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VIA ELECTRONIC FILING AND HAND DELIVERY

David J. Collins
Executive Secretary
Maryland Public Service Commission
William Donald Schaefer Tower
6 St. Paul Street, 16th Floor
Baltimore, MD 21202

Re: Case No. 9325 - *In the Matter of an Investigation to Consider the Nature and Extent of Regulation over the Operations of Uber Technologies, LLC and Other Similar Companies* – **CONFIDENTIAL MATERIAL ENCLOSED**

Dear Mr. Collins:

Enclosed on behalf of Uber Technologies, Inc. (“Uber”) in the above-referenced proceeding are: (1) an original and 17 copies of the **Confidential Version** of Uber’s Initial Post-Hearing Brief; (2) an original and 17 copies of the **Public Version** of Uber’s initial brief; and (3) a CD containing the Confidential Version. Only the Public Version is being filed electronically. The Confidential Version of Uber’s brief includes information derived from materials that Uber has designated as confidential pursuant to the confidentiality agreement in effect between the parties in this matter, and Uber asks that it be kept under seal. Copies were served on the parties by electronic mail, with courtesy copies via first-class mail. Service of the Confidential Version was limited to Judge Romine and persons who have executed the confidentiality agreement. Please contact me if you have any questions.

Respectfully submitted,

Stinson Morrison Hecker LLP

John E. McCaffrey

Enclosures

cc: Counsel for all parties

**BEFORE THE
MARYLAND PUBLIC SERVICE COMMISSION**

In the Matter of an Investigation to)	
Consider the Nature and Extent of)	
Regulation Over the Operations of)	Case No. 9325
Uber Technologies, LLC and)	
Other Similar Companies)	

**INITIAL POST-HEARING BRIEF OF UBER TECHNOLOGIES, INC.
(Public Version)**

December 11, 2013

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INITIAL POST-HEARING BRIEF OF UBER TECHNOLOGIES, INC.

Pursuant to Code of Maryland Regulations (“COMAR”) § 20.07.02.06 and the Chief Public Utility Law Judge’s Notice of Briefing Schedule, Uber Technologies, Inc. (“Uber”) hereby files its Initial Post-Hearing Brief in the above-captioned proceeding. The evidence is clear that Uber is not a public service company, and therefore, Uber is not subject to the Public Service Commission’s (“Commission”) jurisdiction. This conclusion is consistent with the Commission’s original Staff conclusion, issued on January 3, 2013, prior to the Commission’s about-face and unsupportable pivot on this issue.

Uber urges the Chief Judge to uphold the law and regulations as written and interpreted in this State. The Chief Judge should not attempt to create jurisdiction where none was intended by the legislature by forcing a square peg into a round hole. Further, the determination of the issues should be based on evidence presented in this proceeding, not on inaccurate and sensational stories submitted to Commission Staff, including the Commission Staff’s witness in this proceeding and the Commission Staff’s Counsel by various Commission stakeholders.¹

¹ On October 4, 2013, Uber submitted a request for documents to the Commission pursuant to the Maryland Public Information Act (“PIA”), State Government Article § § 10-611 to 10-630. Uber received more than 7,600 pages of documents responsive to its PIA request, with documents produced on November 25, 2013 and December 4, 2013. The document production is replete with emails from industry interests to

I. INTRODUCTION

Uber is a technology company that has developed a free software application service (“Uber App”). The Uber App allows users to request transportation in Baltimore from carriers and drivers licensed by the Maryland Public Service Commission (“Commission”) to provide passenger-for-hire (“PFH”) service. Uber is not a transportation company. It does not own vehicles or employ drivers.

The Uber App is simply one of an increasing number of internet applications provided by information service providers and other non-utilities which permit consumers to maximize their use of various regulated energy, telecommunications, transportation and other services. In this case, Uber provides a new and popular way for customers seeking transportation to request service from the existing Commission-regulated transportation providers. Uber’s service provides benefits to both customers and transportation providers by making it easier for riders to request transportation services and allowing PFH carriers easier access to prospective customers. By providing easy access to limousine providers, the Uber App affords users more choice in transportation as well as higher reliability and access in all neighborhoods, reducing discrimination. It is attractive to business travelers, tourists, and convention planners, and reduces drinking and driving. By providing its lead generation service, the Uber App is also a job creator and economic driver. These benefits have been proven from Bangalore to Baltimore. Uber’s operations, however, do not make it a public service company under Maryland law.

Commission Staff that enclosed inaccurate stories regarding the Uber business model. Further, there are a number of emails that show that during the course of this proceeding the Deputy Counsel of the Commission and the lead counsel for Yellow Cab Company discussed substantive issues pending in this matter. Contemporaneous with its Initial Brief, Uber is filing a motion to introduce certain of the materials obtained through the PIA request into the record in this proceeding pursuant to the Chief Judge’s November 8, 2013 Notice of Briefing Schedule.

The basic threshold issue in this case remains the legal question of whether Uber is a “public service company” within the meaning of the Public Utilities Article (“PUA”) of the Maryland Code. If Uber is not a public service company as defined in the PUA, the Commission may not regulate it.

The Commission’s Staff (“Staff”) takes the position that Uber is a public service company because it is a common carrier providing transportation of persons for hire service. Staff attempts to shoehorn Uber into the relevant statutory definitions, however, by construing the PUA in ways that are not supported by the statutory text, legislative history, logic or common sense. In particular, Staff’s centerpiece “manage and control” argument has no basis in the relevant statutory text and is, in any case, unsupported by the facts. Rather, as testified to by the Commission’s witness, the definition is based on a reading of the dictionary. There is no basis for finding Commission jurisdiction based on the ordinary definition of “manage” or “control.” The law in Maryland requires more.

Nor is there any merit in Staff’s theory that Uber is a common carrier because it “offers” to transport persons in motor vehicles within the meaning of PUA § 10-101(f)(1). Staff’s interpretation of that provision is inconsistent with the legislative intent of the statute and would purport to create an entirely new basis for Commission jurisdiction. Notably, Yellow Cab Company, Inc. (“Yellow”) implicitly *concedes* that Uber is not a public service company by asserting (incorrectly) that Uber is a taxicab association. Further, the credibility of Staff witness Christopher T. Koermer’s analysis is undermined by the fact that he is essentially providing a legal opinion and by record evidence indicating that taxicab industry representatives and other anti-Uber organizations have sought to influence Mr. Koermer’s opinions.

