IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Uber Technologies, Inc., Rasier, LLC, Gegen LLC, and Rasier-PA LLC, Petitioners, v. Pennsylvania Public Utility Commission, Respondent.	:	No. 1617 C.D. 2016

BRIEF OF PETITIONERS

Petition for Review of Final Determination by the Pennsylvania Public Utility Commission, Issued September 1, 2016, at Docket No. C-2014-2422723

BUCHANAN INGERSOLL & ROONEY PC
John F. Povilaitis (PA I.D. #28944)
Alan M. Seltzer (PA I.D. #27890)
Jayson R. Wolfgang (PA I.D. #62076)
Kyle J. Meyer (PA I.D. #307743)
409 North Second Street, Suite 500
Harrisburg, PA 17101
Telephone: (717) 237-4800
Facsimile: (717) 233-0852

Douglas R. Cole (admitted *pro hac vice*)
Joshua M. Feasel (admitted *pro hac vice*)
ORGAN COLE LLP
1330 Dublin Road
Columbus, Ohio 43215
Telephone: (614) 481-0900
Facsimile: (614) 481-0904

Attorneys for Petitioners Uber Technologies, Inc., et al.

Date: January 19, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, Regulations, and Legislation

Other Authorities

I. INTRODUCTION

Statutory text, constitutional commands, and basic rule-of-law principles all impose judicially enforceable outer bounds on the scope of a government agency's authority to impose monetary sanctions on those entities that it regulates. The Pennsylvania Public Utility Commission ("Commission" or "PUC") exceeded those limits here. Over the strenuous objections of two of the five Commissioners, the Commission imposed an unprecedented and unwarranted $11.4 million fine on Petitioners Uber Technologies, Inc. ("UTI"), Rasier, LLC ("Rasier"), Gegen LLC ("Gegen"), and Rasier-PA LLC ("Rasier-PA") (collectively, "Uber"). This penalty is more than five times higher than any fine the Commission has ever imposed. Moreover, the Commission assessed the fine based on Uber providing a service that the Commission itself conceded caused no harm to anyone. As one of the dissenting Commissioners noted, the Commission did not receive even a single customer complaint regarding the conduct that led to the $11.4 million fine. Indeed, the Commission has expressly authorized Uber to continue providing the very service on which the fine is based, finding both that there was an "immediate need" for the service and that it provided a "substantial benefit" to Pennsylvania's citizens. Pennsylvania's General Assembly likewise has weighed in, now authorizing this service by statute, and providing that the maximum permissible

fine for the conduct here is $250,000, ***less than one-fortieth*** the fine that the Commission wrongly imposed. If ever an agency determination called for judicial intervention, this one is it.

II. STATEMENT OF JURISDICTION

This is an appeal of a final order entered by the Commission. Accordingly, the Court has appellate jurisdiction over this matter pursuant to 42 Pa.C.S. §763(a)(1) and 2 Pa.C.S. § 702.

III. ORDERS IN QUESTION

Uber seeks review of two Commission Orders. Pursuant to Pa. R.A.P. 2111(b), a true and correct copy of the Commission Orders that are the subject of this appeal are appended as Tab "A" and Tab "B."[1] The first is the Commission's Final Order entered May 10, 2016, which provides, inter alia:

> That, in accordance with Section 3301 of the Public Utility Code, 66 Pa.C.S. §3301, within thirty (30) days of entry of this Opinion and Order, Uber Technologies, Inc., Gegen, LLC, Rasier LLC, and Rasier-PA, LLC, shall pay a civil penalty in the amount of eleven million three hundred sixty-four thousand seven hundred thirty-six dollars ($11,364,736.00).

(Tab A at 72). The second is the Commission's Order dated September 1, 2016, denying reconsideration and reaffirming the May 10, 2016 Order. (Tab B at 77-78). Collectively, these Orders impose an $11.4 million fine on Petitioners for providing services that the Commission itself has acknowledged were urgently needed and beneficial to Pennsylvania's citizens.

In addition, Uber is also challenging the substance of an earlier "Cease and Desist" Order the Commission affirmed in a related enforcement action against Uber on July 24, 2014 (the "July 24, 2014 Order"), at least to the extent the

[1] All "Tabs" referenced herein are contained in the Appendix to Petitioners' Brief filed contemporaneously herewith.

Commission relied on that Order as a basis for enhancing the fine imposed through its May 10, 2016 Order (and affirmed in the September 1, 2016 Order). The Commission entered this earlier Order in *Petition of the Bureau of Investigation and Enforcement for an Interim Emergency Order*, Docket No. P-2014-2426846. For the Court's convenience, the Order is appended as Tab "C."

IV. STATEMENT OF SCOPE AND STANDARD OF REVIEW

This Court's "standard of review of a PUC order is limited to determining whether there was a constitutional violation, an error of law, or a violation of PUC procedure." *Mun. Auth. of W. View v. Pa.PUC*, 41 A.3d 929, 932 n.5 (Pa.Cmwlth.2012). As to errors of law or asserted constitutional violations, the "standard of review is *de novo*, and to the extent necessary, [the] scope of review is plenary." *Chester Water Auth. v. Pa.PUC*, 868 A.2d 384, 389 n.9 (Pa.2005). "Plenary" is "a broad scope of review." *Bowling v. Office of Open Records*, 75 A.3d 453, 475 (Pa.2013). Separately, an administratively imposed civil penalty, such as the one at issue here, constitutes an error of law if it "strike[s] at one's conscience as being unreasonable and would not 'fit' the statutory violation." *U.S. Steel Corp. v. Dep't of Envtl. Res.*, 300 A.2d 508, 514 (Pa.Cmwlth.1973). In addition, this Court must determine "whether the findings, determinations or order[s] are supported by substantial evidence." *Popowsky v. Pa.PUC*, 853 A.2d 1097, 1102 n.19 (Pa.Cmwlth.2004); *see also W. View*, 41 A.3d at 932 n.5 (same).

V. STATEMENT OF THE QUESTIONS INVOLVED

1. Did the Commission lack jurisdiction over transportation network company services during the time Uber engaged in the conduct on which the penalty at issue is based?

Answered in the negative below. Suggested answer in the affirmative.

2. Did the $11.4 million fine the Commission imposed violate 66 Pa.C.S. §2609(b), which caps the maximum lawful penalty for transportation networking company conduct that occurred prior to the effective date of that statute (such as the conduct at issue here) to the lesser of $1,000 per day or $250,000 in total?

The Commission did not address this question. Suggested answer in the affirmative.

3. Did Uber's conduct—which consisted of the continuous and non-divisible activity of operating and maintaining a transportation network—constitute a "continuing offense" under 66 Pa.C.S. §3301, such that the maximum lawful penalty was $1,000 per day?

Answered in the negative below. Suggested answer in the affirmative.

4. Did the Commission err in imposing a higher fine on Uber for trips that occurred after entry of the Administrative Law Judges' ("ALJs'") Cease and Desist Order, given that ALJs do not have the power to issue equitable injunctions, nor the power to issue criminal-contempt penalties for failure to comply with administrative orders?

The Commission did not address this question. Suggested answer in the affirmative.

5. Did the Commission err as a matter of law in imposing an excessive fine that does not "fit" the record or the nature of Uber's conduct and "strike[s] at one's conscience as being unreasonable," *U.S. Steel*, 300 A.2d at 514, and that is so disproportionate to the nature of the conduct at issue as to violate Uber's rights under the federal and state constitutions?

> *The Commission answered this question in the negative below, including wrongly finding that the constitutional issues had been waived. Suggested answer in the affirmative.*

6. Did the Commission abuse its discretion and/or err as a matter of law in denying rehearing and reconsideration regarding the amount of the penalty?

> *The Commission did not address this question. Suggested answer in the affirmative.*

VI. STATEMENT OF THE CASE

A. Statement Of The Form Of Action.

This is an appeal from a 3-2 decision of the Commission, in which the Commission exceeded the bounds of its statutory authority, and imposed an unprecedented and legally erroneous $11.4 ***million*** fine against Uber. (*See* Tab A at 72). This fine is more than five times higher than any fine the Commission has ***ever*** previously imposed, even in cases involving significant safety violations that resulted in personal injuries, substantial property damage, and even deaths, and more than 45 times greater than the fine that the Commission imposed on Uber's direct competitor (Lyft, Inc.), for engaging in alleged violations nearly identical to those here. Moreover, as the two dissenting Commissioners noted, the majority imposed the fine notwithstanding the undeniable absence of ***any*** harm to ***anyone*** as a result of Uber's conduct. (*Id*., Witmer Dissent at 2; Powelson Dissent at 3). Indeed, one dissenting Commissioner noted that the Commission had not received even a single customer complaint regarding the activities on which the fine is based. (*Id*., Witmer Dissent at 2).

B. Procedural History.

As more fully described in the statement of facts below, Petitioner Uber is a technology company that has developed transportation network software. On

February 11, 2014, Uber began making its software available for use in Pennsylvania, so that members of Uber's online community could begin using the software to arrange transportation in the state. (*Id*. at 10 (majority)). On June 5, 2014, Commission staff filed a formal complaint ("Formal Complaint") alleging that Uber was acting as an unlicensed transportation utility. (*Id*. at 1). That Formal Complaint ultimately led to the Orders that are challenged here.

Shortly after Commission staff filed the Formal Complaint, on July 24, 2014, the Commission granted emergency experimental services authority to Uber, with that grant becoming effective on August 21, 2014. (*Id*. at 11 n.10). All agree that Uber has maintained all applicable authorizations to operate in Pennsylvania since that time.

Commission staff nonetheless continued to prosecute the Formal Complaint, seeking a penalty based on Uber's activities between February 11, 2014 and August 20, 2014. On November 17, 2015, the ALJs upheld the Formal Complaint, and imposed a $49,852,300 fine on Uber. (*Id*. at 8-9).

