

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

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

September 12, 2014

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Application of Rasier-PA LLC, a Wholly Owned Subsidiary of Uber Technologies, Inc. for a Certificate of Public Convenience Evidencing Approval to Operate an Experimental Ride-Sharing Network Service Between Points in the Commonwealth of Pennsylvania, Excluding Designated Counties
Docket No. A-2014-2424608

Dear Secretary Chiavetta:

On behalf of Rasier-PA LLC., I have enclosed for electronic filing the Brief of Rasier-PA LLC Opposing Motion to Dismiss Application in the above-captioned matter.

Copies have been served on all parties as indicated in the attached certificate of service.

Sincerely,



Karen O. Moury

KOM/tlg
Enclosure
cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Rasier-PA LLC, a Wholly Owned :
Subsidiary of Uber Technologies, Inc. for a :
Certificate of Public Convenience Evidencing :
Approval to Operate an Experimental : Docket No. A-2014-2424608
Ride-Sharing Network Service Between Points in :
the Commonwealth of Pennsylvania, Excluding :
Designated Counties :

**BRIEF ON BEHALF OF RASIER PA LLC
OPPOSING MOTION TO DISMISS APPLICATION**

BUCHANAN INGERSOLL & ROONEY, P.C.

Karen O. Moury, PA ID No. 36879

409 North Second Street, Suite 500

Harrisburg, PA 17101-1503

Telephone: (717) 237-4820

Facsimile: (717) 233-0852

karen.moury@bipc.com

Attorneys for Rasier PA LLC

Dated: September 12, 2014

TABLE OF CONTENTS

I.	INTRODUCTION AND STATEMENT OF CASE	1
II.	SUMMARY OF ARGUMENT	4
III.	ARGUMENT	5
IV.	CONCLUSION.....	15

TABLE OF AUTHORITIES

Cases

<i>Citizens United v. FEC</i> , 130 S. Ct. 876 (2010).....	11
<i>Commonwealth of Pennsylvania, Pennsylvania Gaming Control Board v. Office of Open Records</i> , 48 A.3d 503, 2012 Pa. Commw. LEXIS 174 (2012); 65 P.S. § 67.305	9
<i>Den-Tal-Ez, Inc. v. Siemens Capital Corp.</i> , 389 Pa. Super. 219, 566 A.2d 1214, 1228 (1989).....	8
<i>Gully v. Sw. Bell Tel. Co.</i> , 774 F.2d 1287, 1293 (5 th Cir. 1985).....	9
<i>Kastigar et al. v. United States</i> , 406 U.S. 441 (1972).....	10
<i>Kohn v. State</i> , 336 N.W. 2d 292, 298-99 (Minn. 1983).....	11
<i>Popowsky v. Pennsylvania Public Utility Commission</i> , 166 Pa. Commw. 690, 647 A.2d 302, 1994 Pa. Commw. LEXIS 477 (1994).....	13
<i>Ruckelshaus v. Monsanto Co.</i> , 467 U.S. 986, 1003 (1984)	9
<i>Scott Kraus and the Morning Call v. Pennsylvania Public Utility Commission</i> , Docket No. AP 2013-1986	10
<i>Sperry Rand Corp. v. Pentronix, Inc.</i> , 311 F. Supp. 910 (1970), 1970 U.S. Dist. LEXIS 12473 ..	7
<i>The West River Bridge Company v. Dix et al.</i> , 77 U.S. 507, 533 (1848).....	9

Statutes

52 Pa. Code § 29.313(c).....	8
52 Pa. Code § 29.352	3
52 Pa. Code § 5.302	13
52 Pa. Code § 5.372(a)(3).....	3
52 Pa. Code § 5.401(b)(2)(i).....	11
65 P.S. § 67.102	9
65 P.S. § 67.707(b)	10
65 P.S. § 67.708(a)(1).....	9
65 P.S. § 67.708(b)(11).....	9
65 P.S. § 67.708(b)(17).....	9
65 P.S. §§ 67.101-67.3104.....	3
66 Pa.C.S. § 1312.....	13
66 Pa.C.S. § 3310.....	11

I. INTRODUCTION AND STATEMENT OF CASE

It is beyond dispute that the proposed ridesharing network services would fill significant gaps in the transportation infrastructure in Pennsylvania and provide important societal benefits that are responsive to public demand. As one Pennsylvania rider on disability who used Uber in Orange County, California in July, testified:

Uber if used in more small towns where I'm from in the Wilkes-Barre/Scranton area would be very helpful to multiple people, because right now the only transportation I am able to use is buses and shared ride programs, and it takes about two hours to get to a doctor's appointment that's 20 minutes away. So I'm spending a lot of time and a lot of stress and anxiety to get to a doctor's appointment that I have maybe like once or twice a week where with Uber, it would take 15, 20 minutes tops to get there and back.¹

Additionally, Brian Bashin, Chief Executive Officer for Lighthouse for the Blind, testified that for visually impaired individuals:

