnished, the trips were provided on different dates. Therefore, the Commission made no distinction between the approaches since the civil penalties would have been the same whether they were imposed on the basis of the number of trips or the number of days. Further, no Commission precedent exists for the imposition of a civil penalty on the basis of the *total* number of unauthorized trips using data produced by a respondent, including trips that are not alleged in the complaint. *Indeed, the Commission has not previously even inquired into the total number of unauthorized trips that were furnished by a carrier.*

105. Notably, no precedent exists in which the Commission imposed a civil penalty on a motor carrier based on the total number of trips that were provided in an unsafe vehicle, while the carrier had no insurance or by a driver who was operating without a valid license or for whom a criminal background check was not performed. Despite serious departures from driver integrity, vehicle safety and liability insurance standard -- departures that jeopardized public safety and consumer protections -- neither I&E nor the Commission has considered the number of trips that were provided in violation of the Code or Commission regulations or orders in proposing or determining a civil penalty.

106. Deciding to impose a civil penalty on a per trip basis in this proceeding, the Commission relied on *Kviatkovsky v. Pa. PUC*, 152 Pa. Cmwlth. 291, 618 A.2d 1209 (1992), which did not even involved unauthorized service.[75] In *Kviatkovsky*, the Commission assessed a

[75] Order at 31. The Commission also relied on *Newcomer Trucking, Inc. v. Pa. PUC*, 531 A.2d 85 (Pa. Cmwlth. 1987), which Respondents fully addressed in their Exceptions at 44-46, noting that it did not involve unauthorized operations or the use of a digital platform to facilitate passenger transportation services. The penalty-setting approach taken in the *Newcomer* proceeding appears to be an outlier, compared to how penalties are normally

$2,000 civil penalty for four separate violations of the Code, including a failure to have a vehicle inspected. In their discussions of the appropriate civil penalty, neither the Commission nor the Commonwealth Court questioned the number of trips that the carrier had provided using an uninspected vehicle. Despite the risks to the public, including passengers, pedestrians and other drivers, of a motor carrier operating an uninspected vehicle, the Commission's civil penalty was not based on the total number of trips that were furnished. Therefore, the *Kviatkovsky* decision offers no support for the Commission's conclusion to assess the civil penalty on the basis of the total number of trips in this proceeding.

107. Also, in the Order, the Commission sought to distinguish its decision in *Pa. PUC v. S.S. Sahib Cab Co.,* Docket No. A-00121184C0601 (Order entered March 6, 2007), which was cited by Respondents and is squarely on point in this proceeding In *S.S. Sahib Cab*, the Commission assessed a *per day* civil penalty of $500 on a carrier for operating for 37 days while its certificate was suspended for failing to maintain evidence of insurance. Claiming that the *S.S. Sahib* proceeding involved violations that could not be feasibly segregated into separate violations, the Commission discounted its applicability to this proceeding. However, operating while under suspension is the equivalent of operating without authority. If the number of trips provided while the respondent in *S.S. Sahib Cab* operated under a suspended certificate could not be feasibly segregated into separate violations, the Commission should reach the same result in this proceeding. The failure to maintain liability insurance is a serious violation that placed every passenger and the public in general at risk of not having a claim paid during each trip that was provided during those 37 days.

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calculated. Notably, the carrier was not fined more than $1,000 per day. Therefore, the Court did not address Respondents' position that $1,000 per day is the statutory cap for fining a carrier.

108. The Commission has reached the same result in other proceedings, which were overlooked in the Order. In *Pa. PUC v. Erie Transportation Services, Inc., t/a Erie Yellow Cab*, Docket No. A-00108419C0603 (Order entered March 5, 2007), the Commission imposed a civil penalty on a taxicab company for transporting passengers on 2,461 occasions from February 23, 2006 through February 27, 2006 without authority from the Commission. Although the exact number of trips was known, I&E sought and the Commission imposed a civil penalty of $1,000 *per day* for five days of unauthorized service.

109. Similarly, in *Pa. PUC v. Big Time's Night Train*, Docket No. A-00121227C0602 (Order entered July 25, 2007), the Commission imposed a civil penalty of $1,000 on a limousine provider that engaged in unauthorized service on 42 days during a 10-week period without authority, furnishing 101 trips. The original complaint had requested a $42,000 civil penalty, which was based on $1,000 per day. Even though the trip data was readily available, it was not used in proposing or assessing the civil penalty.

110. The Commission's Order also referred to *Blue & White Lines, Inc. v. Waddington*, Docket No. A-00108279C9301 (Order entered February 13, 1995), *aff'd, Pa. PUC v. Waddington*, 670A.2d 199 (Pa. Cmwlth. 1995), *app. den.*, 544 Pa. 679, 678 A.2d 368 (1996).[76] In *Blue & White Lines*, the carrier was accused of performing unauthorized broker service and the complainant (a competitor) alleged eleven specific instances between October 11, 1990 and January 11, 1993. Evidence was introduced in the proceeding about advertisements offering transportation services. Imposing a civil penalty for each known instance of arranging transportation services, the Commission did not discuss whether the respondent had engaged in unauthorized brokering of transportation on each day during that time period and did not inquire

[76] Order at 26.

as to the number of trips that were arranged by the respondent over the course of over two years. Also, in assessing a civil penalty for each alleged and proven instance, the Commission relied heavily on the fact that the respondent had been previously fined in 1990 by the Commission for rendering illegal service and therefore knew that a license was required. Given the history of the respondent in *Blue & White Lines* and the lack of any inquiry by the Commission regarding the total number of trips that were arranged between 1990 and 1993, it likewise does not support the imposition of a penalty on Respondents for every trip that was facilitated by the App.

111. In addition, the Commission cited *Pa. PUC v. Penn Harris Taxi Service Company, Inc.,* Docket No. A-00002450C9603 (Order entered March 12, 1998) in support of the per trip civil penalty imposed on Respondents.[77] In *Penn Harris*, the formal complaint alleged fifty-four specific occasions during July of 1996 when the respondent transported passengers outside its operating territory and failed to have the requisite direct control and supervision of the vehicles operated by a lessee of the respondent's operating rights. The Commission assessed a civil penalty of $200 only for the trips referenced in the formal complaint, with no inquiry into the total number of trips that the respondent furnished without authority. Therefore, that decision likewise offers no support for the penalty structure used here.

112. The Commission further cited its decision in *Pa. PUC v. Brungard t/d/b/a Protean Potentials*, 97 Pa.P.U.C. 189, 2002 WL 31007842 (Pa.P.U.C.), Docket No. A-00113098C0101 (Order entered June 3, 2002) as supporting its approach in this proceeding.[78] A review of *Brungard* reveals otherwise. In *Brungard*, the Commission sustained a complaint against an entity that was alleged to have provided two unauthorized trips on the same date and

[77] Order at 26.
[78] Order at 38.

then advertised *over the course of several years* by way of a website and the Yellow Pages that it had authority to provide transportation for compensation within points in Pennsylvania. In assessing a civil penalty, the Commission significantly reduced the amount recommended by the ALJ (by over 90%) and arrived at a $1,000 civil penalty for the one day when the record showed that unauthorized trips were provided (consistent with the allegations in the complaint) and a $10 civil penalty for each of the 918 days when the carrier held out as being authorized to provide service. During the course of that proceeding, I&E did not seek information as to the total number of trips that the carrier had furnished during the 918 days while it was holding out to provide service, and the Commission did not in any way suggest that such information was needed to adjudicate the matter. Therefore, *Brungard* does not support the imposition of a civil penalty for every trip facilitated by Respondents.

113. A review of other Commission cases in the transportation industry likewise shows that the Commission has consistently assessed civil penalties on the basis of the number of days when a carrier has operated without authority, as follows:

a. In *Pa. PUC v. Collegeville Airport Service,* Docket No. C-2010-2176745 (Initial Decision served October 26, 2011; Order entered January 12, 2012), the Commission assessed a civil penalty on the motor carrier for operating while its certificate was suspended. The Commission imposed a per day civil penalty on the motor carrier without any inquiry into the number of trips that were actually given during the time when the carrier was not authorized to provide service.

b. In *Pa. PUC v. K-Larens Transportation Service, Inc.*, Docket No. C-2010-2172842 (Order entered January 13, 2011), the Commission assessed a civil penalty for each day the carrier operated while its certificate of public convenience was suspended. The Commission made no inquiry into the number of unauthorized trips the carrier furnished.

c. In *Pa. PUC v. Tri-Star Enterprises*, Docket No. C-2009-2088370 (Order entered October 8, 2009), the Commission fined a motor carrier $1,000 for each day on which the carrier operated without authority. No discussion

occurred as to the number of trips the carrier had provided while its certificate of public convenience was suspended. *See also Pa. PUC v. Hazleton Transport Co.*, Docket No. C-2009-2087293 (Order entered October 8, 2009); *Pa. PUC v. Pegasus Chauffered Motor Cars*, Docket No. A-00116364C0502 (Order entered September 15, 2006); *Pa. PUC v. Aspire Limousine Service, Inc.,* Docket No. A-00110269 (Order entered October 6, 2005); *Pa. PUC v. VA Five Star, Inc.*, Docket No. C-2011-2208073 (Order entered August 11, 2011).