Uber appealed that decision to the Commission. On May 10, 2016, the Commission entered its Final Order imposing the $11.4 million fine referenced above. On May 25, 2016, Uber timely filed a petition for rehearing of that Order. (Tab B at 10). On June 9, 2016, the Commission granted rehearing pending

reconsideration of the merits of its Order. (*Id*.). On September 1, 2016, however, the Commission entered an Order denying reconsideration and reaffirming its earlier May 10, 2016 Order. On September 30, 2016, Uber timely filed its Petition for Review ("Petition") with this Court.

C. Statement Of Prior Determinations.

No other court has rendered a decision in this case. This Court did, however, render a decision in a related matter involving a challenge to the Commission's grant of experimental services authority to Uber. That decision is reported at *Capital City Cab Service v. Pennsylvania PUC*, 138 A.3d 119 (Pa.Cmwlth.2016).

D. Respondent And Its Commissioners.

Respondent PUC is the governmental unit of the Commonwealth of Pennsylvania that entered the orders that are the subject of this Petition. It consists of five individual Commissioners. At the time of the May 10 and September 1, 2016 Orders, those five Commissioners were: Gladys M. Brown (Chairperson), Andrew G. Place (Vice-Chair), Pamela A. Witmer, John F. Colman, Jr., and Robert F. Powelson. (*See* Tab A, caption; Tab B, caption).

The Commission is responsible for the oversight and regulation of public utilities pursuant to the Public Utility Code, 66 Pa.C.S. §§101-3316 ("Code"). The

PUC's jurisdiction and authority is strictly limited to the powers granted by statute. Specifically, the PUC's authority extends to any "public utility," which includes entities that "[t]ransport[] passengers . . . as a common carrier." 66 Pa.C.S. §102. "Common carrier," in turn, is expressly limited to those "persons or corporations holding out, offering, or undertaking, directly or indirectly, service for compensation ***to the public*** for the transportation of passengers . . . between points within this Commonwealth." *Id*. (emphasis added).

E. Statement Of Facts.

1. Petitioners are four affiliated entities, collectively referred to as Uber.

Petitioners are four related entities, which are collectively referred to in this Petition as "Uber." Petitioner UTI is a technology company that has developed innovative software to facilitate transportation services. Petitioner Rasier is a wholly owned subsidiary of UTI that licenses the software from UTI and enters into contracts with carefully screened third parties who use a smartphone application (the "Uber App") to provide transportation services using their own personal motor vehicles, a service referred to as "uberX." (*See* Tab A at 9-10; Tab C at 3). During the period at issue, Rasier entered such contracts with third parties in Pennsylvania. (Tab A at 9-10). Today, Rasier no longer does so; instead, Petitioner Rasier-PA, another wholly owned subsidiary of UTI, now enters into

such contracts in the Commonwealth. (*Id*. at 10-11). Finally, Petitioner Gegen is a wholly owned subsidiary of UTI. (*Id*.). Since March 1, 2013 (and through the entire six-month period at issue, i.e., February 2014 through August 2014), Gegen has held a broker's license from the Commission authorizing it to arrange for the transportation of persons between points in Pennsylvania. (*Id*. at 4, 10).

On August 21, 2014, the PUC issued Rasier-PA a certificate of public convenience pursuant to the PUC's experimental services authority that—as the PUC admits—allows Petitioners to operate a transportation network service in Allegheny County, Pennsylvania, using the Uber App. (*Id*. at 11 n.10). And, on December 5, 2014, the Commission entered an Order expanding that authority to the entire Commonwealth (other than Philadelphia, in which Uber later received authorization to operate). (*Id.* n.11). That authorization has been in effect at all times since it was first issued on August 21, 2014 through the present.

2. Uber is a technology company, not a transportation company.

Uber is a transportation network company ("TNC"), not a transportation company. (Tab A at 10). It developed innovative and ground-breaking technology that has revolutionized the way transportation services are arranged. Uber's software creates a virtual network that members of Uber's online community (and ***only*** members of Uber's online community) can use to request transportation

services from, or provide transportation services to, other members of Uber's online community. (*Id*. at 9-10).

Riders join Uber's online community by downloading the riders' version of the Uber App ("Rider App"), agreeing to its terms and conditions, and providing a source of payment. (*Id*. at 10, 20). Drivers wishing to use the drivers' version of the Uber App ("Driver App") to receive rider trip requests through the network must first pass a criminal history and motor vehicle record screening, produce vehicle registration and proof of insurance (in addition to coverage held by Uber), and meet other requirements before gaining access to the Driver App. (*See* May 6, 2015 Hearing Exhibit 2 at 2-3). The drivers are not employees of Uber, but rather independent third-parties who provide transportation on their own schedules, using their own vehicles. (Tab A at 12).

Once drivers' accounts are activated, the drivers receive access to the Driver App. When a rider member of Uber's online community makes a transportation request, the Uber App routes that request to nearby driver members who are logged into the system. (*Id*. at 10). When a driver accepts the request, the Uber App helps the driver and rider locate each other. After a ride is complete, the Uber App facilitates payment from the rider to the driver, with Uber recouping a fee as payment for the driver's access to the App. (Uber Pet. for Rehearing Appx.A at 3).

As this description suggests, Uber itself does not transport passengers, and those services that it does provide are not available to the public at large, but rather only to pre-registered members of Uber's online community. The Uber App provides these members of the Uber online community access to safe, reliable and effective transportation services in more than 400 cities around the world. (*See* www.uber.com/cities/). Since February 11, 2014, that has included the citizens of Allegheny County, Pennsylvania. (Tab A at 10).

3. Uber (and its competitor, Lyft) began making its software available for use in Pennsylvania in February 2014.

Uber (formerly through Rasier, LLC, and currently through Rasier-PA) and Lyft compete against each other in the TNC space, with Lyft operating its own separate TNC. (*Id*. at 48-49). Uber and Lyft both began making their software available for use in Allegheny County in February 2014. (*Id*. at 10).

Prior to launch, Uber had investigated and reasonably concluded that the Commission did not have authority over Uber, as the Commission's authority extends only to companies that are "operating . . . facilities for . . . [t]ransporting passengers . . . as a common carrier," with "common carrier" defined as an entity whose services are open "to the public." 66 Pa.C.S. §102. Uber does not "transport passengers," but instead only operates software that allows third-parties to contact each other to arrange transportation services among themselves. (May

6, 2015 Stipulations of Fact ¶¶10-14). Nor does Uber act as a "common carrier," as services through the Uber App are not open "to the public," but rather only to the members of Uber's online community. (*Id*. ¶9). Moreover, at the time of the launch, Uber's wholly-owned subsidiary, Gegen, had an operative broker's license from the PUC, which authorized Gegen to arrange transportation for persons in Pennsylvania. (Tab A at 10). Accordingly, Uber reasonably concluded that, even if Uber had incorrectly decided the Commission lacked authority to regulate TNC services, Gegen's PUC-issued license would provide sufficient authority for Uber to make the Uber App available for use in Pennsylvania.

Lyft likewise did not seek or obtain authorization from the Commission prior to its launch. In fact, neither Lyft nor any of its subsidiaries even had a broker's license. *See* Initial Decision, *Pa.PUC v. Lyft, Inc.*, Docket No. C-2014-2422713 (June 1, 2015) (appended as Tab "D") (Tab D at 3).

4. Although the Commission's jurisdiction does not extend to TNCs, out of an abundance of caution, Uber filed an application seeking authority to operate as an experimental service.

Roughly a month after Uber began operating, in March of 2014, advisory personnel from the Commission informed Uber that they believed that Uber needed authority from the Commission to operate in the Commonwealth, and that the Gegen broker license was insufficient. While Uber did not concur in those

assessments, out of an abundance of caution, on April 14, 2014, Uber (through Rasier-PA) filed an application seeking authority to operate its Uber App in Pennsylvania as an "experimental service." *See* 52 Pa.Code §§3.381-3.386, 29.352 (experimental services authority). (*See also* Tab A at 20-21).

5. While the experimental service application was pending, the Commission Staff filed its Formal Complaint against Uber.

Nearly two months later, on June 5, 2014, although the Commission had yet to act on Uber's experimental service application, the PUC's Bureau of Investigation and Enforcement ("I&E") filed the Formal Complaint against Uber, alleging, among other things, that Uber was "acting as a broker of transportation in Pennsylvania without proper Commission authority." (*See Pa.PUC v. Uber Techs., Inc., et al.*, Docket No. C-2014-2422723). The complaint alleged that enforcement officers had arranged eleven rides in Pennsylvania. (*Id*.). On June 16, 2014, the I&E also filed a Petition for an Interim Emergency Order, seeking to stop Uber from operating in Pennsylvania. (*See* Tab B at 3).

In response to the Petition for an Interim Emergency Order, on July 1, 2014, a panel of Commission ALJs entered an Order purporting to require Uber to "immediately cease and desist from utilizing its digital platform to facilitate transportation to passengers utilizing non-certificated drivers in their personal

vehicles until such time as it secures appropriate authority from the Commission" (the "Cease and Desist Order," appended as Tab "E"). (Tab E at 16).

The next day, on July 2, 2014, as the Commission had yet to rule on the April 14, 2014 application seeking authority to operate as an "experimental service," Uber (through Rasier-PA) filed an application for Emergency Temporary Authority ("ETA") to operate TNC services. (*See Application of Rasier-PA LLC for Emergency Temporary Authority*, Docket No. A-2014-2429993 (July 24, 2014), appended as Tab "F"). Pending Commission review of the ALJs' Cease and Desist Order pursuant to Section 3.10(b) of the Commission's regulations, 52 Pa.Code §3.10(b), and consideration of Uber's emergency application, Uber continued to operate in the Commonwealth. (Tab A at 45).

6. The Commission granted Uber's application for emergency temporary authority, finding there was an "immediate need" for Uber's services in Pennsylvania and those services would provide a "substantial benefit" to Pennsylvania citizens.