Even if there were any basis for a conclusion that Uber's operations make it a public service company under Maryland law (which there is not), the Commission is preempted by federal law from regulating Uber because Uber is a provider of information services. Regulation of Uber by the Commission would conflict with federal laws and decisions prohibiting regulation of information services provided over the internet. As well, the smartphone that Uber supplies to drivers is "customer premises equipment" within the meaning of 47 U.S.C. § 153(16), and, therefore, is not subject to public service company regulation by the Commission.

The Chief Judge should also reject the efforts of Staff and Yellow to impede Uber's operations even absent a finding that Uber itself is a public service company. In particular, the Chief Judge should dismiss the contention that the Uber-supplied smartphone is a taximeter ineligible for use in PFH vehicles providing sedan service. The iPhone provided to the drivers by Uber does not meet the definition of a taximeter recognized under Maryland law (or any law in any jurisdiction), and does not perform the functions of a taximeter. Further, there is no merit in Staff's suggestion that Uber's pricing practices are inconsistent with Maryland law. Staff's position is contrary to the express provisions of the PUA which in effect allow each PFH company to determine its rates based on market demand and is undermined by the fact that the Commission has accepted rates similar to Uber's recommended rate structure.

Accordingly, the Chief Judge should reject the Staff position that Uber is subject to the Commission's jurisdiction.

II. STATEMENT OF THE CASE

On October 31, 2012, Yellow Transportation filed a letter with the Commission purporting “to express concern about the potential proliferation of mobile ‘smartphone’ applications . . . designed to dispatch taxi trips and offer payment services”² (“October 31 Letter”). Uber had yet to begin operating in Baltimore at the time Yellow Transportation filed the October 31 Letter, and Yellow Transportation asked the Commission effectively to foreclose Uber from entering the Baltimore market, exhorting “the Commission to act now before the camel’s nose is under the tent.”³

On January 3, 2013, Commission Staff Counsel submitted a memorandum to the Commission recommending that Yellow Transportation’s request be denied.⁴ Staff specifically observed that “it does not appear that the App providers are providing transportation services.”⁵ On January 28, 2013, the Senior Executive Vice President of Taxi Affiliation Services, LLC (“Baltimore TAS”) filed a letter in response to Staff’s January 3, 2013 recommendation urging the Commission to commence an investigation in response to the October 31 Letter. Baltimore TAS also specifically called upon the Commission to “expand its inquiry into the illegal activity currently being carried out by Uber, a public transportation company, in Baltimore City.”⁶

² Mail Log (“ML”) No. 143424 at 1.

³ *Id.* at 1. Yellow Transportation asked the Commission to “order that: (1) non-transportation companies are not permitted to operate in Baltimore City and County pending further Commission action; and (2) commence an investigation or rulemaking to consider the nature and extent of regulation necessary to adequately protect consumers and drivers.” *Id.* at 2.

⁴ *See* S 1432.

⁵ *Id.* at 4.

⁶ ML 145274.

In response to Yellow Transportation’s October 31 Letter, the Commission on February 13, 2013 directed its Staff to undertake an inquiry regarding the operations of Uber and other companies operating in a similar manner to Uber.

In a March 29, 2013 letter docketed on April 15, 2013, the International Association of Transportation Regulators (“IATR”), through its President, Matthew Daus, sent a letter to Staff Counsel Chuck McLean purporting to provide information and suggest areas of Staff inquiry regarding what IATR characterized as “rogue transportation technology companies” such as Uber.⁷

Staff submitted its report on May 8, 2013 in response to the Commission’s February 13 order.⁸ Reversing course from its January 3, 2013 recommendation, Staff expressed the view that Uber is subject to the Commission’s jurisdiction and recommended “that Uber be directed to file for authorization to operate as a PFH company if it intends to continue operating in Maryland.”⁹ In a response filed on May 13, 2013, Uber disputed Staff’s analysis and conclusions.¹⁰

On May 16, 2013, the Commission’s Executive Secretary issued a letter order which described the Staff report’s recommendation concerning Uber and reported that “[a]fter considering this matter at the May 15, 2013 Administrative Meeting, the Commission set this matter for hearing.”¹¹ The May 16 letter order delegated the case to the Public Utility Law Judge Division.

⁷ ML 146755.

⁸ ML 147207.

⁹ *Id.* at 8.

¹⁰ ML 147260.

¹¹ ML 147354.

The Chief Public Utility Law Judge convened a pre-hearing conference on June 26, 2013, at which a schedule was established for the proceeding. The Chief Judge issued an Order on June 27, 2013 confirming the procedural schedule. The schedule was subsequently amended several times by orders issued by the Chief Judge.¹²

Throughout this time period, documents obtained through a PIA request indicate that Deputy Counsel of the Commission, Chuck McLean, and lead counsel for Yellow, Todd Chason, discussed substantive issues related to Uber.¹³ For example, on July 22, 2013, Mr. Chason asked Mr. McLean whether transportation companies who partner with Uber had filed rate sheets, and Mr. McLean stated that he would “double check, but Transportation hasn’t said anything.” The same day, discussing a potential extension of a deadline, Mr. Chason indicated to Mr. McLean that he wanted to “keep the pressure on,” and that if Uber’s counsel’s revisions were “unreasonable,” “we may need to change tact.”¹⁴

On August 26, 2013, Uber filed a motion to define the scope of the hearing. After receiving answers and Uber’s reply, the Chief Judge issued an order on September 17,

¹² During discovery, a dispute arose between Uber and Staff concerning Staff’s request for the identity of the drivers that utilize Uber’s driver application to receive transportation requests, as well as the vehicles used by such drivers. The Chief Judge directed Staff to seek a subpoena for this information. Staff obtained a subpoena, which Uber moved to quash. *See* ML 148986. The Chief Judge denied Uber’s motion to quash the subpoena, and Uber took an interlocutory appeal to the Commission, which the Commission denied. Uber appealed the Commission’s ruling to the Maryland Circuit Court for Baltimore City. On October 22, 2013, the Circuit Court, per Judge Cox, dismissed Uber’s appeal on the grounds that it sought review of a non-final agency order. Uber has appealed the Circuit Court’s ruling to the Maryland Court of Special Appeals, where the matter remains pending.

¹³ *See* Case No. 9325, Motion of Uber Technologies Inc. to Admit Documents into the Record, Attachment 1 at MD-PSC-006784-85 (December 11, 2013).