114. In other transportation cases, the Commission has simply imposed civil penalties for separate instances of unauthorized service that were specifically alleged in the complaint, which fell on different dates, again without making any inquiry into the number of trips that the respondent may have provided on those dates or other dates during the relevant timeframe, as follows:

a. In *Pa. PUC v. M&G Trucking, Inc.*, Docket No. A-00114371C0601 (Order entered July 20, 2006), the Commission imposed a $3,000 penalty on the respondent for transporting property for compensation on three different dates in 2005, four years after its certificate was cancelled. The penalty reflected the trips alleged in the complaint and no inquiry was made into how many trips the respondent may have provided on those three dates or on other days between March 11, 2005 and July 11, 2005.[79]

b. In *Pa. PUC v. J&E Transportation Service, LLC*, Docket No. A-00122121C0601 (Order entered September 19, 2006), the Commission assessed a $2,000 penalty on a carrier that transported persons for compensation without authority on two different dates in March 2006, as alleged in the complaint. However, the Commission did not inquire as to the total number of trips provided on those two dates or between those dates.[80]

c. In *Pa. PUC v. Constanza's Chauffeur Service of Pittsburgh*, Docket No. A-00119040C0701 (Order entered September 13, 2007), a carrier was cited for unauthorized service on the basis of holding out to provide transportation on three occasions (by advertising in the Yellow Pages and

[79] In the Order at 33, the Commission suggested that this case, previously cited by Respondents, supports the imposition of a civil penalty for every trip. However, given that the service was provided on separate dates and no inquiry was made into the number of trips that were furnished, it supports Respondents' position that per day civil penalties are warranted for ongoing violations

[80] Again, in the Order at 33, the Commission incorrectly suggested that this case supports the imposition of a civil penalty for every trip, which it does not for the reasons explained in the foregoing footnote.

by offering transportation to enforcement officers) over the course of two years. Fining the carrier $3,000, the Commission made no inquiry into the number of unauthorized trips that had actually been provided.

d. In *Pa. PUC v. Neighboring Movers of Pittsburgh*, Docket No. C-2010-2144722 (Order entered October 21, 2010), the carrier held itself out as a household goods mover for *over six years*. The Commission's civil penalty was $2,000, which reflected one instance of holding out and one specific instance of transportation described in the complaint. No inquiries were made as to the number of unauthorized transportation the carrier had engaged in over the course of six years.

e. In *Pa. PUC v. Transit Aide Inc.,* Docket No. C-2010-2187719 (Order entered February 10, 2011), the Commission fined the paratransit carrier $1,000 for transporting passengers without authority on a single day. No inquiry was conducted as to the number of trips that were given on that day or at any other time.

f. In *Pa. PUC v. Same Day Delivery Service,* Docket No. A-00110909C0601 (Order entered May 4, 2006), a carrier was fined $4,000 for providing unauthorized service on four different dates between January 17, 2005 and May 25, 2005, as specified in the complaint. No consideration was given to any additional trips that were furnished by the carrier during that give month period.

g. In *Pa. PUC v. Sun Coach Lines,* Docket No. C-20065888 (Order entered May 4, 2006), the Commission imposed a $2,000 civil penalty on a carrier for providing unauthorized service on two separate dates consistent with the allegations in the complaint. The total number of trips was not a consideration when assessing the civil penalty. *See also Pa. PUC v. Park Avenue Limousine,* Docket No. A-00119050C0601 (Order entered May 4, 2006) (carrier fined $2,000 for providing unauthorized service on two different days); *Pa. PUC v. Transportation by Design, Inc.,* Docket No. C-20066588 (Order entered March 1, 2007) (carrier fined $3,000 for three separate instances of holding out as providing transportation for compensation; no inquiry into number of trips furnished).

115. In another proceeding involving unauthorized service, the Commission based its $3,000 civil penalty on the number of vehicles that had been used, with no consideration given to the number of days on which the carrier operated or how many trips the carrier furnished. *Pa.*

PUC v. AVP Transport, Inc., Docket No. A-00114699C0701 (Order entered September 13, 2007).

116. Using yet a different approach to address unauthorized service, the Commission assessed a civil penalty of $10,000 on a carrier for providing unauthorized service, basing the fine on the number of drivers who were engaged in such service over a five-month period. Although the Commission referenced numerous trips, no efforts were made to obtain the specific data, and the civil penalty was not based on total trip data or the number of days of unauthorized service. *Pa. PUC v. Kitchen,* Docket No. A-00117913C0601 (Order entered November 30, 2006).

117. In *Lyft*, I&E followed an alternative approach from what was used in the above-referenced proceedings or in this matter involving Respondents.[81] I&E originally sought a $130,000 civil penalty (including $1,000 for each of 16 alleged specific unauthorized trips) and requested $1,000 per day for each day following the filing of the complaint that Lyft continued to provide service.[82] In the Amended Complaint filed against Lyft, after receipt of the trip data, I&E continued to seek a per day civil penalty for the time period from the launch of TNC services until the entry of the cease and desist order on July 1, 2014. It sought a per trip penalty from that date until Lyft received ETA on August 14, 2014. Ultimately, the Commission's $250,000 civil penalty was not based on the total number of trips provided over the course of the six months.

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[81] In the Order, the Commission suggested that default orders, where the carrier has failed to respond to a complaint, are somehow of less precedential value than litigated proceedings. Order at 33. However, the proceedings that result in default orders reflect I&E's typical approach to proposing civil penalties; and regardless of the default nature of the orders, the Commission has reviewed and endorsed those various approaches.

[82] This approach mirrored the format used in I&E's original Complaint against Respondents.

118. In addition, the Commission has typically not inquired about the number of trips provided by a motor carrier that is in violation of regulations establishing standards for driver integrity, vehicle safety and liability insurance, as follows:

a. In *Pa. PUC v. Rosemont Taxicab Co., Inc.*, Docket No. C-2011-2249510 (Order entered February 16, 2012), I&E alleged a number of violations, including a failure of the taxicab company to obtain criminal background checks for 15 drivers. The absence of criminal background checks strikes at the very core of the driver integrity requirements on which the Commission has understandably focused in the interest of ensuring adequate public safety protections. Although the Commission assessed a civil penalty on the basis of the number of drivers for whom the taxicab company had not obtained criminal background checks, no inquiry was made into the number of trips those drivers gave during the time they were operating for the company.

b. In *Pa. PUC v. Premium Taxi*, Docket No. C-2010-2181602 (Order entered September 26, 2011), the Commission fined a taxicab company for various violations, including inoperable dome lights and safety belts and the use of vehicles that were over the eight year age limit. In doing so, the Commission imposed a civil penalty on the carrier for each violation without considering the number of trips that the public took in vehicles that did not comply with the Commission's safety standards.

c. In *Pa. PUC v. Rosemont Taxi Cab Co.*, Docket No. C-2011-2229464 (Order entered August 11, 2011), the Commission levied a civil penalty on the carrier for various violations including a driver operating without a valid driver's license. Despite the Commission's focus on driver integrity, it did not consider the number of trips that the driver provided during the period when he lacked a valid driver's license.

d. In *Pa. PUC v. Altoona USA & Transfer*, Docket No. C-2010-2189008 (Order entered January 13, 2011), the carrier was fined $1,100 for various violations, including operating a vehicle with unsafe tires. Despite the Commission's emphasis on vehicle safety, the order contains no discussion about the number of trips the carrier furnished in a vehicle that did not meet those standards.

e. In *Pa. PUC v. Trinity Limo, Inc.*, Docket No. C-2010-2131626 (Order entered June 3, 2010), the Commission levied a civil penalty of $1,250 on the limousine carrier for failing to obtain criminal history records for drivers. The Commission assessed the fine on the basis of the number of

drivers whose records were not obtained, with no inquiry into the number of trips that those drivers had furnished.

f. In *Pa. PUC v. Yellow Cab Co. of Pittsburgh*, Docket No. C-2008-2034624 (Order entered May 14, 2009), the Commission approved a $4,000 civil penalty for failure of the taxicab company to require drivers' licenses and maintain safe services in providing transportation to the public. No inquiry was made into the number of trips the carrier furnished while in violation of safety regulations.

g. In *Pa. PUC v. J.B. Taxi,* Docket No. A-00118810C0701 (Order entered December 20, 2007), the Commission imposed a civil penalty in the amount of $1,050 on a taxicab for a series of safety-related violations, including inoperative hazard flashers and left turn signal. Assessing $100 for each violation, the Commission gave no consideration to the number of trips that the company furnished while in violation of those safety standards.

h. In *Pa. PUC v. Capital City Cab Service,* Docket No. A-00113875C0501 (Order entered October 6, 2005), the taxicab company was fined for a series of violations including serious safety issues with tires on vehicles being used to transport the public. The Commission did not inquire as to how many trips were provided in those unsafe vehicles.

i. In *Pa. PUC v. Classic Coach Ltd.*, Docket No. A-00107689C0303 (Order entered May 10, 2007), the Commission imposed a $2,000 civil penalty on a carrier for providing service without insurance on two different dates during a five week period. Despite the emphasis that the Commission has placed on the importance of maintaining insurance to ensure the protection of the public, the number of trips that the carrier furnished was not even discussed.

119. In the Order, the Commission became focused on the total number of trips that were provided without its authority. In doing so, the Commission failed to consider that the allegations in this proceeding (aside from the fourteen individual trips alleged and proven by I&E) involved the Respondents' continuous, ongoing and indivisible activity of making a digital platform available for others to use in facilitating passenger services. In treating this continuous and ongoing activity as a series of separate violations, the Commission exceeded its statutory authority and violated Respondents' due process rights. At the very least, the Commission

abused its discretion by ignoring its settled precedent regarding its approach to calculating penalties in the transportation services arena. Respondents thus respectfully urge the Commission to recalculate the penalty on a per day basis, or at the most on a per day basis with a per trip surcharge for the fourteen trips that were alleged and proven.

e. The imposition of a higher civil penalty for trips provided after the issuance of a cease and desist order is unlawful since the Commission has no statutory authority to award injunctive relief.