On July 24, 2014, the Commission entered an Order upholding the ALJs' Cease and Desist Order. (*See* Tab C). That same day, however, the Commission issued an Order ***granting*** the ETA application filed by Uber on July 2, 2014 (the "ETA Order"). (*See* Tab F at 22-23; Tab A at 11 n.10). In the ETA Order, the Commission found, inter alia, that "there is an immediate need for the experimental service proposed by [Uber]," that "there will be a substantial benefit

to be derived from the initiation of a competitive service" because of Uber's "wider ranging, faster and more user-friendly scheduling of transportation services." (Tab F at 13). The Commission further found that Uber had shown the "technical and financial fitness" to provide the proposed service safely and legally. (*Id*. at 19). The Commission required some adjustments to the insurance Uber holds and the filing of a tariff. (*Id*. at 18-21).

Uber continued to operate and, on August 20, 2014, it provided proof of compliance with all conditions imposed by the ETA Order. (Tab A at 43 n.29). Accordingly, with the Commission's full knowledge and concurrence, Uber (through Rasier-PA) has been authorized to operate a TNC in Allegheny County, Pennsylvania since August 21, 2014. On December 5, 2014, the Commission entered an additional Order extending Uber's authority to operate its "experimental service" across the Commonwealth. (*Id*. at 11 n.11).

Supporting the appropriateness of the Commission's finding of an "immediate need" for Uber's services, and the "substantial benefits" those services provided to Pennsylvania's citizens, between July 1, 2014 and August 20, 2014 alone, Pennsylvanians arranged more than 40,000 trips using the Uber App, often in areas that had been chronically underserved with transportation options. (*Id*. at

58; *id*., Witmer Dissent at 1). And in the full six-month period at issue, individuals used the Uber App to arrange more than 120,000 rides. (*Id*. at 22).

7. Commission enforcement personnel nonetheless continued to seek a civil penalty based on Uber having made the Uber App available in the Commonwealth for six months before the Commission granted experimental services authority.

Notwithstanding the Commission's emergency grant of operating authority to Uber, and its accompanying determination that Uber's services filled an immediate need and provided a substantial benefit, I&E continued to pursue the Formal Complaint against Uber based on Uber's past activities between February 11, 2014, and August 20, 2014. To that end, I&E filed an amended complaint on January 9, 2015 ("Amended Complaint"), in which it alleged an additional five trips during that time period—bringing the total number of alleged trips during the time period to sixteen. For the first time, though, I&E also sought the imposition of a per-trip fine for ***all*** of the 120,000+ trips that riders arranged using the Uber App during the six-month period in 2014 prior to the grant of emergency operating authority. (Tab A at 6-7).

During the following months, Uber made several attempts to settle the Amended Complaint case, but I&E was unwilling to do so. I&E did agree, however, to settle its complaint against Lyft, resulting in Lyft paying a $250,000 fine for engaging in the same alleged conduct, in the same alleged geographic area,

during the same time period at issue in this case, including Lyft's conduct in continuing to operate after both the ALJs and the Commission had issued cease and desist orders, just like Uber had. (*See* Tab D at 7-10).

F. Brief Statement Of The Orders Under Review.

1. The ALJs' initial decision.

On November 17, 2015, the ALJs issued an initial decision on the Formal Complaint and Amended Complaint, finding that Uber had violated the Code, and recommending a fine of ***$49,852,300***. The ALJs calculated that amount based on a per-trip assessment for each of the 122,998 trips that Pennsylvanians arranged using the Uber App during the six-month period from February 11, 2014, to August 20, 2014, with an enhanced penalty for each trip that occurred after the ALJs issued a Cease and Desist Order on July 1, 2014, up through August 20, 2014, when Uber completed all filings necessary to show compliance with the terms adopted in the Commission's grant of emergency temporary authority on July 24, 2014. (Tab A at 42).

Uber filed various exceptions to the ALJs' decision, asserting that: (a) the fine was excessive, arbitrary and capricious, and based on legal and factual errors; (b) the Commission lacked jurisdiction over Uber's activities; (c) the ALJs failed to follow the Commission's own policy statement in formulating the fine; and (d) a

per-trip fine was unlawful, as the conduct at issue constituted a "continuing offense" which at most required a per-day fine under 66 Pa.C.S. §3301. (Tab A at 18-19, 27, 42 n.28, 49).

2. The Commission imposed an unprecedented $11.4 million fine on Uber.

On May 10, 2016, the Commission entered its Final Order in this matter. Over the objection of two Commissioners, a bare three-Commissioner majority imposed an $11.4 million fine on Uber, an amount multiple times higher than any fine the Commission had ***ever*** ordered, including, as one of the dissenting Commissioners noted, in cases involving substantial property damage or even deaths. (Tab A, Powelson Dissent at 5). In reaching that result, the Commission concluded it had jurisdiction over Uber as a "common carrier," finding that Uber "was offering and providing motor common carrier service to the public," (*id*. at 21 (majority)), even though the undisputed evidence showed that transportation services requested through the Uber App were available only to those who had joined Uber's online community and who had agreed to the terms and conditions thereof (*id*. at 20). Separately, the Commission found that Uber had "waived any objection to its status as a motor common carrier" (and therefore waived its jurisdictional challenge) by seeking and obtaining operating authority as an experimental service. (*Id*. at 22).

Turning to the penalty itself, the three-member majority rejected Uber's argument that its activities constituted, if anything, a "continuing offense" subject to at most a fine of $1,000 per day. In that regard, Uber had argued that its conduct consisted of the indivisible conduct of maintaining a network, which could not be feasibly segregated into discrete violations so as to impose separate penalties. (Uber August 7, 2015 Brief at 31-32 (citing *Newcomer Trucking, Inc. v. Pa.PUC*, 531 A.2d 85 (Pa.Cmwlth.1987)). The Commission held, however, that a per-trip penalty was appropriate, as Uber purportedly "played an active role in providing the unauthorized transportation services," and the rides themselves could be "segregated and documented," (Tab A at 32), a result it reached even though the drivers who provided the rides were not Uber employees or agents. (*Id*. at 12).

The majority then addressed the ten-factor test for assessing monetary penalties set forth in 52 Pa. Code §69.1201. Despite the absence of harm to anyone, the three-member Commission majority nonetheless concluded that factors one (whether conduct at issue was of a serious nature) and two (whether the resulting consequences were of a serious nature) called for a higher penalty. (Tab A at 51-53). The majority further concluded that Uber had "deliberate[ly] disregard[ed]" Commission authority, despite the fact that Uber had filed for operating authority as early as April 2014. (*Id*. at 54). The majority conceded that

factors four (Uber's internal practices) and six (compliance history) favored Uber, (*id*. at 54-55), but found that the remaining factors counseled in favor of a higher penalty, largely based on a finding that Uber had intentionally disregarded the Cease and Desist Order, coupled with the Commission's asserted need to send a message to "the entire industry, specifically other motor carriers or brokers." (*Id*. at 56).

The Commission then imposed a per-trip fine broken into two time periods. For the 81,273 trips that occurred between February 11, 2014 and July 1, 2014, the Commission imposed a fine of $7 per trip, equaling what the Commission found to be the "average cost" for those trips. (*Id*. at 57-58). (This was apparently based on a mistaken assumption that Uber earned the entire $7 per trip average fare, when in fact, Uber earned only 20% of the at-issue fares as a service fee for drivers' access to the Uber App. (Uber Pet. for Rehearing Appx.A at 3).) For the remaining 41,725 rides that occurred between July 1, 2014, and August 20, 2014, (i.e., after entry of the Cease and Desist Order), the Commission imposed the same $7 per-trip "base" fine, but then added a ***$250 per-trip surcharge***. (Tab A at 58). Thus, the fine for that latter two-month period—half of which occurred ***after*** the Commission had determined on July 24, 2014, that it would grant emergency operating authority to Uber based on the immediate need for Uber's services and

the substantial benefits they provided—was $10,723,325 (of which $10,431,250 constituted the per-trip "surcharge"). (*Id*.). Accordingly, the total per-trip penalty for the six-month period of operations was $11,292,236, which the Commission then further enhanced by $72,500 for alleged "discovery violations," to arrive at a total penalty of ***$11,364,736***. (*Id*. at 70, 72).

Two of the five Commissioners dissented from the May 10, 2016 Order. Commissioner Witmer observed that Uber's entry "into the marketplace provided an immediate and substantial benefit to customers as a competitive alternative to traditional call and demand service." (*Id*., Witmer Dissent at 1). She also noted that "Uber provides wide ranging, fast and user-friendly transportation, often to underserved areas." (*Id*.). While she would have held, like the majority, that Uber's service fell within the Commission's jurisdiction and that a fine was warranted, she stated that "this case also presents mitigating factors that should be considered and weighed in assessing a civil penalty." (*Id*. at 2). To that end, she noted that "there is little evidence to demonstrate that Uber's actions resulted in actual harm," and that the Commission "received not one customer complaint regarding Uber's services." (*Id*.). Observing that the penalty at issue was "several times higher than the largest fine assessed on a company whose conduct caused

actual harm to customers," she stated that she "cannot support such a grossly disproportionate outcome." (*Id*.).

Commissioner Powelson likewise objected to the amount of the fine, concluding that the Commission erred in its application of the ten-factor test under 52 Pa. Code §69.1201(c). (Tab A, Powelson Dissent at 1). Like Commissioner Witmer, he agreed that the Commission could not "overlook the existence of several mitigating factors in this case, such as the minimal actual harm that resulted from Uber's operations, as well as Uber's current compliance with PUC orders and continuing willingness to meet Commission directives." (*Id*.). Based on straightforward application of the ten-factor test, Commissioner Powelson believed "that a civil penalty amount of $2,500,000 is appropriate," less than one-quarter of the fine that the three-member Commission majority ordered. (*Id*. at 7).

