

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Rasier-PA LLC, a limited liability :
Company of the State of Delaware, for the right :
to begin to transport, by motor vehicle, : A-2014-2416127
persons in the experimental service of shared-ride :
network for passenger trips between points in :
Allegheny County :

RECOMMENDED DECISION

Before
Jeffrey A. Watson
Mary D. Long
Administrative Law Judges

SYNOPSIS

This decision recommends dismissal of the above captioned transportation application due to the applicant’s willful failure to comply with an order of the presiding officers.

PROCEDURAL BACKGROUND

On April 14, 2014, Rasier-PA LLC (Rasier or Applicant) filed with the Pennsylvania Public Utility Commission (Commission), its Application for the right to begin to transport, by motor vehicle, persons in the experimental service of shared-ride network for passenger trips between points in Allegheny County. Applicant proposes to operate a ride-sharing network service for passenger trips between points within Allegheny County, Pennsylvania:

Applicant proposes to use a digital platform to connect passengers to independent ride-sharing operators (“Operators”) with whom Applicant intends to contract. Operators will use their personal,

non-commercially licensed vehicles for the purpose of providing transportation services. The Applicant plans to license the Uber technology to generate leads from riders who need transportation services. Applicant does not own vehicles, employ drivers or transport passengers.¹

Notice of the application was published in the Pennsylvania Bulletin on April 26, 2014. The notice provided that the deadline for the filing of protests was May 12, 2014.²

The Protestants

On May 7, 2014, JB Taxi LLC (JB Taxi) filed a protest and a petition to intervene. The Applicant filed preliminary objections on June 2, 2014, which sought dismissal of the protest, averring that the JB Taxi lacked standing to protest the application. The Protestant filed an answer to the preliminary objections on June 13, 2014. On July 1, 2014, the undersigned presiding officers issued an Initial Decision dismissing the Protest and denying the petition to intervene filed by JB Taxi. JB Taxi filed exceptions to this initial decision on June 23, 2014. By Opinion and Order entered August 15, 2014, the Commission granted JB Taxi's exceptions and reversed the dismissal.

On May 12, 2014, Concord Limousine, Inc. (Concord), and Executive Transportation, Inc., t/a Luxury Sedan (Executive) filed protests to the Application. On June 2, 2014, the Applicant filed preliminary objections which sought dismissal of the protests. Concord and Executive filed Answers to Preliminary Objections on June 12, 2014. On July 1, 2014, the undersigned presiding officers issued Interim Orders denying the preliminary objections to the protests of Concord and Executive. The Applicant filed a Petition for Interlocutory Review and Answer to Material Question before the Commission on July 11, 2014. By order dated July 24, 2014, the Commission declined to answer the material question, but directed the undersigned to issue a Recommended Decision no later than September 25, 2014.³

1 Application at ¶ 10-11.

2 44 Pa.B. 2604 (April 26, 2014).

3 Docket No. P-2014-2431743.

On May 12, 2014, the Pennsylvania Association For Justice (PAJ) and the Insurance Federation of Pennsylvania, Inc. (Insurance Federation), filed protests to the Application. On June 2, 2014, the Applicant filed preliminary objections which sought dismissal of the protests. Applicant sought the dismissal of the protests averring that neither the Insurance Federation nor PAJ established the requisite standing to protest the application. On July 1, 2014, the undersigned presiding officers issued an Initial Decision dismissing the Protests of the Insurance Federation and PAJ. On July 16, 2014, the Insurance Federation filed exceptions to the initial decision which dismissed its protest. By Opinion and Order dated August 15, 2014, the Commission granted the exceptions and reversed the dismissal.

Other Commission Proceedings

The Commission has also rendered orders in other proceedings which are related to the Applicant. On July 2, 2014, in addition to the application before us now, the Applicant also filed an application for Emergency Temporary Authority.⁴ By Order entered July 24, 2014, the Commission approved the application. However, the approval was contingent upon the Applicant meeting specific insurance and tariff requirements on or before August 24, 2014.

Additionally, on July 24, 2014, the Commission ruled on an Order for Interim Emergency Relief, which was issued on July 1, 2014, in connection with enforcement proceedings initiated against Uber Technologies, Inc., the parent company of the Applicant, by the Commission's Bureau of Investigation and Enforcement (BIE).⁵ That order required Uber Technologies to immediately cease and desist from utilizing its digital platform to facilitate the transportation of passengers until it secured the proper authority from the Commission. In a public statement made by Commissioner Cawley, he requested the issuance of a Secretarial Letter seeking additional information to aid in the formulation of the final order in the enforcement proceedings. That letter was served on July 28, 2014. We determined that the information requested in the Secretarial Letter was also important to the development of the record in this application. Accordingly, by order dated July 31, 2014, we also directed the Applicant to provide the information for submission to the hearing record in these proceedings.

4 Docket No. A-2014-2429993.

5 Docket No. C-2014-2422723.

Prehearing and Hearing Proceedings

A Prehearing Conference proceeded as scheduled on July 24, 2014. The purpose of the conference was to schedule evidentiary proceedings in this matter, along with a related application that was filed by the Applicant for statewide authority. After consultation with counsel, evidentiary hearings were scheduled for August 18-19, 2014, in Pittsburgh. An additional day of hearing was later scheduled for September 9, 2014.