This is not a discretionary item or just might be nice item. This is something that some of use every day to get to work, to do shopping, to visit our family, that kind of thing. So it is not just something that's superficial. It will be the heart and soul of how blind and visually impaired people get around and how baby boomers who are not going to stay at home will decide on having options later on when they can't drive.²

Mr. Bashin's organization has been helping blind people travel independently, and in his twenty years in the industry, he has not seen any one thing so significantly impact that goal as being able to summon a ride "when you want, to show up when you want, to do it so safely and a little cheaper than it has been."³

Indeed, the Commission has recognized that the use of an App-based technology to arrange motor carrier passenger transportation services allows for "a wider ranging, faster and more user friendly scheduling" of needed rides. *Application of Yellow Cab Company of*

¹ N.T. 42-43.

² N.T. 165.

³ N.T. 165.

Pittsburgh, Inc., t/a Yellow X, Docket No. A-2014-2410269, Order adopted on May 22, 2014 (“*Yellow Cab Order*”). In a Joint Statement accompanying the *Yellow Cab Order*, Commissioner Witmer and Commissioner Brown described ridesharing as having “the potential to revolutionize the transportation market and provide customers with more options for travel throughout Pennsylvania” and expressed confidence that the market for ridesharing “will grow and thrive in Pennsylvania and provide great benefits to customers.”⁴

Among the benefits that have been identified by Rasier-PA when ridesharing enters new markets include declines in DUI rates and wait times for rides, especially in underserved neighborhoods. Importantly, the availability of ridesharing gives the consumer a choice in the way they arrange their transportation and enables them to opt for an easy cashless transaction with the opportunity to know when the operator will arrive and that they will be able to give feedback about the quality of the vehicle and the service provided by the operator.⁵

Currently, Rasier-PA is providing ridesharing between points in Allegheny County pursuant to a grant of emergency temporary authority by the Commission. *Application of Rasier-PA LLC, a Wholly Owned Subsidiary of Uber Technologies, Inc., For Emergency Temporary Authority to Operate An Experimental Ride-Sharing Network Service Between Points in Allegheny County, Pennsylvania*, Docket No. A-2014-2429993 (July 24, 2014) (“*ETA Order*”). Although the Commission’s findings in the *ETA Order* were limited to Allegheny County from the standpoint of immediate need for the proposed service, the Commission recognized that the introduction of a new App-based transportation service provides consumers with another competitive alternative to traditional call and demand service. *ETA Order* at 13.

⁴ Joint Statement at 1-2.

⁵ N.T. 66-67, 70 and 74.

On June 2, 2014, Rasier-PA filed the pending application for a certificate of public convenience to operate an experimental ride-sharing network service between points in the Commonwealth of Pennsylvania, excluding certain counties. By the application, which was filed pursuant to Section 29.352 of the Commission’s regulations, 52 Pa. Code § 29.352, Rasier-PA requests authority to use a digital platform to connect passengers to independent ridesharing operators using their personal vehicles. The application is currently protested by taxicab companies and limousine providers.⁶

The sole purpose of this brief is to oppose dismissal of the pending application as a sanction pursuant to Section 5.372(a)(3) of the Commission’s regulations, 52 Pa. Code § 5.372(a)(3). Despite a clear showing of how the proposed service is responsive to a public need or demand and would deliver many benefits to the riding public throughout the Commonwealth, a motion has been made to dismiss the application without a consideration of its merits due to Rasier-PA exercising its legal rights to guard against the disclosure of proprietary information that constitutes a trade secret, is protected by the Fifth Amendment of the United States Constitution and is irrelevant to the pending application. Based on these compelling legal grounds, Rasier-PA objected to and did not provide certain trip data during the evidentiary hearing that was directed to be provided by an Interim Order issued by Administrative Law Judges (“ALJs”) Long and Watson on July 31, 2014 (“*July 31 Interim Order*”).

Of particular concern to Rasier-PA regarding written disclosure of this proprietary data is the broad scope of Pennsylvania’s Right-to-Know Law, 65 P.S. §§ 67.101-67.3104 (“*RTK Law*”), which creates a rebuttable presumption that records supplied to a Commonwealth agency are public records and the inevitable request for such information. Even when information is

⁶ Rasier-PA’s Main Brief, filed on September 15, 2014, will contain a thorough description of the procedural history and fully address all other issues relevant to the pending application.

provided to a Commonwealth agency on a proprietary basis, there is no guarantee that it will be protected as such. To the contrary, neither Rasier-PA nor the Commission would ultimately be able to ensure the confidential treatment of this information. In fact, this information was provided under a temporary protective order in the application proceeding involving Lyft, Inc. and is now the subject of a petition seeking its release to the public.