3. The Commission denied Uber's request for reconsideration.

On May 25, 2016, Uber timely filed with the PUC a petition for reconsideration, raising various legal challenges to the fine imposed by the May 10, 2016 Order, and asking the Commission to reopen the record to hear new evidence about Uber's business operations and the effect that the fine would have on the Petitioners and Pennsylvanians generally. (Tab B at 10, 43-48). On June 9,

2016, the Commission granted Uber's petition for reconsideration, pending further review of, and consideration on, the merits. (*Id*. at 10).

Approximately three months later, however, on September 1, 2016, the Commission denied reconsideration and reaffirmed the May 10, 2016 Order. (*Id*. at 77). In that Order, the Commission refused to reopen the record to hear Uber's new evidence, stating that the "purported evidence appears to have been available prior to the close of the record" and the Commission "do[es] not believe that the public interest requires the reopening of the record," because its original May 10, 2016 Order "carefully weighed all of the factors to arrive at a civil penalty that was vastly lower than" the penalties recommended by the ALJs and I&E. (*Id*. at 42).

In addition to refusing to hear the new evidence, the Commission also denied Uber's legal arguments in support of reconsideration, holding both (1) that Uber allegedly had waived some of those arguments "by failing to assert them at an earlier stage of the proceeding," (*id*. at 51), and (2) that other arguments failed precisely because Uber ***had*** asserted them at an earlier stage of the proceeding, (e.g., *id*. at 63). Accordingly, the Commission left in place the $11.4 million fine. (*Id*. at 77-78).

VII. SUMMARY OF ARGUMENT

The Commission's Orders imposing an $11.4 million fine should be reversed for two basic reasons. ***First***, the Commission erred as a matter of law in both the September 1, 2016 Order and the May 10, 2016 Order in holding that the Commission had jurisdiction over Uber in connection with the TNC activities at issue in these proceedings, and in further finding that Uber somehow "waived" its objection to the Commission's jurisdiction. As relevant here, the Commission's jurisdiction extends only to "public utilities," which in the transportation context is limited to "transportation companies" which are "common carriers." Uber is neither a "transportation company" nor a "common carrier." As to the former, Uber provides no transportation to anyone; it merely operates a digital network that allows Uber community members to arrange rides among themselves. As to the latter, the term "common carrier" is limited to those entities that are freely open ***to the public at large***. The TNC activities at issue here, however, were strictly limited to members of Uber's online community, ***not*** the public at large.

Second, even if the Commission had authority to regulate Uber's activities, the Commission erred as a matter of law in imposing an unprecedented $11.4 million fine on Uber—a fine that is ***over 50 times greater*** than the estimated revenue that Uber received as a result of the rides on which the fine is based, in a

case in which nobody—riders or drivers or third parties—suffered ***any*** harm. (*See* Uber Pet. for Reconsideration at 70). That fine is confiscatory and unlawful and should be vacated for at least five reasons.

- The fine violates recently enacted legislation. On November 4, 2016, Governor Wolf executed S.B. 984, adding a new Chapter 26 to Title 66 (the Title directed to the Commission). New Chapter 26 expressly applies to TNCs. It includes a provision, 66 Pa.C.S. §2609(b), that clearly and unequivocally provides that the maximum permissible penalty based on TNC activities that occurred ***prior to the effective date of the statute*** (like those here) is $1,000 per day up to a maximum of $250,000. *See id*. ("A person or entity which, as determined by the commission, operated as a transportation network company ***prior to the effective date of this section*** without proper authority from the commission shall be subject to a penalty not to exceed $1,000 per day or a maximum penalty not to exceed $250,000, notwithstanding the number of violations that occurred during the period in which the person or entity operated without authority.") (emphasis added). The $11.4 million fine here violates that unambiguous legislative command.

- Even ignoring the plain language of S.B. 984, Uber's activities, to the extent unlawful at all, constituted a "continuing offense" under preexisting Commission statutes, as that term has been interpreted by this Court. *See* 66 Pa.C.S. 3301(b). As such, each ***day's*** continuation of the activities constituted a single offense. *Id*. Accordingly, as a matter of law, Uber committed at most 190 violations in the 190 days that elapsed between February 11, 2014, and August 20, 2014, meaning that the maximum permissible fine was $190,000 (i.e., $1,000 per violation). The Commission exceeded its statutory authority and erred as a matter of law in instead imposing a per-trip, rather than per-day, fine, amounting to a fine nearly ***sixty times higher*** than the per-day fine would have been.
- The Commission erred as a matter of law in imposing a higher fine for trips conducted after entry of the ALJs' Cease and Desist Order, as the Commission does not have equitable injunctive powers, and cannot impose a monetary "punishment" against Uber for allegedly violating the Commission's Cease and Desist Order.
- This Court has long held that the Commission errs as a matter of law when it imposes a penalty that does not "fit" the record or the nature

of the conduct and "strike[s] at one's conscience as being unreasonable." *See U.S. Steel Corp.*, 300 A.2d at 514. Moreover, the Eighth Amendment to the U.S. Constitution and a parallel provision in the Pennsylvania Constitution (as well as the Federal Due Process Clause) likewise prohibit any fine that is grossly disproportionate to the gravity of the offense or obviously irrational. The $11.4 million fine here fails under each of these standards. It exceeds, by a factor of five, any fine that the Commission has previously imposed, even though the services at issue were services that the Commission concluded were immediately needed by Pennsylvania citizens and provided a substantial benefit to them. Moreover, by July 24, 2014, the Commission had already concluded that Uber was providing the services in a safe and effective manner, but it nonetheless fined Uber millions of dollars for rides arranged through Uber's App after that date, even though there was no evidence that a single person suffered any actual harm. The Commission's analysis in imposing this fine is inconsistent with (1) its own past practice in similar situations, and (2) the ten-factor test for imposing penalties set forth in 52 Pa. Code §69.1201(c). In short, on the facts here, the fine "strikes at one's

conscience" and is "grossly disproportionate" in violation of both the Commonwealth and Federal Constitutions.

- The Commission also abused its discretion and acted in an arbitrary and capricious manner in refusing to reconsider the penalty despite new evidence and relevant arguments establishing that the Commission's May 10, 2016 Order was wrong as a matter of fact and law.

VIII. ARGUMENT

A. The Commission Lacks Authority/Jurisdiction To Regulate The Conduct At Issue Here.

The Commission erred as a matter of law in finding, in both the September 1, 2016 Order and the May 10, 2016 Order, that Uber was a "transportation public utility" and that it "satisfied the definition of common carrier by motor vehicle, a category of public utility service under Section 102 of the Code." (Tab A at 21; Tab B at 17). To the contrary, as of the time that Uber launched its services, the Commission did not have jurisdiction over TNC services. It was not until the Commission elected to extend its jurisdiction ***in response to Uber's application for "experimental service" authority*** that the Commission acquired such jurisdiction.

The Commission is a creature of statute, and as such, "may exercise only those powers that are expressly conferred upon it by the legislature." *Gasparro v. Pa.PUC*, 814 A.2d 1282, 1285 (Pa.Cmwlth.2003) (citing *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa.1978)); *see also 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 either 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 to act in any particular case must be clear.").

The purported authority on which the Commission relied here is its authority over "public utilities," and more specifically, "transportation public utilities." (*See* Tab A at 21). To that end, under the Code, a "public utility" includes "[a]ny person or corporation[] . . . owning or operating in this Commonwealth equipment or facilities for . . . [t]ransporting passengers . . . as a common carrier." 66 Pa.C.S. §102. "Common carrier" is, in turn, defined to include "all persons or corporations holding out, offering, or undertaking, directly or indirectly, service for compensation ***to the public*** for the transportation of passengers . . . between points within this Commonwealth." *Id*. (emphasis added).

Uber does not meet this definition. Uber does not "transport passengers" within the Commonwealth and it does not provide service "to the public." As to the first, Uber provides no transportation. Rather, it has created a software application that allows members of Uber's online community to arrange transportation services among themselves. (Tab A at 1, 9-10). Uber does not employ drivers, nor does it own or otherwise provide vehicles to the drivers. Rather, the transportation via uberX is provided by independent third parties in their own personal vehicles. (*Id*.). Uber's role in connection with a given ride is to transmit requests from those who are seeking transportation to those who are currently logged on to the network as drivers, and then to facilitate payment from

rider to driver once that transportation has occurred. (*Id*.). To be sure, as an overarching matter, Uber takes steps to screen the drivers before allowing them to join the Uber community, and, pursuant to a contract with the driver, Uber provides insurance that covers harms that may occur during a given ride. (*See id*. at 43 n.29). But that does not transform Uber into a transportation provider, any more than the driver's personal insurer—which also provides insurance pursuant to a contract with the driver—would be a transportation company. Indeed, if a company becomes a transportation company merely by providing services during rides, then presumably Sirius and On-Star—both of which also provide in-ride services—would be transportation companies subject to PUC authority. That makes no sense. In short, Uber is a technology company, not a transportation company, and the Commission lacked jurisdiction over it.

Further confirming the lack of jurisdiction, Uber is not a "common carrier" as it does not provide services "to the public." To the contrary, only those who have joined Uber's online community have ***any*** access to Uber's digital network. (*Id*. at 20). Of course, Uber encourages widespread adoption of the Uber App; it genuinely hopes that many Pennsylvanians will take advantage of the convenient, low-cost transportation that users can obtain through the App. That does not change the underlying fact, though, that until a person has joined the Uber

community—and agreed to the corresponding terms and conditions that mark membership in that community—that person does not have access to any services facilitated through the Uber App. This approach stands in sharp contrast to a "common carrier," such as a taxi, which is available to anyone who hails it on the street.