The hearings were held as scheduled.⁶ The Applicant was represented by Karen O. Moury, Esquire who presented the testimony of six witnesses. The Applicant also offered seven exhibits which were admitted into the hearing record. Concord and Executive were represented by Michael S. Henry, Esquire. Mr. Henry presented the testimony of three witnesses. David Donley, Esquire represented JB Taxi, LLC. JB Taxi offered no witness testimony, but did offer one exhibit which was admitted into the record. Finally, the Insurance Federation was represented by Samuel Marshall, Esquire. The Insurance Federation offered the testimony of one witness. The hearing resulted in a transcript of 735 pages.⁷

⁶ Parties in the statewide application and the Pennsylvania Insurance Federation requested a continuance of the hearings. The request was denied by order dated August 13, 2014.

⁷ The hearing was a joint proceeding for both this application, as well as the Applicant's statewide application filed at Docket No. A-2014-2424608. Additional parties and witnesses were presented relevant to that docket. The reader is directed to our recommended decision for a description of the additional record materials in the proceeding.

FINDINGS OF FACT

1. On July 31, 2014, the presiding administrative law judges issued an interim order directing the Applicant, Rasier-PA, LLC. to provide certain enumerated trip data in order to develop the record in this application proceeding.
2. The Applicant did not seek redress from the interim order.
3. The Applicant did not seek a protective order.
4. The Applicant refused to provide the trip data.

DISCUSSION

On July 31, 2014, we issued an interim order directed to the Applicant to provide certain trip data for the record in this proceeding. That order derived from the Commission's July 24, 2014 Public Meeting where the Commission ruled on an Order for Interim Emergency Relief, which was issued on July 1, 2014, in connection with enforcement proceedings initiated against Uber Technologies, Inc., the parent company of the Applicant, by the Commission's Bureau of Investigation and Enforcement (BIE). That order required Uber Technologies to immediately cease and desist from utilizing its digital platform to facilitate the transportation of passengers until it secured the proper authority from the Commission. In a public statement made by Commissioner Cawley, he requested the issuance of a Secretarial Letter seeking additional information to aid in the formulation of the final order in the enforcement proceedings. That letter was served on July 28, 2014. We determined that the information requested in the Secretarial Letter was also important to the development of the record in this application. Accordingly, by order dated July 31, 2014, we also directed the Applicant to provide the information for submission to the hearing record in these proceedings:

- (1) The number of transactions/rides provided to passengers in Pennsylvania via the connections made with drivers through Internet, mobile application, or digital software during the following periods:
 - (a) From the initiation of Uber's service in Pennsylvania to June 5, 2014 (the date I&E filed the Complaint against Uber);

(b) From the receipt of the cease and desist letter from the Commission's Bureau of Technical Utility Services dated July 6, 2012, to June 5, 2014;

(c) From June 5, 2014, to July 1, 2014 (the date the *Cease and Desist Order* became effective); and

(d) From July 1, 2014, to the date on which the record in this Complaint proceeding is closed.

(2) Should there be a finding that Uber's conduct in any one or all of the periods in question (1), above, was a violation of the Public Utility Code, whether refunds or credits to customers would be an appropriate remedy.

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

The Applicant did not file any motion for protective order, seek redress from the Commission, or otherwise signal that it objected to the production of the information.

For the first time, the Applicant objected to the provision of the information during the August 18, 2014 hearing. The Applicant offered no justification for failing to comply with the July 31 order, but instead simply argued that the trip data was highly confidential and proprietary. Thereafter, the Applicant's counsel instructed her witness to not to answer each question posed from the July 31, 2014 Order.⁸

The other counsel for the Protestants noted that they had been in regular communication with the Applicant's counsel in preparation for the hearing. They were given no indication that the Applicant did not intend to comply with the July 31, 2014 Order.⁹

The Applicant was thereafter directed to return the following day with a legal justification for refusing to comply with the July 31, 2014 Order. The Applicant did not provide any justification for failing to file a motion for protective order or otherwise provide the presiding officers or opposing counsel with any notice in advance of the hearing that it did not intend to comply with the Order. Instead, the Applicant merely reiterated its position that the

8 N.T. 252-54.

9 N.T. 254, 325, 329.

material was confidential and proprietary, was not relevant and invoked a Fifth Amendment right against self-incrimination. Following further legal argument by the parties, the witness Mr. Gore again declined to answer the questions based on the advice of counsel. He also stated that he was not authorized to provide the information.¹⁰ The Applicant had no other witness available who would have been authorized to answer the questions posed in the July 31, 2014 Order.¹¹

The Protestants' made a motion to dismiss the application due to the Applicant's continued failure to comply with the July 31, 2014 Order. We held the ruling on the motion in abeyance and provided the parties with the opportunity to brief their positions at the conclusion of the proceedings. The Applicant filed its brief in opposition to dismissal on September 12, 2014. The Protestants filed their replies on September 15, 2014.