120. Imposing a higher civil penalty for trips facilitated after the issuance of a cease and desist order is unlawful since the Commission, and the ALJs, lacked statutory authority to grant injunctive relief. Code Section 502 makes it clear that the Commission is obligated to initiate appropriate legal proceedings in a court of competent jurisdiction requesting the issuance of a cease and desist order. Authority that the Commission does not have under the statute cannot be conferred by regulations. Due to the lack of enforceability of the cease and desist order issued by the ALJs, which was later ratified without statutory authority by the Commission, it is inappropriate to factor noncompliance into the determination of a civil penalty.

121. In imposing a significantly higher civil penalty for trips provided after the issuance of the cease and desist order by the ALJs on July 1, 2014, which was ratified by the Commission on July 24, 2014, the Commission overlooked the lack of statutory authority that it (or the ALJs) have to award injunctive relief. As such, the cease and desist orders were unenforceable and were improperly relied upon to assess higher civil penalties for trips following their issuance.

122. It is well-settled that as a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Code. *See City of Phila. v. Phila. Elec. Co.*, 473 A.2d 997, 999-1000 (Pa. 1984) ("We begin our inquiry

by recognizing that the authority of the Commission must arise from the express words of the pertinent statutes or by strong and necessary implication therefrom...It is axiomatic that the Commission's power is statutory; and the legislative grant of power in any particular case must be clear."); *see also Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 795 (Pa. 19; *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008). It is well-settled that the Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A.2d 348 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *alloc. denied*, 637 A.2d 293 (Pa. 1993).

123. The Commission is not a governmental entity endowed with equitable powers. The General Assembly did not grant the Commission injunctive powers; rather, it specifically gave the Commission the ability to seek injunctive relief from courts of equity. Code Section 502 provides that "[w]henever the commission shall be of opinion that any person or corporation, including a municipal corporation, is violating, or is about to violate, any provisions of this part...the commission may institute injunction, mandamus or other appropriate legal proceedings, to restrain such violations. 66 Pa. C.S. § 502.[83] This statute is in accord with the division of powers among the three branches of the Commonwealth's government, as the

[83] 66 Pa. C.S. § 502. This statutory provision is substantially similar to Section 903 of a previous version of the Public Utility Law which the Supreme Court of Pennsylvania interpreted as the legislature's providing a means for the Commission to come before the court to prevent the violation of a provision of the Public Utility Law by obtaining an injunction. *Israel.* Indeed, the situation in Israel involved unauthorized taxicab service, which the Commission appropriately addressed by seeking the issuance of a cease and desist order by a court of competent jurisdiction.

granting of injunctive relief is an extraordinary exercise of a court's equitable powers which should be issued with caution and should only be considered when there is no adequate remedy under the law. *Maritrans GP Inc., v. Pepper, Hamilton & Scheetz*, 529 Pa. 241, 259, 602 A.2d 1277, 1286 (1992); *Big Bass Lake Cmty. Ass'n v. Warren*, 950 A.2d 1137, 1144 (Pa. Cmwlth. 2008).

124. If the General Assembly had wanted to give the Commission broad injunctive powers, it would have done so through the Code. The maxim *expressio unius est exclusio alterius* teaches that the express mention of one thing in a statute implies the exclusion of other things. *See Lamar Advertising Co. v. Zoning Hearing Bd.*, 939 A.2d 994, 1000 (Pa. Cmwlth. 2007); *see also L.S. v. David Eschbach, Jr., Inc.*, 583 Pa. 47, 874 A.2d 1150 (2005). As the General Assembly gave the Commission only the ability to seek an injunction from the courts, it is clear that the Commission is not vested with the ability to issue injunctive relief.

125. The only authority referenced by the Order in connection with the cease and desist order is Section 3.10 of the Commission's regulations, 52 Pa. Code § 3.10, which provides for the granting or denying of interim emergency relief by ALJs, followed by Commission review. Respondents are aware that the Commission has previously issued injunctive relief in the form of cease and desist orders under Section 3.10 of its regulations. *See Application of Fink Gas Company for Approval of the Abandonment of Service*, 2015 WL 5011629 (Pa. P.U.C.), Docket No. A-2015-2466653 (Order entered August 20, 2015). However, it is well-settled that the Commission may not confer subject matter jurisdiction on itself. *Roberts.*

126. When the Commission lacks statutory authority to grant certain relief, it may not rely on its regulations to establish powers. The Pennsylvania Supreme Court has held that the rulemaking power of administrative agencies is limited by statutory grant of authority and can

only be conferred by clear and unmistakable language setting the exact bounds of the statutory grant. *Volunteer Firemen's Relief Association v. Minehart*, 425 Pa. 82, 227 A.2d 632 (1967); *Pennsylvania Medical Society v. State Board of Medicine*, 118 Pa. Cmwlth. 635, 546 A.2d 720 (1988). An agency's authority to promulgate a regulation may rest upon a grant of power implicit in the enabling legislation; such implication, however, must be manifest. *Pennsylvania Association of Life Underwriters v. Department of Insurance*, 481 Pa. 330, 393 A.2d 1131 (1978). *See also Campo v. State Real Estate Commission*, 723 A.2d 260, 262 (Pa. Cmwlth. 1998).

127. A review of other administrative agencies' enabling statutes reveals that they have been expressly authorized to issue cease and desist orders. *See, e.g., Zamantakis v. Cmwlth., Human Relations Commission*, 10 Pa. Cmwlth. 107, 308 A.2d 612 (1973) (Court confirmed that the Pennsylvania Human Relations Commission's enabling statute expressly authorized it to order respondents to cease and desist from committing any unlawful and discriminatory practices); 43 P.S. § 959(f)(1). Similarly, the Federal Trade Commission is expressly authorized by 15 U.S.C. § 45 to issue cease and desist orders. *See Lee v. Federal Trade Commission,* 679 F.2d 905 (D.C. Cir. 1980).

128. Given the Commission's lack of statutory authority to issue a cease and desist order, the ALJs also clearly had no such power. Indeed, under the language of Code Section 502, the Commission would not have been able to even seek enforcement of the ALJs' cease and desist order in a court of competent jurisdiction because it did not constitute a final order. 66 Pa. C.S. § 502 (Section 502 authorizes the Commission to seek enforcement of an order made by the Commission). Since neither the July 1, 2014 cease and desist order issued by the ALJs nor the July 24, 2014 order issued by the Commission ratifying that cease and desist order were valid, it

is inappropriate for the Commission to rely on them in imposing a higher civil penalty for individual trips furnished after their issuance.

f. The Commission's vague and ambiguous guidelines for calculating penalties has led to the implementation of inconsistent and unfair approaches that bear no relation to the conduct being addressed.

129. The Commission overlooked many mitigating material factors, as well as applicable case law, in applying the guidelines set forth in its Policy Statement at 52 Pa. Code 69.1201, resulting in an this excessive and unprecedented civil penalty. As such, the Order is not based on substantial evidence and ignores the evidence in the record regarding Respondents' safe business practices, the lack of actual harm to the public arising from the unauthorized operations and compelling consumer demand for Respondents' services. The ultimate result bears no relation to the conduct being addressed and spotlights the vague and ambiguous nature of the Commission's penalty guidelines.

130. The Commonwealth Court has vacated civil penalties as unlawful when they "strike at one's conscience as being unreasonable" and do not "fit" the statutory violation. *United States Steel Corp. v. Dept. of Environmental Resources*, 300 A.2d 508, 7 Pa. Cmwlth. 429 (Pa. Cmwlth. 1973). See *also Eureka Stone Quarry, Inc. v. Department of Environmental Protection*, 957 A.2d 337 (Pa. Cmwlth. 2008) (penalty may be overturned if administrative agency's decision violated respondent's constitutional rights or if it does not reasonably fit the violation and strikes the conscience of the Court as being unreasonable.) A civil penalty is considered arbitrary and capricious if it bears no rational connection to the relevant factors in a proceeding. *See Shandong Huarong Machinery Co., Ltd. v. United States*, 435 F. Supp. 2d 1261 (2006).

131. The Commission has promulgated a Policy Statement that establishes factors and standards that are to be used in evaluating litigated and settled cases involving violations of the Code and regulation, presumably in an effort to produce results that reasonably fit the violation and avoid striking one's conscience as being unreasonable. 52 Pa. Code § 69.1201(c). However, based on the application of those guidelines here, it appears that they are hopelessly vague and do nothing to meaningfully constrain the Commission's calculation of civil penalties. Indeed, if the Commission's position is that it has unfettered discretion to impose any penalty from $250,000 (as it did for Lyft) to $49 million (as the ALJs imposed here) for essentially identical conduct, that view raises significant due process concerns.

132. The Due Process clause requires that potential violators have notice of "the potential penalties that accompany noncompliance," as well as "explicit standards for those who apply the law." *Harris*, 564 F.3d at 1311. A reasonable party, reading the statutes and the PUC's policy statement promulgated in the Pennsylvania Code, would not have been on notice that they faced a potential fine approaching $50 million for making a digital platform available in Pennsylvania to allow drivers and riders to connect with each other to arrange transportation services.