Pennsylvania courts have long recognized that transportation that is not open to the public typically would not constitute a "common carrier." In *Aronimink Transportation Co. v. Public Service Commission*, 170 A. 375 (Pa.Super.1934), the court rejected the Commission's attempt to regulate a bus service that a landlord made available for his tenants. According to the court, the term "common carrier" applies to those who undertake to provide transportation to "all persons indifferently who may apply for passage." *Id*. at 377; *see also Drexelbrook Assocs. v. Pa.PUC*, 212 A.2d 237, 240 (Pa.1965) (applying similar analysis in the context of electrical and water provider). Under these accepted understandings of "common carrier" and "public utility," Uber did not constitute either type of entity, and the Commission thus lacked jurisdiction to regulate Uber's activities.

If any further confirmation were needed that "common carrier" does not include a transportation network company like Uber, the General Assembly has now provided it. As explained more fully below, in S.B. 984, enacted on

November 4, 2016, the General Assembly amended Title 66, applicable to the Commission, to include a new Chapter 26, expressly directed at TNCs. In doing so, the General Assembly also clarified that, consistent with common understandings, the term "common carrier" as used in Title 66 does ***not*** include TNCs. *See* 66 Pa.C.S. §102 (defining "common carrier," and stating that "[t]his term does not include a transportation network company or a transportation network company driver"). With this new Chapter 26, the General Assembly has now assigned TNC regulatory oversight to the Commission, but that authority did not exist in the past—at least, as explained below, not until the Commission invoked its experimental services power.

Try as it might, the Commission cannot overcome this jurisdictional problem by claiming that Uber "waived" its objection to the Commission's jurisdiction. In the May 10, 2016 Order, the Commission asserted that, because Petitioner Raiser-PA (an Uber subsidiary) had applied for and received a certificate from the Commission to offer experimental service, Uber is "prohibited from objecting to the Commission's jurisdiction of its service." (Tab A at 22-23).

But, as this Court has observed, "waiver" contemplates the "voluntary relinquishment of a known right." *State Emps.' Ret. Sys. v. Pennsylvanians for Union Reform*, 113 A.3d 9, 18 (Pa.Cmwlth.2015). Here, Uber did not "voluntarily

relinquish" anything. Rather, Commission advisory personnel demanded that Uber seek authority from the PUC to operate, and Uber did so out of an abundance of caution and in an effort to avoid an enforcement action. Even while doing so, Uber continued expressly and unequivocally to argue in the proceeding below that the Commission lacked statutory authority over TNC services. (Tab A at 18). That is not a "waiver."

Nor does this Court's recent decision in *Capital City Cab Service v. Pennsylvania PUC* support a finding that the Commission had jurisdiction over Uber's TNC services (provided through Rasier, LLC and Rasier-PA) during the relevant time period (i.e., February 2014-August 2014). *See* 138 A.3d at 128. In *Capital City*, this Court reviewed a challenge brought by various traditional common carriers (e.g., taxi cab companies) to the Commission's decision to issue a certificate of public convenience to Rasier-PA under the Commission's experimental services authority. (*See* Tab A at 11 n.11 (citing *Application of Rasier-PA LLC for Experimental Services Authority*, Docket No. A-2014-2424608 (December 5, 2014))). One of those traditional common carriers, Executive Transportation, argued that Uber was not a common carrier because "it does not have custody of any vehicles," and that the Commission thus lacked jurisdiction

over Uber and could not approve Uber's application for experimental authority. *Capital City*, 138 A.3d at 128.

This Court agreed that Uber's "TNC service does not fit neatly into any existing category of passenger service." *Id*. The Court observed, though, that the legislature has assigned to the Commission the responsibility to "regulate[] how various utilities are impacted by technological advances." *Id*. Consistent with this legislatively assigned responsibility, in the face of technological advances, the experimental service regulation can "accommodate[] forms of motor carrier service not specifically enumerated in the Public Utility Code or in the PUC's regulations on a provisional basis." *Id*. Accordingly, "the PUC is entitled to deference when it applies the experimental service regulation to find jurisdiction over TNC services." *Id*. (citing cases).

In other words, this Court has recognized that the Commission is legislatively authorized to use its experimental service regulations in appropriate circumstances to ***expand*** its jurisdiction at the margins to "accommodate" technological advances. Nor is it surprising that the General Assembly would confer such power on the Commission. Given the rapid pace of technological change, some play in the joints is necessary to allow an administrative agency to conduct efficient and continuing oversight in the market it regulates. But as this

Court's very words confirm, until the PUC exercises that power—that is, until it "applies the experimental service regulation to ***find*** jurisdiction"—no such jurisdiction exists. Thus, the Court's finding in *Capital City* that the Commission ***now*** has such jurisdiction based on the Commission's exercise of experimental service authority (and now also based on Chapter 26, enacted on November 4, 2016), does not imply that jurisdiction existed as of February 2014.

Because the Commission lacked jurisdiction over Uber, it could not impose a penalty. Accordingly, this Court should vacate the Commission Orders.

B. The Commission Wrongly Imposed An Excessive Fine That Is Not Supported By Substantial Evidence Of Record.

Even if the Commission had jurisdiction over Uber's TNC services (provided through Rasier, LLC and Rasier-PA), the Commission separately erred in imposing an $11.4 million fine for Uber's activities during a six-month period—activities that harmed no one, and that the Commission recognized as providing a "substantial benefit" for Pennsylvanians. Indeed, this Court itself recently noted the testimony from "multiple witnesses" that "their needs are better served by TNC-type services as opposed to traditional taxi services." *Capital City*, 138 A.3d at 129. Yet the Commission imposed a fine far higher than any fine it has ***ever*** imposed before, and more than ***45 times*** greater than what Lyft paid for alleged violations that were nearly identical to those here. (*See* Tab D at 18-20). Even two

of the Commissioners dissented on this point in the May 10, 2016 Order, with one characterizing the fine as "egregious" and "grossly disproportionate." (Tab A, Witmer Dissent at 2).

The dissenting Commissioners were correct to reject the $11.4 million fine, and this Court should do so as well. As more fully described below, that is true for at least five separate and independent reasons, any one of which is sufficient to reverse the decision below.

1. The Fine Here Violates 66 Pa.C.S. §2609(b).

First, the penalty violates newly enacted 66 Pa.C.S. §2609(b), which limits penalties imposed on TNCs, including the penalty here, to no more than $1,000 per day or a maximum of $250,000. That statute—signed into law as part of S.B. 984 on November 4, 2016—provides:

> **Violations for operation without Commission authority.**—A person or entity which, as determined by the Commission [i.e., the PUC], operated as a transportation network company ***prior to the effective date of this section*** without proper authority from the Commission shall be subject to a penalty not to exceed $1,000 per day or a maximum penalty not to exceed $250,000, notwithstanding the number of violations that occurred during the period in which the person or entity operated without authority.

66 Pa.C.S. §2609(b) (emphasis added). The new law became effective the date that the Governor signed it. *See* S.B. 984 §8 ("This act shall take effect immediately.").

The plain text of §2609(b) clearly applies to the penalty imposed on Uber. No one can dispute that the Commission determined that Uber "operated as a transportation network company prior to the effective date of this section without proper authority from the Commission." (*See* Tab A at 21). Accordingly, under §2609(b), Uber "shall be subject to a penalty not to exceed $1,000 per day or a maximum penalty not to exceed $250,000," regardless of the "number of violations that occurred" when Uber was found to be operating without authority. The penalty here covers Uber's operations for 190 days, between February 11, 2014, and August 20, 2014, meaning that under §2609(b), Uber's maximum penalty is $190,000. An $11.4 million penalty far exceeds that statutory maximum, and thus it cannot stand.

The Commission cannot escape this express statutory mandate by arguing that §2609(b) cannot be retroactively applied to issues arising before its November 4, 2016 effective date. In Pennsylvania, statutes apply retroactively when "clearly and manifestly so intended by the General Assembly," 1 Pa.C.S. §1926—i.e., when "the statute contains a specific legislative direction that it is to be retroactive." *Bible v. Dep't of Labor & Indus.*, 696 A.2d 1149, 1151 (Pa.1997). In §2609(b), the General Assembly could not have been more clear about retroactivity. The statute explicitly applies to "[a] person or entity which, as

determined by the commission, operated as a transportation network company ***prior to the effective date of this section*** [i.e., §2609] without proper authority from the commission." 66 Pa.C.S. §2609(b) (emphasis added). By expressly providing that the statute applies to conduct that preceded the statute's enactment, the General Assembly has given "a specific legislative direction" that section 2609(b) is to apply retroactively.

Even ignoring this "specific legislative direction," where the statute "must apply retroactively or not at all," courts must afford retroactive application accordingly, as failing to do so "would entail the absurd conclusion that the legislature intended a nullity." *Commonwealth v. Fee*, 567 A.2d 645, 647 (Pa.1989); *see also* 1 Pa.C.S. §1922(1) (permitting courts to presume "[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable"). Here, of course, now that §2609(b) is law, a TNC cannot possibly, at present, operate "prior to the [statute's] effective date." The only way that §2609(b) has any application at all is if it is applied retroactively to TNCs that operated before the effective date, confirming the General Assembly's express mandate of retroactive application.

Moreover, this only makes sense when read in the context of §2609 as a whole. In S.B. 984, the General Assembly provided a comprehensive set of new

rules governing TNCs. These rules respond to the novel issues raised by the operation of TNCs in a market traditionally dominated by taxis and limousine services. One of these novel issues is how to calculate penalties and fines against TNCs, whose business model does not fit into the previous legal regime originally designed for traditional taxicab and limousine companies. Section 2609 itself addresses this issue with a two-pronged approach. ***Prospectively***, §2609***(a)*** requires the Commission to provide proper notice of the penalties that TNCs face for future violations. *See* §2609(a) ("The commission may, after notice and opportunity to be heard, impose civil penalties under section 3301 . . . . The commission shall adopt a schedule of penalties to be imposed for specific violations, including multiple violations."). Separately, given the lack of such proper notice in the past, §2609***(b)*** limits the penalties that TNCs face for prior conduct. It is not surprising that the General Assembly would adopt this course, as the lack of such notice in the past has spawned considerable litigation (including this case) over questions such as how to calculate penalties for "multiple violations" and "continuing offenses" and what constitutes a "serious" offense. *See, e.g.*, *Newcomer Trucking*, 531 A.2d 85; *Pa.PUC v. Peoples Nat. Gas Co.*, No. M-2009-2086651. The TNC business model exacerbates these problems, because TNCs facilitate a greater number of rides than traditional taxi and limousine

services. Indeed, the Commission in this case recognized as much, agreeing with the ALJs below that "the sheer number of violations" here—meaning the individual rides arranged by members of Uber's online community—led to "an ***unprecedented*** civil penalty." (Tab A at 26 (emphasis added)).