Commission regulations authorize the presiding officer to dismiss an application when a party fails to obstruct the orderly conduct of a hearing:

If the Commission or the presiding officer finds, after notice and opportunity for hearing, that the actions of a party, including an intervenor, in a proceeding obstruct the orderly conduct of the proceeding and are inimical to the public interest, the Commission or the presiding officer may take appropriate action, including dismissal of the complaint, application, or petition, if the action is that of complainant, applicant, or petitioner.¹²

The Applicant's conduct in this matter is similar to a willful failure to comply with discovery. In those situations the Commission has not hesitated to dismiss a complaint or an application. Indeed the failure to comply with the rules of discovery directly affects the due process rights of the promulgating party and therefore prevents orderly and fair litigation.¹³ Accordingly, on more than one occasion, the Commission has dismissed a transportation application when the applicant has refused to comply with the discovery rules and orders from the administrative law judge

10 N.T. 332.

11 N.T. 333.

12 52 Pa.Code § 2.245(c).

13 *Nippes v. PECO Energy Co.*, Docket No. C-2013-2363324 (Initial Decision August 20, 2014, Final Order dated September 30, 2013).

enforcing them.¹⁴ In other contexts as well, the Commission has held that the orders of an administrative law judge must be complied with and that a failure to do so is a sufficient basis to support dismissal of the matter.¹⁵

At the hearing, the Applicant offered no excuse for failing to comply with the July 31 Order, but only offered the unsubstantiated contention that the trip data was proprietary information. The following day, when offered an opportunity to provide a legal basis for the refusal, the Applicant only discussed a legal objection to the information sought by the July 31, 2014 Order in the form of its position that the trip data was proprietary and that to provide it would impact its Fifth Amendment rights and that the information, in the Applicant's view, was not relevant to the Commission's consideration of the application. The Applicant's brief in opposition to the motion to dismiss essentially memorializes the legal arguments related to its position that the trip data is proprietary, but provides no legal basis for refusing to comply with a judicial order.

Clearly the Applicant had several more appropriate remedies at its disposal to deal with its objection to requirement of the July 31 Order. The most appropriate remedy for such an objection would have been to file a motion for a protective order.¹⁶ The Protestants would have had an opportunity to respond the Applicant's argument that the material was highly confidential and proprietary and based on our ruling on such a motion, would have been able to prepare their cases accordingly. The protection of highly confidential and proprietary information from public disclosure is done on a routine basis in many Commission proceedings, and certainly could have been done here had we agreed that the information was, in fact, confidential.¹⁷ The fact that the Applicant may have been unsuccessful in convincing the Commission that the trip

14 *E.g. Application of Pickups Moving Company, LLC*, Docket No. A-2013-2372121 (Initial Decision February 4, 2014, Final Order dated March 17, 2014).

15 *Snyderville Community Development Corporation v. Philadelphia Gas Work*, Docket No. C-20055032 (Opinion and Order entered July 31, 2006).

16 66 Pa.C.S. § 335; 52 Pa.Code §§ 5.362, 5.423.

17 Protestant's counsel pointed out, however, that all common carriers are required to maintain trip logs and submit trip data to the Commission on an annual basis.

data is in fact a trade secret as defined by the regulations, does not justify the Applicant's refusal to comply with the July 31 Order.¹⁸

The Applicant chose to offer service in the Commonwealth and chose to seek Commission approval for that service. The Commission's regulations provide that other parties are entitled to challenge the Applicant's proposal in an adversarial setting. The consequence is that the Applicant must therefore submit to the authority of the tribunal. There are procedures in place which permit the Applicant to challenge adverse rulings of the presiding officers. Simply refusing to comply because the Applicant fears a potentially adverse decision is antithetical to the judicial process and does not justify the Applicant's conduct in these proceedings.¹⁹

We find the Applicant's conduct in this proceeding is a willful disregard of the direction of the presiding officers. To permit the Applicant to disregard an order of the administrative law judges, when a remedy was available, would destroy the effectiveness of Commission proceedings and undermines the due process rights of the other parties to the proceeding. Therefore, this application will be dismissed in the ordering paragraphs below.

CONCLUSIONS OF LAW

1. The Applicant's conduct in this proceeding obstructed the orderly conduct of the proceeding and is inimical to the public interest. 52 Pa.Code § 5.245(c).
2. It is appropriate to dismiss the application.

ORDER

THEREFORE,

¹⁸ The Applicant also could have sought interlocutory review of our order from the Commissioners. Between July 31, 2014, and the last day of hearing, there was a Public Meeting scheduled for August 21, 2014.

¹⁹ Given the Applicant's refusal to submit to the Commission's judicial authority, it is highly unlikely that the Applicant intends to comply with the Commission's regulatory authority.

IT IS RECOMMENDED:

1. That the Application of Rasier-PA LLC, a limited liability company of the State of Delaware, for the right to begin to transport, by motor vehicle, persons in the experimental service of shared-ride network for passenger trips between points in Allegheny County is denied.

2. That the Secretary mark the docket closed.

Date: September 25, 2014

/s/
Jeffrey A. Watson
Administrative Law Judge

/s/
Mary D. Long
Administrative Law Judge