II. SUMMARY OF ARGUMENT

Particularly in view of the public demand for the proposed service and the overall benefits of ridesharing to the public, which will be more fully documented in Rasier-PA's Main Brief filed on September 15, 2014, dismissal of the application without a consideration of its merits would be wholly inappropriate. The Commission has recognized the value of introducing an App-based technology that gives customers a choice in the way they arrange transportation service. Moreover, when ridesharing enters new markets, benefits flow to the public in the form of declines in DUI rates and reduced wait times, especially in underserved neighborhoods.

In declining to provide the sought-after trip data, Rasier-PA exercised its legal rights to protect valuable information, which constitutes a trade secret, from disclosure to a government entity, competitors and possibly the general public, and also invoked the protections of the Fifth Amendment of the United States Constitution. Particularly given the broad scope of Pennsylvania's RTK Law and the inevitable request for this information, Rasier-PA properly safeguarded it by declining to produce it. Further, the information is irrelevant to the pending application since no determination has been made as to whether prior activities of Rasier-PA's parent company were under the Commission's jurisdiction and required approval by the Commission. Having exercised its legal rights to protect against the disclosure of proprietary data that is of limited, if any, probative value in this proceeding, Rasier-PA should not be

penalized by being deprived of the opportunity to have its application fully considered on the merits.

More importantly, the riding public throughout Pennsylvania should not be deprived of access to a safe, affordable and reliable transportation alternative that enables them to get to work, to get home safely from a night out, and to visit dying relatives in the hospital and that further provides significant benefits to blind and visually impaired members of the public. Likewise, the operators with whom Rasier-PA would contract to provide this needed transportation should not be deprived of the ability to start and grow their own small businesses, which are vital to their livelihoods and to economic growth throughout the Commonwealth.

III. ARGUMENT

Dismissal of the application without a consideration of its merits would be wholly inappropriate, especially given the overall benefits of ridesharing that have been highlighted by the Commission and by Rasier-PA. Importantly, this sanction would be improperly imposed because Rasier-PA exercised its legal rights to safeguard confidential information that is a trade secret, irrelevant to this proceeding and protected from disclosure by the Fifth Amendment of the United States Constitution.

The Commission has recognized the value of giving consumers a choice in the way they arrange transportation services and has described ridesharing as providing a wider ranging, faster and more user-friendly scheduling of transportation services. Among the benefits that have been identified by Rasier-PA when ridesharing enters new markets include declines in DUI rates and wait times for rides, especially in underserved neighborhoods. Importantly, the availability of ridesharing gives the consumer a choice in the way they arrange their transportation and enables them to opt for a an easy cashless transaction with the opportunity to know when the operator

will arrive and that they will be able to give feedback about the quality of the vehicle and the service provided by the operator.

This issue regarding disclosure of trip data arises from separate proceedings initiated by the Commission's Bureau of Investigation and Enforcement ("I&E") through the filing of a Complaint against Rasier-PA's parent, Uber Technologies, Inc. ("UTI"), at Docket No. C-2014-2422723, and a related Petition for Interim Emergency Relief ("*Emergency Relief Petition*") at Docket No. P-2014-2426846, regarding allegations that UTI was engaged in the brokering of transportation without a license from the Commission. On July 24, 2014, in the *Emergency Relief Petition* proceeding, the Commission adopted an Order directing UTI to cease and desist from utilizing its digital platform to facilitate transportation of passengers utilizing non-certificated drivers in their personal vehicles ("*Cease and Desist Order*"). The underlying Complaint proceeding is still pending and is scheduled for a hearing on October 23, 2014.

On July 28, 2014, the Commission issued a Secretarial Letter ("*July 28 Secretarial Letter*") in the Complaint proceeding, directing the parties to address the following questions:

- (1) The number of transactions/rides provided to passengers in Pennsylvania via the connections made with drivers through Internet, mobile application, or digital software during the following periods:
 - (a) From the initiation of Uber's service in Pennsylvania to June 5, 2014 (the date I&E filed the Complaint against Uber);
 - (b) From the receipt of the cease and desist letter from the Commission's Bureau of Technical Utility Services dated July 6, 2012 to June 5, 2014;
 - (c) From June 5, 2014, to July 1, 2014 (the date the *Cease and Desist Order* became effective); and
 - (d) From July 1, 2014, to the date on which the record in this Complaint proceeding is closed.
- (2) Should there be a finding that Uber's conduct in any one or all of the periods in question (1) above, was a violation of the Public Utility Code, whether refunds or credits to customers would be an appropriate remedy.

- (3) Whether either evidence of prior unlawful operations or contumacious refusal to obey Commission orders negated the need for the proposed service and/or the fitness of the Applicant as a common carrier such that no certificate of public convenience can be issued by the Commission.

The ALJs' *July 31 Interim Order* directed the parties in this application proceeding to present evidence on the issues enumerated by the Commission *July 28 Secretarial Letter*. By the *July 31 Interim Order*, the ALJs noted their belief that this information is also relevant to consideration of this application.