Given this problematic history, §2609(b) establishes a clear limit on penalties for any pre-enactment conduct. For those TNCs that operated prior to the statute's enactment, and thus without the benefit of the notice required under section §2609(a), the cap under §2609(b) mitigates the effects of the "unprecedented" and unforeseeable application of "taxi-centric" penalties to the vastly different operational model of TNCs.

Two textual cues in §2609(b) further confirm this. First, the penalty cap applies "***notwithstanding the number of violations*** that occurred during the period in which the person or entity operated without authority." §2609(b) (emphasis added). The "number of violations" is precisely the issue that the Commission has recognized as the source of the unprecedented penalty here. This statutory language is the General Assembly's explicit acknowledgement that prior law was ill-suited to TNCs and thus required a retroactive cap on penalties for any pre-enactment conduct. Second, the dollar figure the General Assembly chose for the maximum penalty cap—$250,000—is precisely the same as the widely publicized

settlement amount reached between Lyft and the Commission. *See, e.g.*, *Lyft Settlement with Pennsylvania PUC Finalized*, Pittsburgh Post-Gazette (July 16, 2015), http://www.post-gazette.com/news/state/2015/07/16/Lyft-settlement-with-Pennsylvania-PUC-finalized-resolving-Pittsburgh-area-complaint/stories/2015071601. This is an additional indication that in enacting §2609(b), the legislature was seeking to ensure that the inadequate notice provided prior to S.B. 984's enactment would not lead to grossly unequal treatment among TNCs that operated before that enactment.

In short, the plain text of §2609(b) applies to the penalty against Uber, and this retroactive application is "clearly and manifestly" contemplated by the statutory language. Because the penalty exceeds the applicable statutory cap of $190,000 here, it must be reversed.

2. The Commission Exceeded Its Statutory Authority In Imposing A Per-Trip Fine.

Even ignoring the $1,000-per-day cap in 66 Pa.C.S. §2609(b), the same cap should have applied here based on preexisting law, thus requiring reversal for another, independent reason. Under Code Section 3301, when faced with a "continuing offense," the Commission may assess a penalty of up to $1,000 per offense, 66 Pa.C.S. §3301(a), with "[e]ach and every ***day's*** continuance in the

violation" constituting "a separate and distinct offense." §3301(b) (emphasis added). The conduct of operating a TNC is just such a continuing offense.

All agree that the maximum fine for a "continuing offense" is $1,000 per day. As this Court explained in *Newcomer Trucking* the term "continuing offenses" refers to "proscribed activities that are of an ongoing nature and cannot be feasibly segregated into discrete violations so as to impose separate penalties." 531 A.2d at 87. Uber's alleged violations here meet that test. The record unequivocally demonstrates that Uber did not provide the individual trips ***themselves***. Rather, its role was to manage and operate the digital network ***itself***. And managing a digital network is an activity of an "ongoing nature" that "cannot be feasibly segregated into discrete violations." The digital network is either up and operating on a given day, or it is not. Any ride requests routed through that network are solely a result of activities by individual users, not Uber's conduct. And these are activities, it should be noted, over which Uber had no control (beyond Uber's continuing and indivisible activity of operating the network). Accordingly, "each and every ***day's*** continuance" was a separate offense (to the extent there was any offense at all), giving rise to a possible additional $1,000 fine.

The Commission itself originally seemed to recognize this. Its July 24, 2014 Order affirming the ALJs' Cease and Desist Order said nothing about individual

trips, but instead ordered Uber to "immediately cease and desist from utilizing its digital platform to facilitate transportation of passengers utilizing non-certificated drivers." (Tab C at 26). And even I&E's original Formal Complaint sought a penalty for each of the 11 specific trips alleged in the Formal Complaint itself plus a penalty for each ***day*** that Respondents continued to operate after the date of filing the Formal Complaint. (Tab A at 3, 6). It was only later that I&E amended the Formal Complaint, seeking the unprecedented per-total-trip fine that ultimately produced the $11.4 million penalty.

Consistent with this $1,000 per ***day*** limitation, the Commission has frequently assessed civil penalties based on the number of days that a carrier has operated without authority, without considering the number of unauthorized trips that occurred. *See, e.g.*, *Pa.PUC v. S.S. Sahib Cab Co.*, Docket No. A-00121184C0601 (March 6, 2007) (Tab G); *Pa.PUC v. Erie Transportation Services, Inc.*, Docket No. A-00108419C0603 (March 5, 2007) (Tab H at 2); *Pa.PUC v. Mickens*, Docket No. A-00121227C0602 (July 25, 2007) (Tab I at 4); *Pa.PUC v. Collegeville Airport Service*, Docket No. C-2010-2176745 (January 12, 2012) (Tab J); *Pa.PUC v. K-Larens Transportation Service, Inc.*, Docket No. C-2010-2172842 (January 13, 2011) (Tab K); *Pa.PUC v. Tri-Star Enterprises*, Docket No. C-2009-2088370 (October 8, 2009) (Tab L).

In other cases, the Commission has imposed civil penalties for separate instances specifically alleged in the complaint, each of which fell on a different date, with no inquiry into the total number of unauthorized trips. *See, e.g.*, *Pa.PUC v. M&G Trucking, Inc.*, Docket No. A-00114371C0601 (July 20, 2006) (Tab M); *Pa.PUC v. J&E Transportation Service, LLC*, Docket No. A-00122121C0601 (September 19, 2006) (Tab N); *Pa.PUC v. Costanza*, Docket No. A-00119040C0701 (September 13, 2007) (Tab O); *Pa.PUC v. Transit Aide Inc.*, Docket No. C-2010-2187719 (February 10, 2011) (Tab P); *Pa.PUC v. Same Day Delivery Service*, Docket No. A-00110909C0601 (May 4, 2006) (Tab Q); *Pa.PUC v. Sun Coach Lines*, Docket No. C-20065888 (May 4, 2006) (Tab R).

The Commission here, however, imposed a penalty pursuant to a per-trip calculation, thus eviscerating the $1,000 per-day limitation that should have applied. In doing so, it relied on *Newcomer* and a few other cases imposing a per-trip penalty. But notably, in *Newcomer* and in every other decision relied upon by the Commission and cited in this Petition, the per-trip fine that the Commission ultimately imposed did not exceed the fine that would have been imposed under a $1,000 per day approach. Thus, those cases provide scant support for imposing a per-trip penalty that exceeds the maximum per-day penalty ***by more than fifty times.***

In short, §3301 imposes a $1,000 per ***day*** limitation on the penalty for the violations that the Commission found here, a limit that would yield a penalty of no more than $190,000 in this case. The $11.4 million penalty here thus cannot stand.

3. The Penalty Improperly "Punished" Uber For Allegedly Violating A Cease And Desist Order, Despite The Fact That The Commission Has No Power To Issue Injunctive Relief Enforceable By Criminal Contempt Penalties.

The Commission also committed legal error in imposing a higher per-trip penalty ($257 each instead of $7 each) for trips that occurred after the ALJs entered the Cease and Desist Order on July 1, 2014. Both the Commission and the ALJs lack any authority to issue injunctions enforceable by criminal contempt penalties or any authority to unilaterally issue punitive fines for failure to comply with Commission orders. Rather, if the Commission wants an injunction, it must seek it from a court. And if such an injunction is ignored, the ***court*** is the proper authority to entertain punitive measures for lack of compliance. But here, by treating the ALJs' July 1, 2014 Order as a form of extrajudicial injunction, and then unilaterally "punishing" Uber for violating that "injunction" through a higher per-trip fine after the Order, the Commission claimed power that it lacked, and accordingly the penalty must be reversed.

The Commission has only the powers and authority granted to it by the General Assembly and contained in the Code. *See Phila. Elec.*, 473 A.2d at 999-

1000 ("We begin our inquiry by recognizing that the authority of the Commission must arise either 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 to act in any particular case must be clear.").

Here, the General Assembly did not grant the Commission the power to issue injunctions enforceable by criminal contempt penalties; to the contrary, it specifically gave the Commission the ability to ***seek*** such 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 (emphasis added). *See, e.g.*, *Bykofsky v. Town of Lenox*, 31 Mass. L. Rep. 323 (Mass.Super.2013) (Massachusetts law granting powers to conservation commission "confers a variety of powers on the Commission to enforce the SMA [Massachusetts Scenic Mountain Act], but it does not give to the Commission the power to issue injunctive relief enforceable by a finding of criminal contempt. That authority rests with courts holding equity jurisdiction. Thus, [the enabling law] is best construed as bestowing the right to

seek the aid of the courts, with their concomitant injunctive and contempt powers, in restraining what administrative authorities have already determined to be violations of the SMA.").