133. Rather than providing any sort of notice or predictability, the factors are generally described in the Policy Statement, which indicates that certain situations may warrant a higher or lower penalty. With the penalties ranging from $1 to $1,000 per violation under Code Section 3301, the Commission's discretion is overly broad, particularly given the lack of any penalty matrix or specific penalty guidelines. The Commission's imposition of an $11.3 million civil penalty in this proceeding spotlights the vagueness of these guidelines, and absent a significant

reduction, threatens to undermine the validity of the Policy Statement going forward and the Commission's decisions made thereunder.

134. In contrast to the Commission's Policy Statement setting forth various general factors to be considered in determining an appropriate civil penalty, the Department of Environmental Protection ("DEP") relies on a very specific penalty matrix that places regulated entities on clear notice as to the minimum penalties for certain violations. Additionally, DEP's civil penalty decisions are based on testimony in the evidentiary record that explains in detail how the civil penalties are calculated.[84] *See Pines at West Penn, LLC v. Pa. Dept. of Environmental Protection*, 24 A.3d 1065 (Pa. Cmwlth. 2011).

135. In *Westinghouse Electric Corp. v. Pa. Dept. of Environmental Protection*, 705 A.2d 1349 (1998), the Commonwealth Court vacated a $5.4 million civil penalty because of a faulty penalty analysis. Pointing to an improper calculation by DEP in addressing the company's actions resulting in groundwater contamination in violation of The Clean Streams Law, 35 P.S. §§ 691.1-691.1001, the Court remanded the matter to DEP for it to be recalculated. By contrast, the present proceeding relies on such ambiguous factors that a proper penalty is incapable of being predicted or calculated.

136. A review of the Order in this proceeding reveals many instances in which the Commission made vague references to how its analysis would affect the ultimate civil penalty, as follows:

[84] By contrast, in this proceeding, I&E's witness did not even adjust the amount of the civil penalty after receiving actual trip data, which showed far fewer trips than I&E's Amended Complaint relied upon as proxy data in support of a proposed $19 million civil penalty. Also, he offered no justification for a specific amount of civil penalty per trip. Tr. 112-113.

- "Rather than directing a maximum civil penalty, we instead find that the analysis supports a finding of a higher civil penalty under this factor when weighing all the factors."[85]

- "Such actions weigh in favor of a lower civil penalty when considering all the penalty factors. Therefore, we shall grant Uber's Exception in part as to this factor and shall modify the ALJs' Initial Decision accordingly."[86]

- "We adopt the reasoning of the ALJs as to this factor and find that it warrants the imposition of a higher penalty."[87]

- "We find in the absence of any significant compliance problems...supports a lower civil penalty when evaluating all the factors. We shall grant the Respondent's Exception in part as to the sixth factor and modify the ALJs' Initial Decision accordingly."[88]

- "In the absence of a significant penalty, there is the danger that other motor carriers may attempt to disregard the Regulations."[89]

- "[U]pon evaluation and weighing of all the factors we find that the civil penalty should be adjusted."[90]

- "Uber is entitled to some relief from the civil penalty recommended by the ALJs."[91]

137. References to a "higher civil penalty," a "lower civil penalty" and a "significant penalty, and the use of phrases such as "shall modify the ALJ's Initial Decision accordingly" and "some relief" being warranted, demonstrate the vagueness of the Commission's approach in civil penalty determinations. *See Northern Associates, Inc. v. State Board of Vehicle Manufacturers, Dealers and Salespersons*, 725 A.2d 857 (1999) (Commonwealth Court vacated a civil penalty due to the vagueness of the administrative agency's order).

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[85] Order at 54.
[86] *Id.*
[87] *Id.*
[88] Order at 55.
[89] *Id.*
[90] Order at 57.
[91] Order at 59.

138. The Commission's Policy Statement also contains a conspicuous element of ambiguity due to the factor that permits it to consider "other relevant factors." 52 Pa. Code § 69.1201(a)(10). Within this portion of the Commission's Order, it reiterated factors that had already been considered (*i.e.* whether consequences of conduct were serious and whether conduct was intentional) and also looked at the average cost of the trips taken by I&E's enforcement officers.[92] While the Commission explained how that information affected the civil penalty for trips facilitated between February 11, 2014 and July 1, 2014, it offered no rationale for the impact of those average fares on civil penalties for trips arranged through the App after July 1, 2014.

139. In other cases, the Commission has similarly considered factors that are not specified in the Policy Statement. For instance, in *HIKO Energy*, the Commission compared its $125 civil penalty per violation to the amount the company obtained through its illicit overbilling of customers in the amount of $124. *Id.* at 48. Had the Commission performed a similar analysis in this proceeding using the average revenue that Respondents earned per trip as a basis for the civil penalty (approximately 20% of the Commission-determined average $7 per trip fare), a per trip civil penalty would have been approximately $172,000, or the lower amount of $162,309 if trips provided free of charge are excluded.

140. The Commission instead started with the average *fare* the customer paid, meaning that the base amount was already five times what Respondents had received in connection with the trips that occurred during the period. Moreover, while that was the Commission's starting point in its analysis here, it did not end there. Rather, the Commission added a substantial

[92] Order at 58.

additional civil penalty for each of the trips facilitated after July 1, 2014.[93] Yet, in *HIKO Energy*, by contrast, the Commission did stop there, despite the company's executive level decision to intentionally overcharge 5,700 customers over the course of three months, ignoring a written price savings guarantee in their contracts. This inconsistency in the Commission's approaches less than five months apart shows that the Policy Statement affords the Commission too much discretion in determining civil penalties.

141. Clear penalty guidelines produce consistent results when regulated entities violate an administrative agency's regulations. Under clear penalty guidelines, it would not be possible to impose a civil penalty of $250,000 on one entity while assessing an $11.3 million fine (or even a $49 million fine as the ALJs recommended) on its primary competitor for engaging in identical activities during the same time period in the exact geographic region. Under a clear penalty matrix, it would not be possible to impose a civil penalty of $11.3 million on an entity that followed safe business practices in providing new and innovative services demanded by the public, while being capped by law at $2 million in assessing a fine on a public utility that departs from established gas pipeline safety standards in the transportation of flammable or toxic gas. Under consistent penalty guidelines, it would not be possible to impose a civil penalty of $11.3 million on an entity that operated in a grey area of the law and is before the Commission for the first time on an enforcement matter when a public utility that is before the Commission nine times in five years in proceedings involving unsafe business practices, including some fatalities, is fined $1 million. Consistently using clearly defined criteria would not result in the imposition of a $500,000 fine on a utility that causes fatalities through its unsafe business practices, while

[93] *Id.*

levying a penalty of more than 20 times that amount on a start-up entity facilitating safe transportation services to the public.

142. Although clear penalty guidelines of an administrative agency would not produce such radically diverse results, all of these outcomes are true based on a review of this and other Commission proceedings. As such, they demonstrate the overly broad discretion of the Commission in determining civil penalties.

g. Order is not supported by substantial evidence due to Commission's misapplication of the factors in the Policy Statement.

143. The Commission's Policy Statement[94] sets forth specific standards and factors that the Commission will consider when evaluating whether and to what extent a civil penalty for violations of the Code, Commission regulations or Commission orders is warranted. These factors were initially developed in the *Rosi v. Bell-Atlantic – Pennsylvania, Inc., and Sprint Communications, L.P.*, Docket No. C-00992409 (Order entered March 16, 2006) and in *Pa. Public Utility Commission v. NCIC Operator Serv.*, Docket No. M-00001440 (Order entered December 21, 2000), where the Commission held that violations would be subject to the same standards. The Commission's Policy Statement is essentially a codification of those guidelines.

144. In the Order, the Commission found that only two factors warranted a lower civil penalty. Specifically, the Commission concluded that a lower civil penalty was appropriate due to Respondents' modifications of its internal practices to comply with the Commission's imposed conditions on Rasier-PA's current authority, and because Respondents have not

[94] 52 Pa. Code § 69.1201.

demonstrated any significant compliance problems since the grant of ETA and the experimental services authority.[95]

145. In reaching this determination that only those two factors warranted a lower civil penalty, the Commission appears to have overlooked evidence in the record demonstrating that other mitigating factors likewise should have resulted in a significantly lower penalty. As such, the Commission's decision is not based on substantial evidence. The specific mitigating factors that the Commission should consider are that: (i) Respondents were in full compliance with the Commission's safety and consumer protection regulations prior to the grant of ETA; (ii) the public was not harmed by Respondents' TNC services and no evidence is in the record to suggest any unsafe business practices; (iii) Respondents' operations fell within a grey area of the Code; (iv) a civil penalty primarily based on the deterrence factor is inappropriate given the Commission's traditional focus on deterring the entity that is the respondent in the proceeding from future violations, and in view of Respondents holding authority for two years to cover the operations that are the subject of this proceeding; and (v) decisions in similar cases, including one identical case, support a civil penalty significantly less than $11.3 million.

i. Whether conduct was serious

146. The first factor in the Policy Statement requires the Commission to consider whether the conduct was serious. In its review of this factor, the Commission determined that the conduct was serious because Respondents' actions in providing service without Commission authority "prevented the Commission from fulfilling its statutory duty to protect the safety of the traveling public."[96] The Commission went on to explain that its "motor carrier enforcement

[95] Order at 58-59; 52 Pa. Code § 69.1201(c)(4) and (6).
[96] Order at 52.

officers were unable to inspect the automobiles of Uber drivers, review and inspect criminal history and driving records of Uber drivers, or ensure that adequate liability insurance covered the vehicles of the Uber drivers."[97]

147. For all the speculation about the potential for public safety to be jeopardized, however, there is not a shred of evidence from the entire proceeding that even suggests a possible departure from the Commission's safety regulations. This was despite I&E having the ability to conduct vehicle inspections from August 21, 2014 through the evidentiary hearing on May 6, 2015. Indeed, it did not even contact Rasier-PA until April 2015 to review driver documents and did not perform any vehicle inspections until September 2015,[98] demonstrating that its conjecture about public safety is nothing but smoke and mirrors and that the Commission's concerns are unfounded.