¹⁴ *Id.*, Attachment 1 at MD-PSC-006784.

2013 addressing the scope of the hearing.¹⁵ Specifically, the Chief Judge adopted Staff's proposed issues list to define the scope of the evidentiary hearings.¹⁶

On September 9, 2013, the parties filed a Joint Stipulation of Facts, including several attachments. The Public and Confidential versions of the Joint Stipulation were admitted into the record as Joint Exhibit 1 and Joint Exhibit 1-C, respectively.¹⁷

In accordance with the amended procedural schedule, pre-filed direct testimony was submitted on October 8, 2013 by Rachel Holt on behalf of Uber,¹⁸ Dwight R. Kines on behalf of Yellow,¹⁹ and Christopher T. Koermer on behalf of Commission Staff.²⁰ The hearing was convened on November 6 and 7, 2013 before Chief Judge Romine.

III. STATEMENT OF THE FACTS

Uber is a software technology company with headquarters in San Francisco, California.²¹ It is a Delaware corporation licensed by the State Department of Assessments and Taxation to do business in the State of Maryland.²² Uber offers a software application that is free to download and which allows users of the application ("Users") to request local transportation service through a smartphone, via text message

¹⁵ ML 149649.

¹⁶ *Id.* at 5. *See also* ML 149425.

¹⁷ *See* Hearing Transcript ("Tr.") at 43.

¹⁸ Exhibits UBR-11 and UBR-11-C (Confidential).

¹⁹ Exhibit Yellow-1.

²⁰ Exhibits Staff-1 and Staff-1-C (Confidential). Upon Uber's motion, the Chief Judge struck a portion of Mr. Koermer's testimony at the hearing. *See* Tr. at 41-42.

²¹ Exhibit UBR-11 at 2.

²² *Id.*; *see also* Tr. at 302 (Holt).

or on Uber's mobile website.²³ The Uber App can be used to request local transportation in parts of Maryland, including portions of Baltimore City.²⁴

Uber offers a number of different options for requesting transportation.²⁵ Two of these options – Uber Black and Uber SUV – are at issue in this proceeding, and unless otherwise noted, the discussion of Uber's operations in this brief is limited to the Uber Black and Uber SUV options.²⁶ The Uber Black option allows Users to request sedan service from Commission-licensed third-party transportation companies and drivers using the Uber App.²⁷ Uber SUV is the same as Uber Black except that Users can request a sport utility vehicle instead of a sedan, and slightly higher rates apply for transportation requested under the Uber SUV option.²⁸

When a User requests transportation service through the Uber App, the transportation service is provided by Commission-licensed transportation companies and their drivers.²⁹ Uber does not own any of the vehicles that provide transportation service requested through the Uber App,³⁰ and it does not employ any of the drivers that provide the transportation service.³¹ Uber requires the transportation companies that wish to receive transportation service requests through the Uber App to agree to Uber's Software

²³ See Exhibit UBR-11 at 2; Joint Exhibit-1 at ¶ 1; Tr. at 274 (Holt).

²⁴ Exhibit UBR-11 at 3; Joint Exhibit-1 at ¶ 1.

²⁵ Exhibit UBR-11 at 3.

²⁶ Beginning November 1, 2013, Uber began offering a third option for requesting transportation service in Baltimore, uberX, in response to the market entry of Lyft, a competing application technology company. Tr. at 303-312 (Holt); *see also* Tr. at 261-264 (Holt). As the Chief Judge explained at the hearing, the decision in this case will be limited to Uber Black and Uber SUV. Tr. at 263.

²⁷ Exhibit UBR-11 at 3.

²⁸ *Id.* To clarify the record, Uber notes that the license fee paid by a carrier to Uber under the Uber SUV option is 28 percent of the total fare instead of 20 percent.

²⁹ *Id.*

³⁰ Joint Exhibit-1 at ¶ 2; Exhibit UBR-11 at 10; Tr. 252 (Holt).

³¹ Exhibit UBR-11-C (Confidential) at 11-12.

License and Online Services Agreement (“License/Agreement”) and drivers must agree to the Driver Addendum Related to Uber Services (“Driver Addendum”).³² The License/Agreement and Driver Addendum require the local companies and drivers that contract with Uber to hold the applicable Commission-issued license and insurance,³³ and Uber engages in ongoing efforts to confirm that the carriers and drivers with whom it contracts are and remain licensed by the Commission.³⁴

A person who wants to use the Uber App to request transportation service generally must first download the Uber App, provide certain information – including credit card information – and agree to the User terms and conditions.³⁵ After registering, a User can use the Uber App to request transportation in locations where Uber’s service is available.

When the User opens the Uber App, the User can set the location at which he or she would like to be picked up, and can see an estimate of the arrival time of the nearest available transportation provider.³⁶ If increased pricing is in effect as a result of high demand, the User is informed of this fact through the Uber App.³⁷ Before sending the request for transportation service, the User can choose to utilize the Uber App’s fare estimator to obtain an estimate of the cost of the trip.³⁸ If the User proceeds with the

³² Joint Exhibit-1 at ¶ 4; *see also* Exhibit UBR-11 at 7; Tr. at 339-41 (Holt), 392-93 (Holt).

³³ Exhibit UBR-11 at 12; Joint Exhibit-1 at ¶ 11.

³⁴ Exhibit UBR-11 at 13-14.

³⁵ Exhibit UBR-11 at 4; Joint Exhibit-1 at ¶ 5. As Ms. Holt explained at the hearing, a User who does not have a smartphone, or who does not have the Uber App installed, may still request transportation service through the Uber software platform. *See* Tr. at 274 (Holt).

³⁶ Exhibit UBR-11 at 5.

³⁷ Tr. at 250-251 (Holt), 356 (Holt), 377 (Holt - Confidential), 396-399 (Holt - Confidential).