Exercising its legal rights to protect against disclosure of this information to the government, its competitors and possibly the public, Rasier-PA declined to produce the information during the evidentiary hearings in this proceeding. Specifically, Rasier-PA objected to the disclosure of data on trips arranged through the mobile application ("App") on three grounds: 1) it constitutes a trade secret, the market value of which would diminish if it is disclosed and which disclosure would be competitively harmful to Rasier-PA's business; 2) the Fifth Amendment of the United States Constitution protects against disclosure of this information; and 3) trip data is irrelevant to the pending application proceeding, and any probative value of this evidence is outweighed by the unfair prejudice to Rasier-PA of producing it in this context. In raising these objections, Rasier-PA stressed the broad scope of the RTK Law and the inability of the Commission to protect proprietary data from public disclosure.

It is well established in Pennsylvania that a trade secret consists of a compilation of information which is used in one's business, and which gives an advantage over competitors who do not know or use it. *See Sperry Rand Corp. v. Pentronix, Inc.*, 311 F. Supp. 910 (1970), 1970 U.S. Dist. LEXIS 12473; *see also* Restatement of Torts, Section 757. The crucial indicia for determining whether certain information constitutes a trade secret are "substantial secrecy and

competitive value to the owner.” *Den-Tal-Ez, Inc. v. Siemens Capital Corp.*, 389 Pa. Super. 219, 566 A.2d 1214, 1228 (1989).

The trip data that is the subject of the *July 31 Interim Order* is information that Rasier-PA has spent considerable time and effort to collect. As such, it is a valuable asset that belongs to Rasier-PA, the disclosure of which would diminish its market value. Particularly since data provided in response to the *July 31 Interim Order* would reveal the number of trips provided through the App in a very limited geographic area of Allegheny County over distinct relatively short time periods, it would be possible for Rasier-PA’s competitors to determine the size of the business and how lucrative it is. For instance, disclosure of data collected about the number of rides provided through the App during a 4-week period in Allegheny County (June 5, 2014 through July 1, 2014), only months after the launch of ridesharing services in the region and in the midst of the I&E proceedings referenced above, would be very revealing about the success of this highly competitive business. Rasier-PA uses this information for making decisions about growth or expansion of the business. If it ends up in the hands of competitors, it could be used as a basis for allocating their resources differently or changing their business models in a way that is injurious to Rasier-PA’s business.⁷ Due to the very nature of the proposed service being new and innovative, thereby qualifying for classification as experimental service, data about rides arranged through the App is commercially sensitive and its disclosure would be harmful to Rasier-PA.

The Fifth and Fourteenth Amendments prohibit the government from depriving anyone of “property, without due process of law,” or taking property “for public use, without just

⁷ Comparisons that have been made between the sought-after trip data and the daily log sheets that call and demand carriers are required to complete under the Commission’s regulations at 52 Pa. Code § 29.313(c) are completely off base. Daily log sheets do not equate to a compilation of trip data showing the number of rides that were provided by a start-up business in a narrow geographic region over distinct relatively short time periods.

compensation.” U.S. Const. Amend V; U.S. Const. Amend. XIV. The United States Supreme Court has long recognized that the Fifth Amendment protects intangible property. *See The West River Bridge Company v. Dix et al.*, 77 U.S. 507, 533 (1848) (no meaningful distinction between real property and “incorporeal property” for the purposes of the takings clause.) Specifically, trade secrets have been recognized as property under the Fifth Amendment. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984). The regulatory taking of a trade secret causes the value of the asset to diminish, which results in awards of damages in the form of compensation. *See Gully v. Sw. Bell Tel. Co.*, 774 F.2d 1287, 1293 (5th Cir. 1985).

Particularly given the broad scope of Pennsylvania’s *RTK Law* written disclosure of this information, even subject to a protective order, may eventually lead to public disclosure of this highly proprietary information in a way that is harmful to Rasier-PA. The sweeping amendments to the *RTK Law* that went into effect on January 1, 2009 were designed to promote access to official government information in order to prohibit secrets and establish a rebuttable presumption that documents in the possession of a Commonwealth agency are public records. *See Commonwealth of Pennsylvania, Pennsylvania Gaming Control Board v. Office of Open Records*, 48 A.3d 503, 2012 Pa. Commw. LEXIS 174 (2012); 65 P.S. § 67.305. The burden of proving that a record is exempt from public access is on the Commonwealth agency. 65 P.S. § 67.708(a)(1).

A “record” is broadly defined by the *RTK Law* to include “information” that is created in “connection with a transaction, business or activity of the agency.” 65 P.S. § 67.102. Although the *RTK Law* also contains several exemptions to the definition of “record,” including two that could be applicable here – namely a record that constitutes or reveals a trade secret or confidential proprietary information (65 P.S. § 67.708(b)(11)) and a record relating to a noncriminal investigation (65 P.S. § 67.708(b)(17)), those exemptions would protect UTI and its

customers only if the Commission agrees that they are applicable and the Pennsylvania Office of Open Records or appellate courts ultimately agree.