148. Further, I&E's witness, Officer Bowser, acknowledged during the hearings that companies often have their own business reasons to follow practices designed to ensure compliance with driver integrity and vehicle safety requirements. Moreover, Respondents introduced evidence into the record describing those business practices which were in effect even prior to the Commission's grant of ETA. It is also noteworthy that even when I&E's enforcement staff began reviewing driver documents and conducting vehicle inspections, no violations were identified.[99]

149. The Commission simply failed to acknowledge in the Order that a business may be regulated by the constraints imposed by the public it serves and thereby engage in safe business practices. While the Commission's Order focuses on Respondents' conduct as being of

[97] *Id.*
[98] Feldman Affidavit ¶ 13.
[99] Feldman Affidavit ¶ 13.

a serious nature because it was not subject to the Commission's oversight for purposes of ensuring public safety and protections, the latter were clearly in effect throughout the time of the operations that are the subject of this proceeding, substantially reducing the seriousness of the conduct at issue here.

ii. Whether consequences were serious

150. Notably, in consideration of the second factor -- whether the consequences were serious -- the Commission inappropriately relied on a *potential* for harm resulting from operations that are not subjected to its oversight and regulation.[100] In doing so, the Commission glossed over the fact that no harm actually resulted from the operations and the fact Respondents followed safe business practices, which fully complied with the Commission's regulations, prior to receiving authority from the Commission. The lack of harm to the public, combined with Respondents' business practices designed to ensure driver integrity and vehicle safety, supports a significantly lower civil penalty.

151. According to the express language of the Commission's own enacted Policy Statement, the Commission "will evaluate the harm sustained rather than engaging in any amount of speculation about the potential for harm." *Final Policy Statement for Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations*, Docket No. M-00051875 (Order entered November 30, 2007) ("*Policy Statement Order*"). Yet, here, in direct contravention of its own policy, the Commission engaged in speculation fueled by I&E's conjecture of potential harm (without any evidence to back it up) to

[100] Order at 52-53. It is noteworthy that the Commission's oversight and control does not prevent accidents or harm to the public. Tr. 35, 40-41. *See, e.g., Pa. PUC v. Rosemont Taxicab Co., Inc.,* Docket No. C-2014-2431452 (Complaint served August 13, 2014; still pending); *Pa. PUC v. Rosemont Taxicab Co., Inc.,* Docket No. C-2011-2265691 (Complaint served November 9, 2011; still pending). Also, I&E's witness acknowledged that a company may have its own business reasons to follow safe business practices. Tr. 38 (June 24, 2014).

conclude that Respondents' actions "presented a significant risk to the safety of the Uber passengers and drivers and to other travelers and pedestrians."[101]

152. In the Order, the Commission indicates that policy statements are not binding norms, but are announcements of the Commission's tentative intentions for the future and cites *Pa. Human Relations Comm'n v. Norristown Sch. Dist.*, 473 Pa. 334, 349-350, 374 A.2d 671, 679 (1977).[102] While the case law makes clear that administrative agency's policy statements do not establish standards that must be followed by regulated entities, they do set forth the agency's own policy pronouncements of how they intend to decide matters, which is particularly relevant in the context of imposing civil penalties due to the importance of clarity and consistency. Further, the pronouncement in the order adopting the Policy Statement reflects well-established law holding that Commission decisions must be supported by substantial evidence in the record, and that more is required than a "mere trace of evidence or suspicion of the existence of a fact." *Norfolk and Western Railway Co. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980).

153. Indeed, the express language of the Policy Statement explains that the seriousness of the consequences of the conduct hinges on whether personal injuries or property damage occurred. 52 Pa. Code § 69.1201(c)(2). In *Pa. PUC, Bureau of Investigation & Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Order entered December 3, 2015), the Commission added financial harm as a factor that may render consequences serious. However, in this proceeding, the record is completely devoid of any harm, and by all accounts, customers received the services they requested.

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[101] Order at 52.

[102] Order at 52, fn. 34.

154. In support of its conclusion that the consequences were serious despite the absence of actual harm or evidence of unsafe business practices, the Commission cited the Pennsylvania Supreme Court's decision in *Pa. PUC v. Israel*, 356 Pa. 400, 52 A.2d 317 (Pa. 1947), as standing for the proposition that unlawful conduct is tantamount to being injurious to the public. A review of the *Israel* decision shows that this concept was addressed in the context of an analysis of irreparable harm for purposes of ruling on a request for a preliminary injunction. As such, it has no bearing on whether the Commission should, or may, view Respondents' conduct as being harmful to the public for purposes of reviewing the factors in the Policy Statement concerning consequences of the conduct and in determining an appropriate civil penalty. In addition, the respondents' activities in *Israel* were clearly covered by the Code, and did not fall in a grey area.

155. The Commission's Order also refers to two other decisions in support of its ability to consider the potential for harm resulting from certain conduct in assessing a civil penalty.[103] In *Pa. PUC v. Columbia Gas of Pa.*, Docket No. M-2014-2306076 (Order entered September 11, 2014), the Commission approved a settlement agreement, as modified.[104] The conduct of the natural gas company in that proceeding involved multiple incidents implicating gas pipeline safety standards, including valve inspection procedures, excessive pipeline pressures, excavation damage and lack of pressure regulation devices, all of which the Commission described as inherently serious in nature. Since the public was at risk of injury due to the broad scope of impacts resulting from a single gas safety incident, especially as compared to the potential

[103] Order at 52, fn. 34.

[104] While Respondents agree that prior Commission decisions addressing settlements provide helpful guidance in adjudicating litigated matters, it is ironic that the Commission relies on two orders disposing of settlements to support its views of being able to speculate about potential harm in order to justify a higher civil penalty, while completely discounting settlements when Respondents urged a comparison of civil penalties. Order at 52.

effects on the public of a single motor carrier incident, the Commission found the consequences to be of a serious nature. Despite reaching those conclusions, the Commission imposed a civil penalty of $200,000 on the natural gas company.

156. The other case cited by the Commission in support of considering potential harm in the civil penalty analysis is inapposite. In *Pa. PUC, Bureau of Investigation & Enforcement v. WGL Energy Services, Inc.*, Docket No. M-2015-2401964 Order entered January 28, 2016), the Commission approved a settlement agreement to impose a civil penalty of $1,000 on an electric generation supplier whose door-to-door sales agent stole a wallet from a prospective customer. In reviewing the factor in the Policy Statement regarding whether the resulting consequences were of a serious nature, the Commission did not consider the potential for significant harm, as suggested by the Commission's Order.[105] To the contrary, the Commission stated as follows:

> There is no indication that the alleged violations actually resulted in personal injury or property damage. Further, according to the Settlement, the wallet and the $203 contained in it were separately recovered by the police; this suggests that there were no financial injuries suffered by the consumer. Thus, the Company's actions...did not result in consequences of a serious nature which would warrant a higher penalty under this factor.

WGL Energy Services at 9. Notably, in both *Columbia Gas* referenced above and in *WGL Energy Services*, the Commission analyzed the first and second factors in the Policy Statement separately rather than together as it did in this proceeding. The Commission's approach in those cases properly viewed the seriousness of the conduct and the seriousness of the consequences as separate inquiries when determining an appropriate civil penalty.

157. This approach of considering whether consumers were harmed, either through personal injury, property damage or financial harm, is consistent with Commission's prior

[105] Order at 52, fn. 34.

practice and is the standard that must be employed here, as in the cases cited by Respondents in Exceptions. *See Pa. PUC, Bureau of Investigation & Enforcement v. Duquesne Light Co.*, Docket No. M-2014-2165364 (Order entered October 2, 2014) (since there is no indication that the alleged violations resulted in personal injuries or property damage, the company's actions did not result in consequences of a serious nature that would warrant a higher penalty under this factor); *Pa. PUC, Bureau of Investigation & Enforcement v. Scott A. Dechert t/a Distinctive Limousine Service*, Docket No. C-2012-2334904 (Order entered October 17, 2013). Indeed, in *Lyft*, the Commission acknowledged that the lack of personal injury or property damage in consideration of this factor, without conjecturing as to the potential for such harm.[106] *Lyft* Initial Decision at 14-15.