³⁸ Exhibit UBR-11 at 4; Tr. at 333-334 (Holt). A User is not required to identify his or her intended destination when requesting transportation service through the Uber App, but use of the fare estimator function does require a destination to be specified. Tr. at 333-34 (Holt). Even where a destination is

request for transportation, the request is routed through Uber's servers in Northern California to the nearest driver logged-in to the Uber software to receive transportation requests.³⁹

Carriers/drivers that have met the requirements reflected in the License/Agreement or Driver Addendum (and paid a deposit) are provided a smartphone (an Apple iPhone) with the Uber driver application ("Driver App") installed.⁴⁰ Like all smartphones, the phones issued to the drivers have GPS capability and telecommunications functionality that permits them to send and receive information to and from Uber's servers.⁴¹ When a driver is available to receive requests for transportation service made through the Uber App, the driver signs in to the Driver App with a unique log-in, and Uber's systems recognize that the driver is available.⁴²

When the driver nearest to a User requesting transportation service receives the request, the driver is provided the first name and rating of the requesting User, along with the requested pick-up location.⁴³ Drivers are free to accept or decline any particular request for transportation received through the Driver App.⁴⁴ If the driver nearest to the person requesting transportation declines the request, it is sent to the next closest driver,

entered for purposes of estimating the fare, however, a driver receiving the request for transportation is not informed of the User's intended destination until informed by the User at pick-up. *Id.*

³⁹ Exhibit UBR-11 at 4.

⁴⁰ Exhibit UBR-11 at 7; *see also* Tr. at 238 (Holt), 385-86 (Holt). The iPhones issued to the drivers are the same as those for sale to the general public, Tr. at 238 (Holt), Tr. at 402 (Holt - Confidential).

⁴¹ Exhibit UBR-11 at 7.

⁴² Exhibit UBR-11 at 7; Tr. at 385-86 (Holt).

⁴³ Exhibit UBR-11 at 8.

⁴⁴ Exhibit UBR-11-C (Confidential) at 4-5, 8, 10; Joint Exhibit-1 at ¶ 6.

who may also choose to accept or decline, and so on until the request for transportation request is accepted.⁴⁵

When a driver accepts a request for transportation service, a text message is sent to the User and the Uber App on the User's smartphone displays the driver's name, photo, license plate number, and rating by previous Uber Users.⁴⁶ The Uber App allows smartphone Users to watch the driver's progress toward the pick-up location.⁴⁷ The Driver App provides the pick-up location identified by the User requesting transportation service, but the smartphone does not otherwise direct the driver to the User's location.⁴⁸ When the driver arrives at the pick-up location requested by the User, the Uber App displays a notification that the driver is arriving. The User enters the vehicle and informs the driver of his or her requested destination.⁴⁹

During a trip requested through the Uber App, the Driver App sends time and location data to Uber's servers in Northern California, where software on the servers uses the data to determine the charge after the trip is completed.⁵⁰ The recommended rates charged by transportation companies to Uber Users are posted on Uber's website and in the Uber App, and are based on time or distance, depending on the speed of the vehicle.⁵¹ When rates are increased above the rates posted on Uber's website during periods of high demand, Users are given specific notice of this fact.⁵² Drivers may request reductions to

⁴⁵ *Id.*; Tr. at 311-312 (Holt).

⁴⁶ Joint Exhibit-1 at ¶ 7; Exhibit UBR-11 at 5.

⁴⁷ Exhibit UBR-11 at 5.

⁴⁸ Tr. at 249 (Holt), 328-29 (Holt).

⁴⁹ Joint Exhibit-1 at ¶ 8; Exhibit UBR-11 at 5.

⁵⁰ Exhibit UBR-11 at 8-9; Tr. at 238-39 (Holt).

⁵¹ Joint Exhibit-1 at ¶ 15; Exhibit UBR-11 at 8.

⁵² Tr. at 250-251 (Holt), 356 (Holt), 377 (Holt - Confidential), 396-99 (Holt - Confidential).

charges based on the recommended rates in specific instances, and such requests are accommodated by Uber.⁵³ Uber expects that the carriers and drivers that use its Uber App will file the rates with the Commission, and Uber makes efforts to follow up with the carriers.⁵⁴

When a User's trip is complete, the User's credit card is charged by a third-party payment processor, and a receipt is provided electronically to the User, which includes details about the trip and the amount charged to the User's credit card.⁵⁵ Uber neither stores the Users' credit card information nor processes credit card payments.⁵⁶ The User also has an opportunity to rate the driver using a five-star rating system.⁵⁷ If a User has a concern with the charge, the User can reply to the email that transmits the receipt, which will automatically generate a customer support inquiry to which the local customer support team would respond.⁵⁸

The transportation companies/drivers pay Uber a fee for the use of the Uber Driver App to receive requests for transportation. Currently, in Maryland the fee is 20 percent of the total fare received by the company/driver for each trip provided by the transportation company to a User.⁵⁹ The 20 percent portion of the fare is paid by the transportation company/driver as a licensing fee for the use of the Uber App.⁶⁰ The Users requesting transportation through the Uber App do not pay a fee to Uber to use the

⁵³ Tr. at 286-287 (Holt), 343-345 (Holt).

⁵⁴ Exhibit UBR-11 at 9-10; Tr. at 287-290 (Holt).

⁵⁵ Joint Exhibit-1 at ¶ 9; Exhibit UBR-11 at 5.

⁵⁶ Exhibit UBR-11 at 6.

⁵⁷ Exhibit UBR-11 at 5; Tr. 244 (Holt).

⁵⁸ Tr. at 313-14 (Holt), 375-76 (Holt-Confidential).

⁵⁹ Joint Exhibit-1 at ¶ 10. Exhibit UBR-11 at 9. As noted, the fee is 28 percent for Uber SUV.

⁶⁰ Tr. at 110 (Koermer); 240 (Holt), 349 (Holt).

software; Users simply pay for the transportation service provided by the Commission-licensed carrier.⁶¹

IV. ARGUMENT

A. Uber is Not Subject to Commission Jurisdiction Under Maryland Law.

1. The Commission is an Agency of Defined Powers and it May Only Exercise Jurisdiction over Uber Pursuant to Authority Granted by Statute.

The threshold question in this case is whether the Commission has jurisdiction to regulate Uber. The Commission “is a legislatively created body and, thus, its powers are limited to those expressly or impliedly granted by statute.”⁶² The Commission, therefore, may only exercise jurisdiction over Uber if a statute expressly or impliedly gives the Commission authority to do so.

As a general matter, the PUA only gives the Commission jurisdiction over public service companies.⁶³ Section 1-101(x)(1) of the PUA defines a “public service company” as “a common carrier company, electric company, gas company, sewage disposal company, telegraph company, telephone company, water company or any combination of public service companies.”⁶⁴ Commission Staff takes the position that Uber is a common carrier company within the meaning of this provision. A common carrier is defined by PUA § 1-101(e)(1) to be “a person, public authority, or federal, state, district, or municipal transportation unit that is engaged in the public transportation of persons for

⁶¹ Exhibit UBR-11 at 9.