Nonetheless, the Commission has relied on its own ***regulations*** to purportedly confer upon itself equitable injunctive power, citing 52 Pa. Code §3.10, which purports to allow for "[a]n order granting or denying interim emergency relief." *See, e.g.*, *In re Fink Gas Co.*, 2015 WL 5011629, Docket No. A-2015-2466653 (August 20, 2015) (Tab S) (issuing injunctive relief pursuant to 52 Pa. Code §3.10). But this says nothing about any power to issue injunctions enforceable by criminal-contempt penalties. And even if it did, it would not matter. When the Commission lacks ***statutory*** authority to grant certain relief, it may not rely on its own ***regulations*** to establish such powers. Rulemaking power of administrative agencies is limited by statutory grant of authority and can only be conferred by clear and unmistakable language that sets the bounds of the statutory grant. *See Volunteer Firemen's Relief Ass'n v. Minehart*, 227 A.2d 632, 635-636 (Pa.1967); *Pa. Med. Soc'y v. Commonwealth*, 546 A.2d 720, 722 (Pa.Cmwlth.1988).

Indeed, constitutional due-process concerns prevent any interpretation of the Public Utility Code that would authorize the Commission to issue enforceable

injunctions (and impose criminal-contempt punishment for non-compliance). *See, e.g.*, *Boettger v. Loverro*, 587 A.2d 712, 716 (Pa.1991) ("[W]hen the [constitutional] validity of an act is drawn in question, and even if a serious doubt of constitutionality is raised, we will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (citation and punctuation omitted). Criminal contempt penalties occur in ***court*** only after specific procedural safeguards, including a right to trial by jury, guaranteed by the federal Due Process Clause (as well as Pennsylvania statutory law). *See Commonwealth v. Charlett*, 391 A.2d 1296, 1298 (Pa.1978). Of course, no jury trial was afforded to Uber before the Commission's punitive $11.4 million fine was imposed.

Nor can there be any doubt that the $250-per-trip extra fine for post-Order was a criminal-contempt penalty. To determine whether a penalty is civil or criminal in nature, Pennsylvania courts "must decide whether the citing court's purpose was to vindicate the dignity and authority of the court and to protect the interest of the general public. Such citation is for criminal contempt." *Id*. (citation and punctuation omitted). On the other hand, "if the citation's purpose is to coerce the contemnor into compliance with the order of the court to do or refrain from doing some act primarily for the benefit of a litigant or a private interest the

citation is for civil contempt." *Id*. (same). "If the contempt consists solely of a past act, the only allowable judicial response is punitive, and any contempt adjudication must be criminal." *Id*. (same). Here, the $250-per-trip fine was punishment for a "past act," i.e., trips that occurred after the Commission's Cease and Desist Order and ***before*** August 20, 2016, when Uber completed all filings necessary to show compliance with the terms adopted in the Commission's grant of emergency temporary authority. Accordingly, there can be no argument that the $250-per-trip surcharge was imposed to compel compliance with a Cease and Desist Order that was no longer operational when the penalty was imposed. And the Commission left no doubt that the surcharge was a punishment for disregarding the Order. (*See* Tab A at 54 ("[I]t is difficult to construe Uber's actions of continuing to operate after two cease and desist orders as being anything but a deliberate disregard of the Commission's authority.")).

Moreover, even if the Commission had the power to punish Uber in this manner, which it does not, imposing a punishment of $250 per trip would violate Uber's due-process rights against excessive punitive damages. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("[I]n practice, few [punitive damages] awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," and "an

award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety."). Here, the Commission itself found that the "average cost" of the trips in question was $7 (100% of which the Commission wrongly presumed that Uber earned as revenue, instead of the 20% service fee that Uber actually earns) (*See supra* at VI.F.2). Thus, the $250-per-trip additional punishment amounts to a punitive-to-compensatory ratio of over 35:1 (or, more accurately, over 178:1, taking into account that Uber receives as a service fee only 20% of the cost of a trip). That ratio is far above what the federal Due Process Clause allows.

Accordingly, the Commission abused its discretion and committed legal error by failing to follow the statutory path that the General Assembly laid out for compelling adherence to a Commission determination, and instead wrongly imposing on Uber an unconstitutionally bloated "enhanced" fine as a "punishment" for failing to comply with a cease and desist order. This punishment—accounting for some $10.4 million of the total fine—cannot stand.

4. The Penalty Strikes One's Conscience As Unreasonable, Is Grossly Disproportionate, And Is Irrational, And Therefore Must Be Reversed.

This Court has held that it will strike down civil penalties that do not "fit" the nature of the conduct and that "strike at one's conscience as being

unreasonable." *U.S. Steel Corp.*, 300 A.2d at 514. Separately, the Excessive Fines Clause of the Pennsylvania Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed." Pa. Const., Art. I, Sect. 13. The Eighth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, contains identical language. 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, 334 (1998). Likewise, a fine violates Pennsylvania's Excessive Fines Clause if it is "irrational or unreasonable." *Commonwealth v. Gipple*, 613 A.2d 600, 602 (Pa.Super.1992). Pennsylvania's Supreme Court has incorporated the "grossly disproportional" analysis from Eighth Amendment jurisprudence into its understanding of "irrational or unreasonable." *Commonwealth v. Eisenberg*, 98 A.3d 1268, 1282 (Pa.2014). More specifically, in *Eisenberg*, the court relied on the Eighth Amendment test from *Solem v. Helm*, 463 U.S. 277 (1983), which requires a court to compare the magnitude of the fine (1) to the gravity of the offense, (2) to the treatment of other offenders in the same jurisdiction, and (3) to the treatment of the same offense in other jurisdictions. *Id*. Moreover, the Due Process Clause likewise bars fines that are "wholly disproportioned to the offense and obviously unreasonable." *See St. Louis, I.M. &*

S. Ry. Co. v. Williams, 251 U.S. 63, 67 (1919). These prohibitions against excessive fines apply to fines against corporations just as to individuals, *see Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 285 (1989) (applying Eighth Amendment), and they apply to civil penalties if they are designed, at least in part, to serve "either retributive or deterrent purposes," *Austin v. United States*, 509 U.S. 602, 610 (1993). (*See also* Tab A at 56 (finding the penalty is "critical to ensuring compliance by the entire industry")).

The penalty here cannot survive under any of these standards. It does not "fit" the nature of the conduct and it "strike[s] at one's conscience as being unreasonable," requiring reversal pursuant to *U.S. Steel*'s standard. For the same reasons, it is "grossly disproportional," "irrational," and "obviously unreasonable," requiring reversal under the federal and Pennsylvania Excessive Fines Clause and the federal Due Process Clause.

At the outset, as explained above, the fine violates 66 Pa.C.S. §2609(b)'s $1,000 per-day limit to unauthorized TNC activities, as well as 66 Pa.C.S. §3301's $1,000 per-day limit for continuing offenses. Separately, the $250-per-trip increase in penalty for trips that occurred after the July 1, 2014 Cease and Desist Order exceeds the Commission's authority. Thus, the fine is unreasonable and excessive as a matter of law.

Beyond these issues, the sheer magnitude of the penalty strikes at one's conscience as being unreasonable. The penalty is ***five times*** higher than the second highest fine the Commission has previously imposed—a $1.8 million penalty in *Pennsylvania PUC v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (December 3, 2015) (Tab T at 55), where an electrical generation supplier had committed an egregious violation of law when it made an executive decision to intentionally overcharge customers and fail to honor a written savings guarantee. The fine is also more than eight times higher than the $1.3 million aggregate fine imposed in three separate cases against gas and electric utilities for violations that involved ***eight fatalities***. *See Pa.PUC v. PPL Electric Utilities Corp.*, Docket No. M-2008-2057562 (March 31, 2009) (Tab U at 8); *Pa.PUC v. UGI Utilities, Inc.*, Docket No. C-2012-2308997 (February 19, 2013) (Tab V at 2); *Pa.PUC v. Phila. Gas Works*, Docket No. C-2011-2278312 (July 26, 2013) (Tab W at 12). Indeed, the penalty here is nearly ***one-sixth*** of the Commission's entire approved ***budget*** for fiscal year 2015-2016. *See* www.puc.state.pa.us/about_puc.aspx.

Perhaps most strikingly, the penalty is more than ***45 times*** higher than the amount Lyft paid for engaging in a course of virtually identical alleged violations. *See Pa.PUC v. Lyft, Inc.*, Docket No. C-2014-2432304 (July 15, 2015) (Tab X). Like Uber, Lyft began operating in February 2014; like Uber, Lyft did not have

authority from the Commission; and like Uber, Lyft continued to operate after the Commission told it to stop. Yet, unlike Uber, Lyft paid a fine of $250,000, while the Commission imposed on Uber a fine of $11.4 million for essentially the same conduct.

Beyond its sheer scope, this unprecedented penalty is also inconsistent with the Commission's own past practice. In its briefs before the PUC, as summarized above, Uber cited several cases in which the Commission imposed per-day penalties, or made no inquiry into number of trips, for failure to possess a required certificate or license for other types of continuing conduct. (Uber Pet. for Rehearing at 56-61; *see also supra* at VIII.B.2). In most of those cases, the Commission had not even ***inquired*** as to how many alleged violations had occurred. On the other hand, the Commission has yet to identify a single case in which the fine that it imposed for continuing conduct exceeded the maximum penalty that it could have imposed on a per-day basis for the violations at issue. Yet, here, the fine is ***over 50 times greater*** than the maximum fine that could have accrued under a per-day approach (i.e., $190,000).

Further demonstrating why the penalty strikes at one's conscience, is grossly disproportional, and is obviously irrational, the fine imposed here ignores the Commission's own guidelines. The Commission has promulgated a ten-factor test

it considers in determining the fine in a given matter. 52 Pa.Code §69.1201(c). Here, the Commission misapplied that test, as a dissenting Commissioner observed, both by ignoring record evidence and by simply ignoring factors that would have reasonably compelled a different result.