The language of the *RTK Law* and its recent application by the Office of Open Records demonstrate that even providing information on a confidential basis subject to a protective order is not sufficient to guard against disclosure of that information. To have any hope of ultimately protecting information marked as proprietary from disclosure by the Commission, Rasier-PA would have five business days after receiving notice of the *RTK Law* request to “provide input on the release of the record.” 65 P.S. § 67.707(b). The Commission would not be bound by that input, and even if the Commission would decline to produce the information on the basis of its confidentiality, the Office of Open Records could require its disclosure. *See In the Matter of Scott Kraus and the Morning Call v. Pennsylvania Public Utility Commission*, Docket No. AP 2013-1986 (documents submitted confidentially as part of a Commission staff investigation were ordered to be publicly released).⁸

Moreover, Rasier-PA is protected by the Fifth Amendment of the United States Constitution from disclosing this information. The United State Supreme Court has found that the Fifth Amendment privilege may be asserted in an administrative proceeding and protects against disclosures that the party reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. *See Kastigar et al. v. United States*, 406 U.S. 441 (1972). Section 3310 of the Public Utility Code (“Code”) provides that any person or corporation operating as a broker, without a license issued by the Commission “shall be guilty of a summary offense, and any subsequent offense by such person or corporation shall constitute a

⁸ Decision is available on Office of Open Records website. <http://dced.state.pa.us/open-records/final-determinations/FileHandler.ashx?FileID=12318>. Decision is currently on appeal in *Pennsylvania Public Utility Commission v. Scott Kraus/The Morning Call*, 2254 C.D. 2013.

misdemeanor of the third degree.” 66 Pa.C.S. § 3310. Given the allegations in the pending Complaint about unlawful brokering, which have not been proven and the Commission has not yet adjudicated, disclosure of information about rides that were arranged through the App could result in prosecution under Code Section 3310 and therefore is protected by the Fifth Amendment.

Since corporations can only act through their agents, officers and agents of a corporation can claim the benefits afforded by the Fifth Amendment, even when acting on behalf of the corporation. *Kohn v. State*, 336 N.W. 2d 292, 298-99 (Minn. 1983). Moreover, if a corporation can be charged with criminal offenses for violations of Code Section 3310, it makes sense that they or their agents can assert the Fifth Amendment privilege. This analysis is bolstered by the 2010 Supreme Court decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), in which the Court held for the first time that a corporation enjoys First Amendment rights of association and free speech.

Finally, the trip data is irrelevant to the pending application. Since the Commission has not yet adjudicated the Complaint, the trip data is not evidence of any prior unauthorized operations that may be relied upon in this proceeding. The Commission knew about the application proceeding when issuing the *July 28 Secretarial Letter* and did not require it to be addressed here.⁹ Any probative value of the evidence is heavily outweighed by the danger of unfair prejudice to Rasier-PA, as outlined above, and it is therefore inadmissible in the application proceeding. 52 Pa. Code § 5.401(b)(2)(i).

⁹ As to the Complaint proceeding, UTI is exploring avenues through which this information may be shared with Commissioners only through an approach that does not leave any documents behind that may later be subject to a right-to-know law request. Due to the statutory prohibitions in Code Section 334(c) against ex parte communications during a contested on-the-record proceeding, UTI has not yet pursued any of those avenues.

During the hearing, Rasier-PA admitted that an affiliate continued providing services after the issuance of a *Cease and Desist Order* by the Commission.¹⁰ Therefore, to the extent that the parties wish to argue that Rasier-PA lacks the propensity to operate legally and safely, they have evidence in the record upon which to do so. The number of trips that were provided by Rasier-PA's affiliate is not needed for that argument.

The legal question in the *July 31 Interim Order* about directing the issuance of refunds or credits to customers is the only issue identified by the parties for which the number of trips might be relevant. However, the number of trips would not provide any information about the amounts that were paid to Rasier-PA's affiliate by customers. More importantly, for purposes of the pending application proceeding, the trip data sought by the *July 31 Interim Order* could not, even if refunds or credits would be an appropriate remedy, form the basis for any refunds or credits to be ordered as part of the application proceeding since there has been no Commission determination that licensing of a software product constituted unlawful brokering.

Although Rasier-PA also objected during the hearing to the questions about whether refunds or credits would be an appropriate remedy, and whether evidence of unlawful operations negate the need for the proposed service and the fitness of Rasier-PA, those objections were based solely on the grounds that they sought legal conclusions. Rasier-PA's attorney proffered that if the witness had testified, the answers would have been no.¹¹ The question concerning evidence of unlawful operations will be addressed in the portion of Rasier-PA's Main Brief filed on September 15, 2014 that discusses legal fitness.

Regarding the question about refunds, Rasier-PA again notes that it is premature to consider this issue before the Complaint has been adjudicated by the Commission. To the extent

¹⁰ N.T. 81-84.