⁶² *Chesapeake and Potomac Tel. Co. v. Maryland/Delaware Cable Television Ass’n*, 310 Md. 553, 566; 530 A.2d 734, 737 (Md. 1987); *see also Pub. Serv. Comm’n v. Kolb’s Bakery & Dairy, Inc.*, 176 Md. 191, 195; 4 A.2d 130, 132 (Md. 1935); *Pub. Serv. Comm’n v. Sun Cab Co.*, 160 Md. 476, 479; 154 A. 100, 102 (Md. 1931).

⁶³ *See* PUA § § 2-112(a), 2-113.

⁶⁴ PUA § 1-101(x)(1).

hire, by land, water, air, or any combination of them.”⁶⁵ Staff’s argument that Uber is a common carrier rests on the contention that Uber “is engaged in the public transportation of persons for hire, by land,” under PUA § 1-101(e)(1). PUA § 10-101(f)(1) defines “operate a motor vehicle for hire” as “to transport or offer to transport a person in a motor vehicle in exchange for remuneration.”⁶⁶ Tracing the links in this chain of statutory definitions, the Commission only has jurisdiction over Uber as a public service company if Uber’s operations fall within the definition of “operate a motor vehicle for hire” under PUA § 10-101(f)(1).

PUA § 10-101(f)(1) plainly was not written with a smartphone application like Uber in mind.⁶⁷ The Commission’s motor vehicle common carrier authority dates back over a century,⁶⁸ and the drafters of the original Public Service Law and its subsequent amendments could not have foreseen the development of the now nearly ubiquitous smartphones and the internet-based services they provide. Nor have more recent sessions of the General Assembly seen fit to provide the Commission with jurisdiction over entities providing smartphone applications to request transportation services. Uber is a technology company that offers a software application to let consumers request sedan service from Commission licensed transportation providers – it is nothing like a traditional common carrier.

In evaluating whether Uber’s operations nonetheless could bring it within the definition of common carrier in the PUA, the Chief Judge must engage in “careful

⁶⁵ PUA § 1-101(e)(1).

⁶⁶ PUA § 10-101(f)(1).

⁶⁷ *See* Tr. at 86 (Koermer).

⁶⁸ *See, e.g., Pub. Serv. Comm’n v. Sun Cab Co.*, 160 Md. 476, 154 A. 100 (Md. 1931).

construction” of the PUA to assess whether Uber fits within the legislatively-established definition.⁶⁹ The Chief Judge should “begin with the normal plain meaning of the language of the statute.”⁷⁰ In interpreting the relevant provisions of the PUA, the Commission may “not construe [the] statute with forced or subtle interpretations that limit or extend its application.”⁷¹ Similarly, the statutes should not be read “in a way that is inconsistent with, or ignores, common sense or logic.”⁷² And while the delegated powers of the Commission are to be liberally construed,⁷³ “[c]onstruing a statute liberally and adding to it, by judicial fiat, a provision which the legislature did not see fit to include are not one and the same thing.”⁷⁴

2. Uber Does Not Meet the Statutory Definition of a Common Carrier.

Uber is not a common carrier under Maryland law because it cannot be deemed to be operating motor vehicles for hire under any reasonable construction of the PUA. As noted, PUA § 10-101(f)(a) defines “operate a motor vehicle for hire” as “to transport or offer to transport a person in a motor vehicle in exchange for remuneration.” Uber does not *transport* people in motor vehicles. As the parties have stipulated, Uber does not own vehicles used to provide transportation services.⁷⁵ Nor does Uber employ drivers.⁷⁶ Uber

⁶⁹ See *Baltimore Launch Serv., Inc.*, Order No. 65551, 72 Md. P.S.C. 615; 1981 Md. PSC LEXIS 25 (1981).

⁷⁰ *Severstal Sparrows Point, LLC v. Pub. Serv. Comm’n*, 194 Md. App. 601, 616; 5 A.3d 713, 722 (Md. Ct. Spec. App. 2010) (quoting *Lockshin v. Semsker*, 412 Md. 257, 274-76, 987 A.2d 18 (Md. 2010)).

⁷¹ *Id.*

⁷² *Office of People’s Counsel v. Maryland Pub. Serv. Comm’n*, 355 Md. 1, 23, 733 A.2d 996, 1007 (Md. 1999).

⁷³ PUA § 2-112(c).

⁷⁴ *Radio Comm., Inc. v. Pub. Serv. Comm’n*, 271 Md. 82, 94, 314 A.2d 118, 124 (Md. 1974).

⁷⁵ Joint Exhibit-1 at ¶ 2.

⁷⁶ Exhibit UBR-11 at 11.

does not have any ownership interest in any of the transportation companies that provide the transportation service or in permits held by such companies. Uber's terms and conditions with both its carriers/drivers and its Users make clear that Uber does not provide transportation service.⁷⁷ Uber merely contracts with Commission-licensed passenger-for-hire companies that wish to expand their business by obtaining leads through the Uber App.⁷⁸

When a User requests transportation service through the Uber App, “[t]he transportation service is provided by Commission-licensed transportation companies.”⁷⁹ It is undisputed that Uber's License/Agreement and Driver Addendum “require all local companies/drivers that use its software application service to obtain and maintain the applicable Commission-issued license and insurance.”⁸⁰ It is likewise undisputed that “Uber expects the local transportation companies/drivers with which it partners to comply with all applicable rules and regulations, including filing rate schedules with the Commission.”⁸¹ Thus, while Uber does not dispute that the carriers provide Commission-jurisdictional passenger-for-hire sedan service when they transport passengers that have requested transportation through the Uber App, such passenger-for-hire service is *not* provided by Uber.

At the hearing, Mr. Koermer appeared to agree, that, if the drivers and vehicles providing transportation service requested through the Uber App are licensed by the Commission as Uber asserts, then Uber is not transporting persons in motor vehicles

⁷⁷ Exhibit UBR-11-C (Confidential) at 12; Exhibit UBR-11 at 14; Tr. at 248 (Holt).

⁷⁸ See Exhibit UBR-11 at 10; Tr. at 394 (Holt).

⁷⁹ Exhibit UBR-11 at 9.

⁸⁰ Joint Exhibit-1 at ¶ 11.