158. In addition to the tortured analysis the Commission went through in an attempt to rationalize its characterization of the consequences as "serious" due to the unsubstantiated *potential* for harm, it also mischaracterized Respondents' testimony when it stated that "Uber's witness testified that he was aware of nine such occurrences involving Uber drivers that led to insurance claims but that not every incident or accident leads to an insurance claim."[107] Respondents' witness clearly testified that there were only nine accidents or incidents -- or less than one in 10,000 trips -- during that timeframe that resulted in anything that could have even led to the filing of an insurance claim.[108] He also explained that no accidents involved fatalities

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[106] While the Commission has discounted both the precedential and persuasive value of orders approving civil penalties as part of settlement agreements, a stance that Respondents address below, it has not suggested that its rationale and discussion of the policy factors in those situations is meaningless. Indeed, given the Commission's obligation to review settlement agreements to determine whether they are in the public interest and supported by substantial evidence, its basis for reaching those conclusions provides helpful guidance in evaluating these factors in litigated proceedings. 52 Pa. Code § 69.1201(a); *Pa. PUC v. PPL Utilities Corp.*, M-2009-2058182 (Order entered November 23, 2009).

[107] Order at 53, fn. 35.

[108] Tr. 138-139, 168 (May 6, 2015).

or serious bodily injury.[109] As to the types of incidents that occurred, he noted that one driver was hit by a hit-and-run vehicle and another was hit by a drunk driver, and gave other examples of a dent from a fender bender.[110] Clearly, a *de minimus* number of incidents happened during the six-month period in question, and none of the evidence suggested that any of them occurred due to inadequate screening of drivers or vehicles or any unsafe business practices of Respondents.

159. Quite simply, the lack of actual harm is a very significant factor that the Commission should have taken into consideration, but instead was overlooked in favor of speculation about potential harm. It is also important for the Commission to keep in mind that accidents are inevitable and the concern should be on whether Respondents took measures to maximize safe trips, which the evidence clearly demonstrates was the case. Also, accidents in the motor carrier transportation industry, by their very nature, do not have the potential to jeopardize public safety in the way that natural gas companies, electric companies and water companies can when they fail to employ sufficient measures to provide safe utility services. For instance, natural gas explosions resulting from one incident can simultaneously affect large segments of the public, as can a water company who allows its supply to become contaminated or an electric company that fails to follow electric safety standards or perform necessary vegetation management.

iii. Whether conduct was intentional

160. The Commission's evaluation of whether Respondents' conduct was intentional appears to have overlooked the facts that Respondents had obtained a broker's license from the

[109] Tr. 138 (May 6, 2015).
[110] Tr. 143-144 (May 6, 2015).

Commission, which Respondents believed to cover the operations at issue here; that, at worst, Respondents' activities were in a grey area under the Code, which both the Commission and the Commonwealth Court have confirmed;[111] that on the same date as the Commission directed Respondents to cease and desist from providing TNC services, it found that an immediate and compelling need for these services existed in Allegheny County and conditionally granted emergency temporary authority to Respondents; and that as of that date, Respondents were already in compliance with the driver integrity and vehicle safety requirements imposed by the Commission and merely had to obtain primary liability insurance to cover the period of time when the App is turned on but no ride has been requested.[112]

161. The Order indicates that "Uber admits that its conduct was intentional," which is not an accurate characterization of Respondents' position. Rather, while Respondents concede that they intentionally launched TNC services in February of 2014, they initially provided the services under the belief that authority held by Gegen, LLC provided a basis for those operations. During that time, these operations were clearly in a grey area, with no Commission ruling on whether authority was needed and many bills pending in the General Assembly. In *Lyft*, the Commission recognized this was a grey area, noting "that the uncertainty in the regulatory framework relating to transportation network companies may offer some justification for the launch of Lyft's transportation network service without first securing authority from the

[111] *ETA Order, Lyft*, and *Capital City Cab.*

[112] Otherwise, Respondents already had in place $1 million in primary liability insurance for the periods during which a trip is occurring, *i.e.* from the time a trip is accepted until the passenger exits the vehicle. Tr. 128. Moreover, no evidence was produced in this proceeding to show that any passenger was delayed or denied insurance coverage related to any incidents that occurred on the platform during that time.

Commission."[113] Yet, the Commission has refused to make the same concession for Respondents.[114]

162. Respondents further explained that upon the issuance of the cease and desist order by the ALJs on July 1, 2014, which the Commission ratified on July 24, 2014, Respondents had been operating for five months and thousands of trips had occurred. This meant that individuals who previously could not move around the City of Pittsburgh were now relying on the service, for example, for transportation to medical appointments, or for getting home safely from a bar at night, rather than drinking and driving. Aside from the tremendous need for the service, Respondents' witness also noted that by the time the cease and desist order was issued, thousands of drivers were relying on the income earned from operating on the platform to pay their bills and raise their families. The witness correctly concluded: "To pull the rug out when there is such tremendous need, when the Commission has said that this is needed, that there is an emergency and that it's conditionally approved would be detrimental to the community."[115]

163. In portraying Respondents' decision to continue operating as a deliberate disregard of the Commission's authority,[116] the Commission overlooked the fact that Respondents had been striving for compliance since April 2014 out of respect for the Commission's authority. The facts that Respondents had filed an application for experimental services authority on April 14, 2014, filed an application for emergency temporary authority on July 2, 2014 and quickly complied with the Commission's conditions do not support a finding of, and are directly contrary to a finding of, a deliberate disregard for the Commission's authority.

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[113] *Lyft* Initial Decision at 18.
[114] Order at 53-54.
[115] Tr. 137-138 (May 6, 2015).
[116] Order at 54.

iv. Number of affected customers

164. By adopting the ALJ's analysis concerning the number of affected customers, the Commission overlooked Respondents' arguments and its own precedent in evaluating this factor, which should have limited consideration to the number of customers who were *adversely* affected by Respondents' operations.[117] The record in this proceeding shows that no customers were adversely affected. Citing to the substantial number of trips provided without Commission authority, the Commission's review of this factor again improperly relies on the potential for harm to the public arising from the unauthorized operations, rather than on any demonstrated *actual* harm.[118] Again, this reliance is in direct contravention to the order adopting the Policy Statement, wherein the Commission unequivocally stated that it "declines to speculate about the possibility of potential, and not actual harm to third parties." *Policy Statement Order* at 11.

165. In *Pa. PUC v. UGI Utilities, Inc.*, Docket No. C-2012-2295974 (Initial Decision served April 5, 2013; Order adopted May 9, 2013), the Commission imposed a $200,000 civil penalty on the natural gas company following a natural gas explosion that caused $455,000 in damages to a home and business amidst allegations of a failure to properly mark underground facilities and have appropriate measures in place to address damage prevention. Evaluating the number of affected customers, the Commission observed that citizens were evacuated from twenty buildings and that one building was damaged beyond repair, while an adjacent building was damaged. The Commission did not speculate as to the potential for harm to the public as a result of the explosion or the business practices that led to the explosion. Initial Decision at 18.

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[117] Order at 54.
[118] Order at 39, 54.

166. In *Pa PUC v. Philadelphia Gas Works*, Docket No. C-2011-2278312 (Initial Decision served January 28, 2013; Order adopted July 16, 2013), a natural gas explosion leveled a two-story row home in Philadelphia, resulting in the death of one company employee and injuries to five other employees and damaging several surrounding properties and six vehicles. The Commission's analysis of the factor concerning the number of affected persons or property considered these specific impacts, along with customers who sustained service interruptions as a result of the incident. Concluding that a $400,000 civil penalty was in the public interest, the Commission did not consider any greater potential for harm to the public as a result of the explosion or the practices that led to the explosion, fatalities, injury and property damage.[119] Order at 27; Initial Decision at 32.

167. In *Pa. PUC v. UGI Utilities, Inc.*, Docket No. C-2012-2308997, a natural gas explosion occurred in Allentown, killing all five occupants of the two residences and injured the patron of a nearby car wash. The fire resulting from the explosion, which was caused by a circumferential crack in a twelve-inch cast iron gas main, destroyed or significantly damaged six other residences. The Commission took these impacts into consideration when evaluating the number of affected individuals, along with the service interruption of "many customers" in imposing a $500,000 civil penalty. No consideration was given, however, to the potential for harm to the public at large as a result of the explosion or fire or the business practices leading up to these incidents.[120]

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[119] It is noteworthy that in a different part of the order in Philadelphia Gas Works, the Commission did recognize the potential for harm to the public in the context of approving modifications to the company's business practices. In the present proceeding, the company's business practices have been modified to address any ongoing concerns about the impact on the public resulting from unauthorized operations. Order at 52, 56-57 Therefore, it is unnecessary and inappropriate to also boost the size of the civil penalty on the basis of speculation as to any harm that could have come to the public during the period prior to the issuance of emergency temporary authority.

[120] Order at 32.

168. In evaluating the number of affected customers in *HIKO Energy*, the Commission emphasized the *adverse* effect on 5,700 customers as a result of the electric generation supplier's decision to increase variable prices and not honor the express terms of their guaranteed savings contracts. Specifically, the Commission noted that a large number of these customers returned to the default service provider for service when these overcharges occurred, showing that they suffered financial harm and were adversely affected. *HIKO Energy* Initial Decision at 44 and Order at 43. Also, in *HIKO Energy*, the Commission stated that if all 5,700 consumers who were financially harmed by the company's conduct had filed a formal complaint, it could have imposed a $5.7 million civil penalty. Based on the number of consumers who filed complaints about Respondents' unauthorized operations in Allegheny County in 2014, the Commission could impose a civil penalty of zero. Compared to the *HIKO Energy* proceeding where consumers complained and were financially harmed, the record in the present proceeding shows that consumers willingly used the TNC services and got exactly the services they requested.