¹¹ N.T. 333-334.

it is addressed in this application proceeding, Rasier-PA submits that refunds are wholly inappropriate. Notably, the case cited by the Commission in suggesting this possible remedy for the Complaint proceeding does not support ordering the issuance of a refund. In *Popowsky v. Pennsylvania Public Utility Commission*, 166 Pa. Commw. 690, 647 A.2d 302, 1994 Pa. Commw. LEXIS 477 (1994), the Commonwealth Court addressed the issue of whether a *de facto* utility may terminate service for failure to pay. That case centered on the fact that the *de facto* utility was charging untariffed rates, which is not relevant here since the Commission has not required transportation network companies to file tariffs with specific rates. *See ETA Order; Application of Yellow Cab Company of Pittsburgh, Inc., t/a Yellow X*, Docket No. A-2014-2410269 (Order adopted May 22, 2014). Moreover, no refunds were awarded in that case pursuant to Code Section 1312 of the Public Utility Code, 66 Pa.C.S. § 1312.

The ALJs also directed that Rasier-PA explain why its application should not be dismissed due to its failure to advise the ALJs and the parties prior to the hearing about its plans not to produce this data. The only vehicle available to Rasier-PA to directly challenge the ALJs' *July 31 Interim Order* was through the filing of a Petition for Interlocutory Review with the Commission pursuant to Section 5.302 of the Commission's regulations, 52 Pa. Code § 5.302. Yet, there was no Public Meeting scheduled between the time of the *July 31 Interim Order* and the hearings scheduled for August 18 and 19, 2014.¹² Also, at that time, the expectation was that the hearings would be concluded on those dates, and the subsequent hearing date of September 9, 2014 was later scheduled when that did not occur.¹³

No Commission regulation or any order issued in this proceeding required Rasier-PA to disclose prior to the hearing its intent to forego production of this information. Moreover, the

¹² http://www.puc.pa.gov/about_puc/public_meeting_calendar.aspx.

¹³ *See* ALJs' Prehearing Order Setting Litigation Schedule dated July 28, 2014; *See* ALJs' Interim Order on Additional Hearing, Rulings on Dispositive Motions, and Briefing dated August 20, 2014.

parties were not in any way prejudiced by a lack of advance notice. None of the protestants served any discovery on Rasier-PA prior to the evidentiary hearing on August 18, 2014. Rasier-PA's witness did not provide the information during direct testimony. Attorneys for three protestants conducted lengthy cross-examination without asking for this information. It was not until the fourth attorney conducting cross-examination asked for it that it became incumbent upon Rasier-PA to object and state its grounds for not producing the data.¹⁴

No party has claimed that they somehow relied on an assumption that this data would be produced by Rasier-PA to forego calling a witness of their own. Since the number of trips was solely within the possession of Rasier-PA, the parties could not have prepared any differently even if they had known in advance that Rasier-PA did not intend to supply the information. Further, it has no relevance to this proceeding since no determination has been made as to whether trips provided during those time frames constituted unlawful brokering.

Rasier-PA was also criticized for not seeking a protective order in advance of the hearing. However, as Rasier-PA has explained, a protective order would have been insufficient due to the commercially sensitive and proprietary nature of the data and the harm to UTI that could result from its disclosure even on a confidential basis. Rasier-PA further notes that an Interim Order was issued by the same ALJs on September 2, 2014 in a different proceeding denying a Petition for Protective Order to protect the confidentiality of similar information. *See Application of Lyft, Inc.*, Docket No. A-2014-2415045. Although a subsequent Interim Order was issued in the *Lyft* proceeding on September 10, 2014 granting temporary protection for this information for the purpose of the evidentiary hearing and the recommended decision, it not clear that the information will be treated confidentially or protected from disclosure even on a temporary basis,

¹⁴ N.T. 251.

due to a Petition for Interim Emergency Order filed in that proceeding on September 10, 2014¹⁵ seeking its public disclosure.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, Rasier-PA submits that it would be wholly inappropriate to dismiss the pending application due to the exercise of its legal rights to guard against the disclosure of information that constitutes a trade secret, that is protected by the Fifth Amendment of the United States Constitution and that is irrelevant to the application, and further that the public need for the ridesharing services proposed by Rasier-PA throughout the Commonwealth warrants an adjudication of the application on its merits.

Respectfully submitted,

Dated: September 12, 2014



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

Attorneys for Rasier-PA LLC

¹⁵ <http://www.puc.pa.gov/pcdocs/1311326.pdf>.