⁸¹ Joint Exhibit-1 at ¶ 16.

within the meaning of PUA § 10-101(f)(1).⁸² Notably, although Yellow Cab Company has been perhaps the most vocal proponent of the Commission regulating Uber’s operations, even Yellow’s witness, Mr. Kines, did not take the position that Uber is a public service company.⁸³

Mr. Koermer nonetheless seized on the word “offer” in PUA § 10-101(f), and asserted that Uber operates motor vehicles for hire under Maryland law because it *offers* to transport persons in motor vehicles in exchange for remuneration.⁸⁴ In Staff’s view, there apparently exists a heretofore unrecognized type of service – “offering” transport in a motor vehicle – that is distinct from the service of *transporting* a person in a motor vehicle and that may serve as independent grounds for the exercise of Commission jurisdiction. Mr. Koermer maintained that, under this view, there could be two separate common carriers involved in the same transaction.⁸⁵ The Staff’s position is unsupportable.

The Commission must not “construe a statute with forced or subtle interpretations that limit or extend its application,”⁸⁶ nor read the statutory language “in a way that is inconsistent with, or ignores, common sense or logic.”⁸⁷ Staff’s forced interpretation of

⁸² Tr. at 89-90 (Koermer).

⁸³ See Exhibit Yellow-1 at 2-3. Mr. Kines’ position is that Uber is “operating as an unregulated taxicab association.” *Id.* at 2. Taxicab associations are not public service companies under Maryland law. See, e.g., *Joseph Paul v. Yellow Taxi Ass’n, Inc.*, Order No. 66643, 75 Md. P.S.C. 134, 1984 Md. PSC LEXIS 44, *3 (1984) (explaining that “[t]he Public Service Law does not specifically confer the Commission with jurisdiction over taxicab associations.”). Mr. Kines’ assertion that Uber should be regulated as a taxicab association is addressed in section C.3, below.

⁸⁴ See Tr. at 87-90 (Koermer). Although Uber does not agree that the issue of whether it is subject to Commission jurisdiction necessarily turns on whether its partner carriers and drivers are licensed by the Commission, Staff apparently finds the point to be significant.

⁸⁵ Tr. at 92-93, 96 (Koermer).

⁸⁶ *Severstal Sparrows Point, LLC*, 194 Md. App. at 616, 5 A.3d at 722.

⁸⁷ *Office of People’s Counsel v. Maryland Pub. Serv. Comm’n*, 355 Md. at 23, 733 A.2d at 1007.

the word “offer” in PUA § 10-101(f) as bringing a whole new type activity under the Commission’s jurisdiction must be rejected as contrary to common sense and logic, as well as the Commission’s previous application (or, more accurately, non-application) of this provision.

The provision currently included at PUA § 10-101(f)(1) was adopted by the General Assembly in 1997 through House Bill 1013.⁸⁸ House Bill 1013 was titled “For-Hire Drivers – Licensing” and the bill’s title section further described that the purpose of the bill was to “prohibit[] . . . a person from operating a certain motor vehicle for hire in the state unless the person holds a for-hire driver’s license issued by the Public Service Commission.”⁸⁹ Prior to the enactment of House Bill 1013, only taxicab drivers were required to be licensed by the Commission – the drivers of for-hire vehicle were not required to be licensed. House Bill 1013 established specific licensing requirements for for-hire drivers, including criminal background checks.⁹⁰ The most natural interpretation of the inclusion of the word “offer” in PUA § 10-101(f)(1) is that the General Assembly wished to ensure that transportation providers could not even begin to *offer* (let alone provide) for-hire transportation services unless and until they satisfied the licensing and other requirements adopted by the General Assembly. There is nothing in House Bill 1013, however, to suggest that the General Assembly intended the Act to create a new category of public service companies – those “offering” to transport people in motor vehicles – distinct from those actually providing for-hire service, and construing the

⁸⁸ See 1997 Md. Laws, Ch. 705.

⁸⁹ *Id.* It is settled that the title of a statute may be considered in determining legislative intent. *Bd. of County Comm’rs of Carroll County, Maryland v. Stephans*, 286 Md. 384, 395, 408 A.2d 1017 (Md. 1979). Moreover, “a court must consider a statute’s purpose in determining legislative intent.” *McAlear v. McAlear*, 298 Md. 320, 343 n. 23, 469 A.2d 1256 (Md. 1984).

⁹⁰ See 1997 Md. Laws, Ch. 705.

statute in this manner would be inconsistent with well-established principles of statutory interpretation.⁹¹

Commission Staff's interpretation of PUA § 10-101(f)(1) is also contrary to the manner in which the Commission has applied (or not applied) this provision in the past. For example, Mr. Kines argued that Uber functions essentially like a taxicab association.⁹² Although Uber fundamentally disputes this characterization, it is notable that, although taxicab associations are certainly heavily involved in the dispatch and operation of taxicabs, the Commission has not regulated taxicab associations as public service companies on the grounds that taxicab associations "offer" to transport persons in motor vehicles. Indeed it does not appear that the Commission has ever exercised jurisdiction over an entity solely on the theory that the entity "offers" to transport people.⁹³

The notion that Uber "offers" transportation service is also undermined by the terms and conditions which carriers and drivers must accept in order to receive transportation requests through the Uber App. These terms and conditions make clear that it is the carriers/drivers that are responsible for providing transportation service and

⁹¹ See *Office of People's Counsel v. Maryland Pub. Serv. Comm'n*, 355 Md. at 22 (explaining that "[w]here the meaning of the plain language of the statute, or the language itself, is unclear, 'we seek to discern legislative intent from surrounding circumstances, such as legislative history, prior case law, and the purposes upon which the statutory framework was based.'" (quoting *Lewis v. State*, 348 Md. 648, 653, 705 A.2d 1128, 1131 (1998))).

⁹² See Exhibit Yellow-1 at 2-3.