For example, in evaluating several of these factors (including whether the conduct was serious, §69.1201(c)(1), whether the consequences were serious, §69.1201(c)(2), and the number of affected customers, §69.1201(c)(5)), the Commission is required to consider public safety concerns. But here, nothing in the record suggests any safety concern, nor does the record identify even a single rider or driver adversely affected by the conduct at issue (or any other aspect of Uber's conduct for that matter). Moreover, the penalty fails to account for the Commission's order of July 24, 2014, granting Uber's Application for Emergency Temporary Authority ***to operate*** in Allegheny County. By law, such applications may only be granted "to advance and promote the ***public necessity, safety, and convenience.***" (*See* Tab F at 2-3 (quoting 52 Pa.Code §29.352) (emphasis added)). In granting this application, the Commission expressly found "that an immediate need for Rasier's service exists" and that Rasier "will comply with the Commission's existing regulations regarding driver integrity and vehicle safety for motor carriers." (*Id.* at 10). For the Commission to both (1) grant this application

based on Uber's ***promotion*** of public safety, while at the same time (2) imposing a higher fine covering that same time period, on the basis that Uber allegedly represented a ***threat*** to public safety, is "obviously irrational" and "strikes at one's conscience as being unreasonable"

In simply ignoring all of this, the Commission seemed to focus on its own notions of the ***potential*** harm that ***might*** have occurred, despite no record evidence to suggest any reasonable fear of any such harm. But this approach conflicts with the Commission's own policy statement requiring it to consider the ***actual*** harm that resulted from the alleged violation, rather than speculate about harm that might have resulted. *See Final Policy Statement for Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations*, Docket No. M-00051875 (November 30, 2007) ("The Commission will evaluate the actual harm sustained rather than engaging in any amount of speculation about the potential for harm.") (Tab Y); *see also Pa.PUC v. Duquesne Light Co.*, Docket No. M-2014-2165364 (October 2, 2014) (Tab Z) (concluding that because "[t]here 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 which would warrant a higher penalty under [§69.1201(c)(2)]"). Indeed, in the *Lyft* case itself, regarding conduct by an Uber competitor not meaningfully

distinguishable from this case, 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. (*See* Tab D at 14-15). Yet, here, the Commission took the opposite approach. As a result, the Commission imposed a penalty wholly out of line with its past practice and with the conduct at issue.

Moreover, in considering the deterrence factor, §69.1201(c)(8), the Commission wrongly rationalized the excessive penalty as necessary not to deter Respondents ***themselves*** from future conduct, but also to deter "***other*** motor carriers" from "disregard[ing] the Regulations and directives of the Commission." (Tab A at 55-56) (emphasis added). This was also unreasonable, as Uber and Lyft themselves had already resolved the Commission's objections and were already granted Commission approval to operate. Nor did the Commission explain why deterrence could only be served by imposing a penalty five times higher than any past Commission penalty; presumably, earlier penalties included deterrence considerations, yet none of them even approached the magnitude of the penalty here.

Finally, in considering "[p]ast Commission decisions in similar situations," §69.1201(c)(9), the Commission again failed to adequately consider the Lyft penalty—$250,000 for indistinguishable conduct.

In short, the penalty violates 66 Pa.C.S. §3301, exceeds the Commission's authority by punishing Uber for violating a cease-and-desist order the Commission had no authority to issue, contradicts that General Assembly's announced public policy of the State, is multiples higher than any other penalty in Commission history, and is dozens of multiples higher than the penalty imposed on Lyft for the same conduct. Moreover, it is wholly inconsistent with past Commission methodology and based in large part on an unfounded fear of ***potential*** harm that is wholly unsubstantiated in the record, completely rejected by the Commission's own later findings that Uber is safe and necessary, and amounts to a complete disregard of the ten-factor test for imposing penalties in 52 Pa. Code §69.1201(c). Indeed, both dissenting Commissioners expressly noted the lack of any harm resulting from Uber's activities, leading one of those Commissioners to call the fine "grossly disproportionate." (Tab A, Witmer Dissent at 2). The other dissenting Commissioner explained that the Commission's ten-factor guidelines for penalties should have resulted in a penalty of no more than $2,500,000, one-fourth of the fine that the three-member Commission majority imposed here. (*Id*., Powelson Dissent at 1). For these reasons, $11.4 million penalty "strike[s] one's conscience as unreasonable," *U.S. Steel*, 300 A.2d at 514, and it is "grossly disproportional," "irrational," and "obviously unreasonable." Accordingly, the

penalty must be reversed pursuant to *U.S. Steel*, the federal and Pennsylvania Excessive Fines Clauses, and the federal Due Process Clause.

5. The Commission Abused Its Discretion In Refusing To Rehear And Reconsider The Penalty.

The Commission also abused its discretion and acted in an arbitrary and capricious manner in denying the merits of Uber's petition for rehearing and reconsideration. Under relevant standards, a proceeding will be reopened "for the receipt of new evidence which was not ascertainable through the exercise of due diligence." *Pa.PUC v. PECO Energy Co.*, 1998 WL 975762, Docket No. M-00960820 (November 10, 1998) (Tab AA); *see also Crooks v. Pa.PUC*, 276 A.2d 364, 365-366 (Pa.Cmwlth.1971). 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. *Duick v. Pa. Gas and Water Co.*, 56 Pa. P.U.C. 553, 559 (1982). Such a petition is likely to succeed when it raises new and novel arguments not previously heard or considerations that appear to have been overlooked or not addressed by the Commission. *Id*.

In its petition for rehearing and reconsideration, Uber sought, among other things, leave to present new evidence regarding its business operations in Pennsylvania, because this new evidence would significantly alter the Commission's penalty calculation under the ten-factor test set out at 52 Pa. Code

§69.1201. First, Uber sought to present new evidence regarding the impact that the Commission's penalty would have on Rasier-PA and, accordingly, the continued provision of TNC services in Pennsylvania (something that the Commission had expressly found to provide "a substantial benefit" to the public), much of which consisted of recent information that was not available prior to the close of the record. (*See* Uber Pet. for Rehearing at Appx.A (Feldman Affidavit)). Uber also sought to present evidence showing that its revenues from the activity in question were lower than the Commission had assumed in calculating its penalty, information that was relevant in light of the fine methodology the Commission used to determine the fine. (*See* Uber Pet. for Rehearing at 2 ("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. This contention is false. In fact, drivers collected the full fare from riders and then remitted 20% to Respondents.")). Finally, Uber sought to present new evidence that would correct the Commission's misunderstandings regarding the public interest—both to show that the public actually suffered no harm from Uber's operations, and to provide new evidence regarding the various ways in which Uber's operations were affirmatively benefiting the public. (Uber Pet. for Rehearing at Appx.A). The Commission, however, refused to even consider this

evidence, (Tab B at 43)—an abuse of discretion given the probity of that evidence and Uber's inability to introduce it previously.

Uber's petition also sought reconsideration on a number of other grounds, including that the Commission's fine violated the U.S. and Pennsylvania Constitutions. The Commission rejected these arguments out of hand, some because Uber had supposedly waived the arguments "by failing to assert them at an earlier stage of the proceeding," others because Uber ***had*** asserted them at an earlier stage of the proceeding. (Tab B at 51). Indeed, the Commission determined that Uber had never before raised an Excessive-Fines-Clause objection prior to its reconsideration motion, but nonetheless "note[d] that in its brief filed with the ALJs, Uber argued that I&E's requested civil penalty was excessive, arbitrary, and capricious and demonstrated a lack of fundamental fairness and objectivity." (*Id*. at 50). This too was an abuse of discretion. The Commission lacks authority to avoid ruling on these arguments. Uber adequately raised and preserved these arguments in its prior filings. Indeed, Uber has objected at every opportunity that the fines at issue here (both the ALJs' original $49.8 million fine, and the Commission's ultimate $11.4 million fine) were grossly excessive. Thus Commission thus abused its discretion in denying Uber's request for reconsideration.

IX. RELIEF SOUGHT

WHEREFORE, Uber respectfully requests that this Court reverse and set aside (1) the Commission's May 10, 2016 Order, including the Commission's reliance in that Order on its earlier July 24, 2014 affirmance of the ALJs' Cease and Desist Order as a basis for enhancing the fine that the Order imposes; and (2) the Commission's September 1, 2016 Order reiterating the substantive findings from the May 10, 2016 Order and denying Uber's petition for rehearing and reconsideration of the $11.4 million fine that the Commission imposed in its May 10, 2016 Order, and grant such further relief as may be just and reasonable under the circumstances. Uber further respectfully urges the Court to remand the case to the Commission with instructions to enter an appropriate fine of not more than $190,000.

Respectfully submitted,

/s/ *Douglas R. Cole*

John F. Povilaitis (PA I.D. #28944)
Alan M. Seltzer (PA I.D. #27890)
Jayson R. Wolfgang (PA I.D. #62076)
Kyle J. Meyer (PA I.D. #307743)
Buchanan Ingersoll & Rooney PC
409 North Second Street, Suite 500
Harrisburg, PA 17101
Telephone: (717) 237-4800
Facsimile: (717) 233-0852

Douglas R. Cole (admitted *pro hac vice*)
Joshua M. Feasel (admitted *pro hac vice*)
ORGAN COLE LLP
1330 Dublin Road
Columbus, Ohio 43215
Telephone: (614) 481-0900
Facsimile: (614) 481-0904

Attorneys for Petitioners Uber Technologies, Inc., et al.

Date: January 19, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Pa. R.A.P. 2135(d), it is hereby certified that the foregoing Brief of Petitioners contains 13,889 words (exclusive of the tables of contents and authorities, and this certificate), according to the Microsoft® Word processing system used to prepare it.

/s/ *Jayson R. Wolfgang*
Jayson R. Wolfgang

Date: January 19, 2017

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the following persons via email and the Court's electronic filing system:

Bohdan R. Pankiw, Chief Counsel
John R. Herzog, Deputy Chief Counsel
Shaun A. Sparks, Assistant Counsel
Pennsylvania Public Utility Commission, Law Bureau
Commonwealth Keystone Building
400 North Street, 3rd Floor West
Harrisburg, PA 17105

By: *s/Jayson R. Wolfgang*
Jayson R. Wolfgang

DATE: January 19, 2017