Appendix A: Proposed Findings of Facts

1. On April 14, 2014, Rasier-PA LLC (“Rasier-PA”) filed an application for a certificate of public convenience to operate an experimental ride-sharing network service between points in Allegheny County in the Commonwealth of Pennsylvania. *Application of Rasier-PA LLC, a Wholly Owned Subsidiary of Uber Technologies, Inc., to Operate an Experimental Ride-Sharing Network Service Between Pints in Allegheny County*, Docket No. A-2014-2416127 (“*Rasier-PA Application*”).
2. The application, which was filed pursuant to 52 Pa.Code § 29.352, requests authority to use a digital platform to connect passengers to independent ridesharing operators using their personal vehicles. *Rasier-PA Application*.
3. On June 5, 2014, the Commission’s Bureau of Investigation and Enforcement (“I&E”) filed a Complaint against Rasier-PA’s parent, Uber Technologies, Inc. (“UTI”) alleging that UTI was engaged in the brokering of transportation without a license from the Commission. *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Uber Technologies, Inc.*, Docket No. C-2014-2422723 (“*Complaint*”).
4. In connection with the *Complaint* proceeding, on June 20, 2014, I&E filed a Petition for Interim Emergency Relief requesting the issuance of a cease and desist order requiring UTI to immediately cease and desist from brokering transportation service. *Petition for Interim Emergency Relief*, Docket No. P-2014-2426846 (“*Emergency Relief*”).
5. On July 1, 2014, Administrative Law Judges Long and Watson issued an Order Granting Interim Emergency Relief and Certifying Material Question in the *Emergency Relief* proceeding.
6. On July 24, 2014, the Commission upheld the ALJs’ decision and adopted an Order in the *Emergency Relief* proceeding, directing UTI to cease and desist from utilizing its digital platform to facilitate transportation of passengers utilizing non-certificated drivers in their personal vehicles. (“*Cease and Desist Order*”).
7. On July 24, 2014, the Commission adopted an order approving emergency temporary authority to Rasier-PA, after finding that there is an immediate need for the proposed experimental service and that introduction of the new App-based transportation service would provide Allegheny County consumers with another competitive alternative to traditional call and demand services that can provide a wider ranging, faster and more user-friendly scheduling of transportation services. *Application of Rasier-PA LLC, a Wholly Owned Subsidiary of Uber Technologies, Inc., For Emergency Temporary Authority to Operate an Experimental Ride-Sharing Network Service Between Pints in Allegheny County*, Docket No. A-2014-2429993 (July 24, 2014).

8. On July 28, 2014, the Commission issued a Secretarial Letter (“*July 28 Secretarial Letter*”) in the *Complaint* proceeding, directing the parties to address the following questions:
 - (1) The number of transactions/rides provided to passengers in Pennsylvania via the connections made with drivers through Internet, mobile application, or digital software during the following periods:
 - (a) From the initiation of Uber’s service in Pennsylvania to June 5, 2014 (the date I&E filed the Complaint against Uber);
 - (b) From the receipt of the cease and desist letter from the Commission’s Bureau of Technical Utility Services dated July 6, 2012 to June 5, 2014;
 - (c) From June 5, 2014, to July 1, 2014 (the date the *Cease and Desist Order* became effective); and
 - (d) From July 1, 2014, to the date on which the record in this Complaint proceeding is closed.
 - (2) Should there be a finding that Uber’s conduct in any one or all of the periods in question (1) above, was a violation of the Public Utility Code, whether refunds or credits to customers would be an appropriate remedy.
 - (3) Whether either evidence of prior unlawful operations or contumacious refusal to obey Commission orders negated the need for the proposed service and/or the fitness of the Applicant as a common carrier such that no certificate of public convenience can be issued by the Commission.
9. On July 31, 2014, ALJs Long and Watson issued an Interim Order (“*July 31 Interim Order*”) directing the parties in the pending *Rasier-PA Application* proceeding to address the issues set forth in the *July 28 Secretarial Letter*.
10. At the evidentiary hearings in the *Rasier-PA Application* proceeding on August 18 and 19, 2014, Rasier-PA objected to the production of the information sought by the *July 28 Secretarial Letter* and *July 31 Interim Order*. N.T. 251-260, 320-323.
11. At the evidentiary hearings in the *Rasier-PA Application* proceeding on August 18 and 19, 2014, Rasier-PA did not produce the information regarding the number of transactions/rides provided to passengers in Pennsylvania via the connections made with drivers through Internet, mobile application, or digital software during the periods identified in the *July 28 Secretarial Letter* and *July 31 Interim Order*. N.T. 331-332.
12. As to the remaining issues in the *July 28 Secretarial Letter* and *July 31 Interim Order*, Rasier-PA did not present testimony *Rasier-PA Application* proceeding but has presented legal arguments.