⁹³ Mr. Koermer also suggested that Uber holds itself out to the public as a transportation company. Exhibit Staff-1 at 11. When asked what significance, if any, this assertion had to the Commission's jurisdictional analysis, Mr. Koermer explained that it was merely another way of saying that Uber "offers" transportation service within the meaning of PUA § 10-101(f). See Tr. at 96-99; Exhibit UBR-3. See also Exhibit UBR-11 at 14-15 (explaining why Uber should not be viewed as holding itself out to the public as a transportation company).

that Uber does not exercise any control over drivers or vehicle operation.⁹⁴ Likewise, the terms and conditions applicable to persons using the Uber App to request transportation make it explicit that Uber itself does not provide transportation services and is not a transportation carrier.⁹⁵ The document states that Uber “offers information and a method to obtain such third-party transportation services, but does not and does not intend to provide transportation services or act in any way as a transportation carrier.”⁹⁶

3. Uber Does Not Transport or Offer to Transport Persons in Exchange for Remuneration.

Uber also falls outside the definition of operate a motor vehicle for hire because it does not transport (or offer to transport) persons *in exchange for remuneration*, as required under PUA § 10-101(f)(1). The plain meaning of § 10-101(f)(1) is that the remuneration required by the section must be *in exchange for transportation in a motor vehicle*. In other words, the remuneration must be provided by the passenger in exchange for the transportation received by the passenger. It is undisputed however, that the remuneration received by Uber is paid by the carriers/drivers as a software licensing fee for the use of the Uber software to receive transportation requests.⁹⁷ Passengers do not pay Uber any remuneration; passengers pay the carriers/drivers in exchange for the transportation provided, and the drivers pay Uber a 20 percent licensing fee.⁹⁸

Uber’s compensation by the carriers through a licensing fee calculated as a percentage of the transportation charge is meaningfully different from simply “splitting

⁹⁴ Exhibit UBR-11-C (Confidential) at 12 (citing relevant provisions of License/Agreement).

⁹⁵ Exhibit UBR-11 at 14; Joint Exhibit-1 at Exhibit 2.

⁹⁶ Joint Exhibit-1 at Exhibit 2.

⁹⁷ See Joint Exhibit-1 at ¶ 10; Staff Exhibit-1 at 9; Exhibit UBR-11 at 9; Tr. at 109-110 (Koermer); Tr. at 240-241 (Holt), 349-50 (Holt).

⁹⁸ See *id.*

the fare” paid by the passenger.⁹⁹ That the drivers and Uber are not just splitting the fare paid by the passenger may be illustrated by the fact that Uber could have chosen a different structure for the licensing fee paid by drivers.¹⁰⁰ Ms. Holt noted, for example, that Uber could charge carriers a fixed cost up front to use the Uber App, regardless of how often the carriers used the application to receive requests for transportation.¹⁰¹ She testified, however, that a licensing fee structure tied to actual trips provided in response to requests for transportation through the Uber App was more fair to drivers, as not all drivers use Uber to the same extent.¹⁰²

To use an analogy, a corporation that employs a salesperson may elect to pay the salesperson either a fixed salary or through a commission on merchandise sold. In both cases, however, the salesperson is being paid by the corporate employer, not by the *customer*. Likewise, regardless of how Uber’s software licensing fee is structured, it is paid by the carriers/drivers to Uber for use of the software, not by passengers. Thus, Uber does not receive “remuneration” in exchange for transporting persons within the meaning of PUA § 10-101(f)(1).

4. Staff’s “Manage and Control” Standard Is Not Based on the Statutory Text.

In addition to its untenable interpretation of the word “offer” in PUA § 10-101(f)(1), Commission Staff also attempts to invent another entirely new basis for Commission jurisdiction over Uber by asserting that Uber “manages and controls”

⁹⁹ See Staff Exhibit-1 at 9 (asserting that “[t]he fare is then split between the driver and Uber, with Uber deducting its 20% fee”).

¹⁰⁰ Tr. at 240-41 (Holt).

¹⁰¹ *Id.*

¹⁰² *Id.*

transportation service.¹⁰³ Not only does Mr. Koermer repeatedly refer to this “management and control” test, he appears to find it *dispositive* as to the question of the Commission’s jurisdiction over Uber. Mr. Koermer asserts in this regard that “I believe [Uber] is managing and controlling motor vehicles for hire and, *as such*, Uber should be required to comply with Commission statutes and regulations.”¹⁰⁴ The Chief Judge must reject Mr. Koermer’s “management and control” theory because it has no basis in the statutory text.

Mr. Koermer’s testimony is that Uber is a common carrier because it allegedly operates motor vehicles for hire within the meaning of PUA § 10-101(f)(1).¹⁰⁵ But the words “manage and control” do not appear in the definition of operate a motor vehicle for hire in PUA § 10-101(f)(1), as Mr. Koermer acknowledged at the hearing.¹⁰⁶ Although the words “manage” and “control” are included in the definition of “own” in PUA § 1-101(f), Mr. Koermer indicated at the hearing that he was not making an argument that Uber owned anything when he referenced Uber’s alleged management and control.¹⁰⁷ Further, although Mr. Koermer’s pre-filed direct testimony purported to define the terms “manage” and “control,” the definitions were obtained from the dictionary, not the PUA.¹⁰⁸ Uber submits that Mr. Koermer failed to provide any cogent rationale for why

¹⁰³ See Exhibit Staff-1 at 10, 11, 12, 16, 17, 21, 22.

¹⁰⁴ Exhibit Staff-1 at 12 (emphasis added).

¹⁰⁵ Tr. at 86-88 (Koermer). Mr. Koermer also suggested at the hearing that Uber might be said to be “engaged in the public transportation of persons for hire” within the meaning of PUA § 1-101(e)(1), if the word “engaged” were read broadly to mean “involved with.” Tr. 86-87. The Chief Judge should reject such a potentially expansive construction of the statutory language that departs from the plain meaning.

¹⁰⁶ Tr. at 100-101 (Koermer).

¹⁰⁷ Tr. at 102-103, 108-109 (Koermer).

¹⁰⁸ Tr. at 102 (Koermer).

the “manage and control” mantra was germane to the statutory jurisdictional analysis the Chief Judge must perform in this case.¹⁰⁹

Acceptance of Staff’s “manage and control” argument would also lead to illogical results, in contravention of basic principles of statutory construction.¹¹⁰ In particular, Mr. Koermer pointed to a number of Uber quality control measures as evidence that Uber is managing and controlling drivers and vehicles.¹¹¹ At the hearing, Mr. Koermer acknowledged that Uber’s implementation of these quality control measures is a good thing from a passenger’s perspective.¹¹² Further, Mr. Koermer conceded that all else being equal, if Uber did *not* undertake these quality control measures, there would be less support for his conclusion that the Commission should regulate Uber as a common carrier under the “manage and control” theory.¹¹³ It is illogical for Mr. Koermer to argue that quality control measures that he concedes are beneficial to the riding public should *increase* the likelihood of Uber being subject to regulation.