169. As noted above in a discussion of the factor regarding the seriousness of the consequences of the conduct and consistent with the Commission's precedent to only consider those members of the public who suffer an actual adverse impact, the potential for harm to customers is not an appropriate consideration when determining the size of a civil penalty. This conclusion is even more compelling in view of the record which shows that the public was not harmed by Respondents' operations and that Respondent followed driver integrity and vehicle safety standards that complied with or exceeded the Commission's requirements. In short, no evidence was offered into the record to suggest any departure from safe business practices, and in fact Officer Bowser testified that he observed no such departures during the trips he took using Respondents' App.

170. More importantly, the Commission's discussion of this factor fails to acknowledge the need to consider the opposite angle: how many consumers benefited by having TNC services available during those six months? How many members of the public would have not been able to obtain transportation to work, school, doctor's appointments or home safely after an evening out? Those questions do not require speculation. Based on the sheer number of customers who voluntarily opted to use Respondents' TNC services, it is reasonable to conclude that some of them would have had to do without transportation and suffer the consequences during that time if Respondents had not been providing these services.

v. Deterrence factor

171. In evaluating the deterrence factor, the Commission focused on the need for a significant civil penalty that deters other motor carriers from engaging in unauthorized service and overlooked its traditional focus on the case before it. *See HIKO Energy* at 44, fn. 13 (the Commission normally crafts "penalties to the individual case and circumstances at hand"). The Commission also failed to consider Respondents' argument explaining the lack of necessity for a deterrent since Rasier-PA has been authorized for nearly two years to provide TNC services that are the subject of this proceeding.

172. The Commission's handling of the deterrence factor and the focus on deterring other entities is especially troubling and warrants reconsideration since it appears that it was the factor that ultimately drove the magnitude of the $11.3 civil penalty. In its discussion of the need for deterrence, the Commission rationalized the need for a "significant" civil penalty due to the "danger that other motor carriers may attempt to disregard the Regulations and directives of

the Commission."[121] Discussing "other relevant factors," the Commission reiterated the deterrence factor when it stated that "[u]pon weighing all the factors, including the importance of deterring future unauthorized activity within the motor carrier industry, we find that a civil penalty of $11,292,236 is appropriate under the circumstances."[122] A few paragraphs later, the Commission again indicated that:

> We believe that any additional, material reduction of the civil penalty in this case would jeopardize the future regulation of TNCs in Pennsylvania. This resolve demonstrates to Uber and to others in the industry that future unlawful operations will not be tolerated and thereby incentivizes them to fully comply with the laws of this Commonwealth.

Order at 59.

173. This emphasis on the deterrent factor as supporting the imposition of an $11.3 million civil penalty is at odds with the Commission's Policy Statement and long-standing case law. It also ignores the fact that Respondents are now authorized to provide the services that are the subject of this proceeding and have demonstrated a commitment to compliance with the Commission's requirements.

174. Notably, the Policy Statement itself does not suggest that a civil penalty needs to deter other entities in the industry. 52 Pa. Code § 69.1201(c)(8). Moreover, the Commission has traditionally not used the civil penalty to serve as a deterrent to other companies. *See, e.g., UGI Penn Natural Gas* at 21 ("We also believe that, along with the remedial measures that UGI-PNG is engaging in to enhance the safety of its distribution system, the civil penalty amount here....will be a sufficient deterrent to prevent similar occurrences in the future").

[121] Order at 56.
[122] Order at 58.

175. Moreover, in focusing on sending a message to the industry, the Commission overlooked the primary and traditional purpose of a civil penalty, which is to deter Respondents from similar occurrences in the future. On reconsideration, the Commission should review the factors set forth by Respondents explaining why deterrence is unnecessary, including the facts that Rasier-PA has been authorized by the Commission since August 21, 2014 to provide the very transportation network services that are the subject of this proceeding and has consistently demonstrated a commitment to complying with the Commission's conditions and requirements.[123] Indeed, in *Lyft*, the Commission recognized that the conduct alleged in I&E's complaint had been addressed by the company obtaining authority to operate its digital platform to facilitate passenger transportation service in the Commonwealth. *Lyft* Initial Decision at 14.

176. Moreover, the Commission provides no explanation for why the specific amount of civil penalty imposed in this proceeding is needed to accomplish its goal of deterring other entities from engaging in unauthorized service. Assessing Respondents in an appreciable amount, such as $250,000 that far exceeds prior civil penalties imposed on motor carriers before TNC services entered Pennsylvania,[124] the Commission would just as effectively send a message about the importance of complying with the Code and Commission regulations without also sending a message that the Commission stifles competition, drives away innovation and refuses to acknowledge the benefits of TNC services to the public.

vi. Similar decisions

177. The Commission's decision to completely ignore as irrelevant a settlement that it approved with Respondents' competitor overlooks the fact that the two proceedings involve

[123] Respondents' Exceptions at 16-19, 41.
[124] Respondents Exceptions at 10-11.

identical activities over the same time period in the exact geographic region, and that Lyft also continued operating after the issuance of the cease and desist order.[125] The dearth of litigated proceedings underscores the importance of the Commission at least looking to settled outcomes for guidance, if not relying on them as being of precedential value.

178. In refusing to consider the $250,000 settlement approved in *Lyft*, which is in the range of Respondents' full civil penalty exposure of $201,000 to $388,000 under the approach used in I&E's original Complaint (as discussed above), the Commission relied on *Pa. PUC v. Bell Telephone Co. of Pa.*, 68 Pa. P.U.C. 430 (1988), for the proposition that it is inappropriate to consider a settlement in any subsequent proceeding. In *Bell Telephone*, the Commission had reduced the company's income tax expense in the context of a rate case, which was reversed on appeal and remanded for recalculation. The company then sought to recoup the revenue that it had previously been disallowed, along with interest. In the face of opposition to its interest claim from the Office of Consumer Advocate, the company cited to settlements between other public utilities and the public advocates that permitted the recovery of interest, which the Commission refused to consider as precedent.

179. While *Bell Telephone* case involved a very narrow set of specific circumstances under which the Commission declined to consider a settlement as having precedential value, the scenario presented by this proceeding offers compelling reasons for comparing civil penalties imposed in settled and litigated proceedings.[126] When faced with an identical set of facts and

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[125] Order at 56-57. *See Lyft* Initial Decision at 18.

[126] The Commission is certainly free to disregard the proclamation made in Bell Telephone, and should do so here given the unique circumstances of having two identical proceedings come before it. *See Philboro Coach Corp. v. Pa. PUC*, 67 Pa. Cmwlth. 176, 179, 446 A.2d 725 (1982) Commission is not required to follow its own precedent, absent a situation involving the doctrine of res judicata); *Duquesne Light Co. v. Pa. PUC*, 176 Pa. Super. 568, 107 A.2d 745 (1954) (the failure of the Commission to follow its prior rulings is not an error of law that is subject to

the same statutory provisions in question, it is inconceivable that the Commission would not consider the civil penalty in the settled proceeding if for no other reasons than as a way of reality checking its result in the litigated case.

180. Even if the Commission continues to decline to consider settlements as having some precedential value, it has failed to explain how the settlement approved in *Lyft* is of no persuasive value in this proceeding. Indeed, the Commission fails to offer any explanation of how a $250,000 civil penalty in that proceeding was found to be in the public interest, using the same factors as were used here to reach the $11.3 million civil penalty.

181. The Commission's only reason for discounting settlements is that violations were not proven in those cases and the question of whether the conduct was intentional or negligent is not addressed in evaluating settlements.[127] While that rationale may have validity in some situations when trying to compare dissimilar factual allegations or statutory provisions, it has no applicability to the comparison between $250,000 civil penalty approved by *Lyft* and the $11.3 million civil penalty imposed in this proceeding -- more than 45 times higher -- because the two cases are identical in all material respects.[128]

182. Other Commission decisions, as shown above, support at most a civil penalty that is levied on a per day basis, along with a civil penalty for trips alleged in the Complaint and Amended Complaint, and proven by I&E. The Commission's typical practice has been to

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review). *See also Namcorp, Inc. v. Zoning Hearing Board of Horsham Township*, 558 A.2d 898 (Pa. Cmwlth. 1989) (res judicata applies only when there is a concurrence of four elements which are not present here).

[127] Order at 56.

[128] The only real difference is that Lyft provided trip data to I&E earlier in the process; however, that element is irrelevant since Respondents have been sanctioned by the Order for failing to furnish the trip data until the evidentiary hearing. Otherwise, although it is possible that the actual number of trips obtained through the platforms differed, Respondents' position is that total number of trips should not be used a basis in determining the amount of the civil penalty. Even if they are used, the Commission should seek to formulate a civil penalty that mirrors the structure followed in *Lyft*.

impose civil penalties for each day on which a violation continues and there is no precedent for devising a civil penalty based on every trip furnished by a carrier in violation of the statute, regulations or orders.

vii. Other relevant factors

183. In its analysis of other relevant factors affecting the determination of an appropriate civil penalty, the Commission should also consider additional evidence that Respondents have proffered in requesting a rehearing or reopening of the proceeding. Specifically, the Commission should consider the impact of the $11.3 million civil penalty on Respondents' Pennsylvania operations. Payment of such an enormous civil penalty will cause financial distress to these operations and threaten the continued provision of TNC services in Pennsylvania. At a minimum, Respondents will be forced to divert funds that might otherwise be available to provide additional benefits to the riding public through the introduction of new and innovative services and products to serve greater numbers of Pennsylvanians. Such measures would deprive Respondents of the ability to compete on a level playing field in a highly competitive industry with other TNCs, most notably Lyft, whose activities mirrored those of Respondents in 2014 and who was fined $250,000.[129]

184. Whether Respondents are able to continue operating as a viable entity in Pennsylvania will affect over 677,000 Pennsylvanians who have already come to rely on their TNC services. Also, the fates of 18,000 drivers who operate on the platform, running their own small businesses to pay their monthly bills or support their families are dependent on Respondents' ability to continue operating in Pennsylvania.[130]

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[129] Feldman Affidavit ¶ 6.
[130] Feldman Affidavit ¶ 7.