Appendix B: Proposed Conclusions of Law

1. Rasier-PA properly withheld data concerning the number of transactions/rides provided during certain time periods because it constituted a trade secret, the disclosure of which would diminish its market value and be injurious to Rasier-PA's business. *See Sperry Rand Corp. v. Pentronix, Inc.*, 311 F. Supp. 910 (1970), 1970 U.S. Dist. LEXIS 12473; *see also* Restatement of Torts, Section 757.
2. The Fifth and Fourteenth Amendments of the United States Constitution prohibit the government from depriving anyone of "property, without due process of law," or taking property "for public use, without just compensation." U.S. Const. Amend V; U.S. Const. Amend. XIV.
3. Trade secrets have been recognized as property under the Fifth Amendment. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984).
4. The regulatory taking of a trade secret causes the value of the asset to diminish, which results in awards of damages in the form of compensation. *See Gully v. Sw. Bell Tel. Co.*, 774 F.2d 1287, 1293 (5th Cir. 1985).
5. Pennsylvania's Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101-67.3104, establishes a rebuttable presumption that documents in the possession of a Commonwealth agency are public record, and the burden of proving that a record is exempt from public access is on the Commonwealth agency. 65 P.S. § 67.708(a)(1).
6. Even if a document is provided to a Commonwealth agency on a proprietary basis, neither the entity seeking to protect the information nor the Commonwealth agency can guarantee that it will remain confidential. 65 P.S. § 67.707(b). *See In the Matter of Scott Kraus and the Morning Call v. Pennsylvania Public Utility Commission*, Docket No. AP 2013-1986 (documents submitted confidentially as part of a Commission staff investigation were ordered to be publicly released).
7. Rasier-PA properly withheld data concerning the number of transactions/rides provided during certain time periods because the Fifth Amendment of the United States Constitution protects against disclosure of this information.
8. The Fifth Amendment privilege may be asserted in an administrative proceeding and protects against disclosures that the party reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. *See Kastigar et al. v. United States*, 406 U.S. 441 (1972).
9. Section 3310 of the Public Utility Code ("Code") provides that any person or corporation operating as a broker, without a license issued by the Commission "shall be guilty of a summary offense, and any subsequent offense by such person or corporation shall constitute a misdemeanor of the third degree." 66 Pa.C.S. § 3310.

10. Given the allegations in the pending Complaint about unlawful brokering, which have not been proven and the Commission has not yet adjudicated, disclosure of information about rides that were arranged through the UTI App could result in prosecution under Code Section 3310 and therefore is protected by the Fifth Amendment.
11. Since corporations can only act through their agents, officers and agents of a corporation can claim the benefits afforded by the Fifth Amendment, even when acting on behalf of the corporation. *Kohn v. State*, 336 N.W. 2d 292, 298-99 (Minn. 1983).
12. Rasier-PA properly withheld data concerning the number of transactions/rides provided during certain time periods because it was irrelevant to the pending application proceeding.
13. Since the Commission has not yet adjudicated the Complaint or determined whether UTI was engaged in unlawful brokering, the trip data is not evidence of any prior unauthorized operations.
14. The record in the *Rasier-PA Application* proceeding contains evidence that an affiliate of Rasier-PA continued operating after the issuance of the *Cease and Desist Order* by the Commission, which may be considered on the issue of legal fitness.
15. Any probative value of the evidence is heavily outweighed by the danger of unfair prejudice to Rasier-PA and it is therefore inadmissible in the *Rasier-PA Application* proceeding. 52 Pa. Code § 5.401(b)(2)(i).
16. In the *Rasier-PA Application* proceeding, it is premature to address the issue of whether UTI should be required to issue refunds or credits, if it is found to have engaged in unlawful operations at the conclusion of the *Complaint* proceeding which is still pending.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Rasier-PA LLC, a Wholly Owned :
Subsidiary of Uber Technologies, Inc. for a :
Certificate of Public Convenience Evidencing : Docket No. A-2014-2424608
Approval to Operate an Experimental :
Ride-Sharing Network Service Between Points in :
the Commonwealth of Pennsylvania, Excluding :
Designated Counties :

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 First-Class Mail

Mary D. Long
Administrative Law Judge
Pennsylvania Public Utility Commission
301 5th Avenue, Suite 220
Pittsburgh, Pennsylvania 15222
malong@pa.gov

Jeffrey A. Watson
Administrative Law Judge
Pennsylvania Public Utility Commission
301 5th Avenue, Suite 220
Pittsburgh, Pennsylvania 15222
jeffwatson@pa.gov

Lloyd R. Persun, Esquire
Persun and Heim PC
PO Box 659
Mechanicsburg, PA 17055-0659

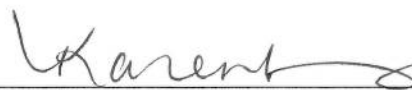
Michael S. Henry, Esquire
Michael S. Henry LLC
2336 S. Broad Street
Philadelphia, PA 19145
mshenry@mshenrylaw.com

Justine Pate, Esquire
620 S. 13th Street
Harrisburg, PA 17104

Joseph T. Sucec, Esquire
325 Peach Glen-Idaville Road
Gardners, PA 17324

David W. Donley, Esquire
3361 Stafford Street
Pittsburgh, PA 15204

Dated this 12th day of September, 2014.



Karen O. Moury, Esq.