185. In addition, Respondents have become actively involved in local communities throughout Pennsylvania, forming partnerships with a number of organizations, including the Girl Scouts of Western Pennsylvania, UPMC Health Plan, the Pittsburgh Pirates Baseball Club, and Pennsylvania SPCA. Through a partnership with Lexus, Respondents will facilitate transportation in June 2016 to the U.S. Open in Oakmont, which is a difficult destination for the traveling public to reach in Allegheny County.[131]

186. Moreover, Respondents have chosen Pittsburgh, Pennsylvania to be the hub for testing of self-driven vehicles and their worldwide headquarters for advanced technology, offering significant benefits to Pittsburgh's economy.[132]

187. Further, Respondents' recent statistics show that passengers in underserved neighborhoods benefit from the introduction and growth of TNC services. One of every six trips is requested to or from areas in Pittsburgh that have been traditionally underserved.[133]

188. Notably, new studies have recently been released about the impact of TNC services on driving under the influence ("DUI") arrests and fatalities. Specifically, these studies have linked the introduction and growth of TNC services in Pittsburgh to an 18 percent decline in DUI arrests in 2015. In addition, the Commonwealth has experienced a 2 percent decline in DUI arrests in 2015 following the entry of statewide transportation network services. Similar results have been observed by Virginia's Department of Motor Vehicles Commissioner, who credits TNC services as playing a major role in a 22% reduction in alcohol-related fatalities in 2015. These results track the data maintained by Respondents, which shows peak usage times in

[131] Feldman Affidavit ¶ 17.
[132] Feldman Affidavit ¶ 8.
[133] Feldman Affidavit ¶ 15.

Pennsylvania as being Friday and Saturday nights (into the early morning hours on Saturday and Sunday) and the most common destinations as being bars and restaurants.[134]

189. In short, under the express terms of the Commission's own Policy Statement, the record evidence adduced in this proceeding, along with the other information proffered here, does not support the penalty that the Commission imposed. Accordingly, Respondents respectfully request the Commission to reconsider, and reduce, that penalty.

V. CONCLUSION

For all of the above reasons, Respondents respectfully request the Commission to grant rehearing, and to reconsider and reduce the civil penalty that the Commission has ordered here. A per day penalty of $187,000, rather than the currently ordered $11.3 million per trip penalty, would be consistent with the Commission's statutory authority, consistent with the Commission's precedent, consistent with the Commission's treatment of Respondents' principal competitor for virtually identical conduct, and consistent with the Commission's policy statement regarding the criteria the Commission will consider in imposing a civil penalty. Moreover, reducing the civil penalty in that manner will avoid infringing Respondents' constitutional rights under the Excessive Fine and Due Process Clauses of the Pennsylvania and United States Constitutions, while still depriving Respondents of the revenue that they earned through the allegedly unlawful transportation activities, thereby preserving the deterrent function of the civil penalty.

[134] Feldman Affidavit ¶ 16.

WHEREFORE, Uber Technologies, Inc., et al. respectfully requests that the Commission grant this Petition for Rehearing and Reconsideration.

Respectfully submitted,

May 25, 2016

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Attorneys for Uber Technologies, Inc., et al.

APPENDIX A

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

AFFIDAVIT OF JONATHAN J. FELDMAN

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

I, Jonathan J. Feldman, being duly sworn according to law, depose and say the following:

1. My name is Jonathan J. Feldman, and my business address is 7821 Bartram Avenue, Philadelphia, Pennsylvania 19153.

2. I am General Manager-Uber Pennsylvania.

3. As General Manager, I am responsible for furnishing management and supervisory services regarding regulatory compliance in Pennsylvania.

4. Payment of an $11.3 million civil penalty for unauthorized transportation network company ("TNC") operations that occurred two years ago in Allegheny County would cause financial distress to the operations of Rasier-PA, LLC and threaten the continued provision of Respondents' TNC services in Pennsylvania.

5. At a minimum, Respondents would be forced to divert funds that might otherwise be available to provide additional benefits to the riding public through the introduction of new and innovative services and products to serve greater numbers of Pennsylvanians. Payment of a civil penalty of this magnitude would preclude Respondents' ability to charge lower prices,

which is particularly important for improving access to underserved and low-income neighborhoods. It would likewise inhibit investment in expansion to surrounding counties such as Butler, Washington, Greene, Blair and Adams.

6. Taking such measures would deprive Respondents of the ability to compete on a level playing field in a highly competitive industry with other transportation providers including TNCs, most notably Lyft, Inc. ("Lyft"), whose activities mirrored those of Respondents in 2014 and who was only subjected to a $250,000 fine. While Lyft would have full access to its resources to develop new services and products, attracting more riders and drivers, expansion of Respondents' operations would be inhibited.

7. As of this date, more than 677,000 members of the traveling public in Pennsylvania have used Respondents' TNC services. Over 18,000 drivers operate on the Respondents' platform. Whether Respondents are able to continue to operate as a viable entity in Pennsylvania will affect those members of the traveling public and the drivers who have come to rely on these services.

8. Payment of an $11.3 million civil penalty would also affect Respondents' ability to continue supporting the technology economy in Pennsylvania. Last year, Respondents opened the Advanced Technologies Center ("ATC") in Pittsburgh to be the hub for testing of self-driven vehicles and their worldwide headquarters for advanced technology, offering significant benefits to Pittsburgh's economy. Respondents also have plans to expand over the next few months by

breaking ground on an additional ATC research facility in the Hazelwood neighborhood of Pittsburgh.

9. In 2014, drivers collected the full fare from riders and then remitted 20% to Respondents in order to operate on the digital platform. Practically speaking, what this means is that for a $10.00 rider fare, Respondents received $2.00. Similarly, for the estimated average fare of $7.00 calculated by the Commission, Respondents received $1.40 from paying riders. However, these examples overstate Respondents' revenues because of free trips that were provided during the relevant time period. In those instances, for what would have been a $10 rider fare, Respondents collected nothing from the rider but the driver still received $8.00.

10. Of the 122,998 trips furnished through Respondents' platform between February 11, 2014 through August 20, 2014, 7,063 were provided free of charge. 41,751 of these trips were furnished from July 2, 2014 through August 20, 2014, of which 1,843 were provided free of charge.

11. Respondents earned revenues in the amount of $89,993.20 for the period of time from July 2, 2014 through August 20, 2014. The civil penalty imposed by the Commission is more than 110 times the amount of those revenues.

12. From February 11, 2014 through August 20, 2014, 33,006 riders obtained transportation through Respondents' platform, with 31,218 of them paying for their rides.

13. The Commission's Bureau of Investigation and Enforcement ("I&E") initially contacted Rasier-PA in April 2015 to arrange for the review of criminal background checks and

driver history records. I&E's enforcement officers performed their first inspections of vehicles operating on Rasier-PA's platform in September 2015. The document reviews and vehicle inspections conducted by I&E have uncovered no violations of the Commission's regulations.

14. Since the evidentiary hearing on May 6, 2015, Rasier-PA has filed four more Quarterly Reports on the Compliance Plans, on July 23, 2015, October 29, 2015, January 29, 2016 and April 29, 2016, continuing to demonstrate full compliance with all conditions imposed by the Commission in connection with its grant of experimental services authority.

15. Respondents' recent statistics show that passengers in underserved neighborhoods benefit from the introduction and growth of TNC services. One of every six trips is requested to or from areas in Pittsburgh that have been traditionally underserved.

16. New studies have recently been released about the impact of TNC services on driving under the influence ("DUI") arrests and fatalities. Specifically, these studies have linked the introduction and growth of TNC services in Pittsburgh to an 18 percent decline in DUI arrests in 2015. In addition, the Commonwealth has experienced a 2 percent decline in DUI arrests in 2015 following the entry of statewide transportation network services. Similar results have been observed by Virginia's Department of Motor Vehicles Commissioner, who credits TNC services as playing a major role in a 22% reduction in alcohol-related fatalities in 2015. These results track the data maintained by Respondents, which shows peak usage times in Pennsylvania as being Friday and Saturday nights (into the early morning hours on Saturday and Sunday) and the most common destinations as being bars and restaurants.

17. Respondents have become actively involved in local communities throughout Pennsylvania, forming partnerships with a number of organizations, including the Girl Scouts of Western Pennsylvania, UPMC Health Plan, the Pittsburgh Pirates Baseball Club, and Pennsylvania SPCA. Through a partnership with Lexus, Respondents will facilitate transportation in June 2016 to the U.S. Open in Oakmont, which is a difficult destination for the traveling public to reach in Allegheny County.

Dated: May 25, 2016

Jonathan J. Feldman

Sworn and subscribed before me this 25th
day of May 2016

Notary Public
My Commission expires on:

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
JUDITH P. LAWRENCE, Notary Public
City of Philadelphia, Phila. County
My Commission Expires April 17, 2020

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).

Via Email and First Class Mail

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Dated this 25th day of May, 2016.

Karen O. Moury, Esq.