At bottom, Mr. Koermer’s repeated references to Uber’s alleged management and control of drivers appeared to be simply his way of characterizing what he believes Uber does relative to drivers and transportation companies:

Q. Is it fair to say that you’re using managing and controlling not really within the meaning of ownership but just, those are words that you think accurately characterize what you think Uber is doing relative to the drivers and transportation company [sic]?

¹⁰⁹ See Tr. at 100-109 (Koermer).

¹¹⁰ *Office of People’s Counsel v. Maryland Pub. Serv. Comm’n*, 355 Md. at 23 (explaining that a statute should not be interpreted “in a way that is inconsistent with, or ignores, common sense or logic”).

¹¹¹ Staff Exhibit 1-C (Confidential) at 10-11.

¹¹² Tr. at 147 (Koermer).

¹¹³ Tr. at 147-148 (Koermer).

A. I would agree to that.¹¹⁴

While Staff may think that Uber “manages and controls” transportation service, the fact remains that nothing in the definition of common carrier indicates that a separate, unaffiliated entity that allegedly manages and/or controls some aspects of transportation provided by Commission-licensed carriers and drivers is itself a common carrier under the applicable statutes that establish the scope of the Commission’s jurisdiction.

5. Uber Does Not Manage or Control Drivers or Carriers.

Even accepting for the sake of argument that assessing the extent of Uber’s management and control of transportation services was relevant to the Chief Judge’s jurisdictional analysis, the facts do not establish that Uber manages or controls transportation services. Uber is a technology company. It generates revenue when people use the Uber App to request transportation and the Commission-licensed carriers that provide the transportation pay Uber a licensing fee. As Ms. Holt explained, Uber implements standards and quality control measures because it has an incentive to keep the quality of the transportation interaction high, so Users will continue to come back to the Uber App to request transportation services.¹¹⁵ The fact that Uber has established certain minimum requirements for the carriers with whom it will work to ensure a positive User experience does not mean that Uber is “managing and controlling” the carriers.¹¹⁶

In any event, the quality control measures adopted by Uber, while helping to ensure certain minimum standards and promote a positive user experience, are not

¹¹⁴ Tr. at 108-109 (Koermer).

¹¹⁵ Tr. at 241-42 (Holt).

¹¹⁶ See Tr. at 242 (Holt).

designed to, and do not, provide Uber with control over the Commission-licensed carriers. [CONFIDENTIAL MATERIAL BEGINS] [REDACTED]

[REDACTED] [CONFIDENTIAL MATERIAL ENDS]

It also bears emphasis that the drivers that have contracted with Uber are not employees and can use the Uber-issued smartphone to receive transportation requests at their discretion, and they are under no obligation to use it to receive transportation requests at any particular time.¹²³ As well, drivers have the option of accepting or rejecting specific requests for transportation received through the Uber App.¹²⁴ The lack of Uber management and control over drivers is also evidenced by the fact that drivers

¹¹⁷ Exhibit Staff-1 at 10.

¹¹⁸ Tr. at 245 (Holt - Confidential), 319 (Holt - Confidential).

¹¹⁹ Tr. at 245-46 (Holt - Confidential); Tr. at 322-23 (Holt); *see also* Exhibit Staff-1 at 10.

¹²⁰ Exhibit Staff-1-C at 10 (Confidential).

¹²¹ Exhibit Staff-1-C at 10 (Confidential).

¹²² Tr. at 319-320 (Holt – Confidential).

¹²³ Exhibit UBR-11 at 10.

¹²⁴ *Id.* at 7.

remain free to obtain passenger leads from other sources and are free to give precedence to transportation requests received through other sources.¹²⁵ Acknowledging this obvious limitation on Uber’s ability to “manage and control drivers,” Mr. Koermer asserts nonetheless that while drivers “are working for Uber it appears to me that Uber is managing and controlling their services.”¹²⁶ To argue that Uber is managing and controlling drivers, but only when the drivers *elect* to use the Uber App to receive transportation requests is a self-contradiction and actually proves that Uber does *not* control the drivers.

With respect to the provision of transportation itself, Uber does not manage or control the drivers. The Driver App merely provides the driver with the User’s location; it does not guide the driver to the User.¹²⁷ Once the passenger is picked up, the driver decides the route to be taken, and the passenger is free to direct the driver.¹²⁸ Thus, the actual transportation service provided by the carrier/driver for the Uber user is no different from the service the carrier/driver would provide a customer that requests the transportation services through some method other than the Uber App.

Mr. Koermer also maintains that Uber management and control is evidenced by Uber’s control over how much the customer is charged for transportation requested through the Uber App.¹²⁹ Although it is true that Uber recommends the rates to be charged, the drivers have the ability to request reductions to the rates in individual cases,

¹²⁵ *Id.* at 10-11.

¹²⁶ Exhibit Staff-1 at 17.

¹²⁷ Tr. at 249 (Holt).

¹²⁸ Exhibit UBR-11 at 11.

¹²⁹ *See* Exhibit Staff-1 at 12.

which requests Uber grants.¹³⁰ Further, as discussed below, sedan companies have wide discretion in establishing the rates they will charge. Nothing in the PUA or COMAR precludes sedan companies from opting to establish rates based on the recommendation of a third-party like Uber, and by the same token, the act of recommending such rates cannot establish Commission jurisdiction over the third-party. The fact that the carriers agree generally to charge the recommended Uber rates for transportation provided in response to requests made through the Uber App does not establish Uber control over the transportation service.

6. Mr. Koermer's Legal Conclusions Are Not Entitled to Any Weight.

Mr. Koermer's pre-filed testimony purported to interpret whether specific statutes governing the Commission's jurisdiction applied to Uber.¹³¹ Indeed, portions of Mr. Koermer's testimony read more like a legal brief than direct testimony.¹³² Uber respectfully submits that the legal opinions pronounced by Mr. Koermer should not be given any weight. Mr. Koermer is not an attorney, and, moreover, at the time he filed his testimony, Mr. Koermer had been employed by the Commission for less than a year.¹³³ His interpretation of whether and how Maryland's common carrier statutes might apply to Uber is not entitled to any weight.

Uber must also question whether Mr. Koermer was able to remain objective in evaluating the issue of the Commission's jurisdiction to regulate Uber. From the outset of the Commission's investigation of Uber, representatives of the taxicab industry have

¹³⁰ Tr. at 286-87 (Holt).

¹³¹ Tr. at 83 (Koermer).

¹³² *See, e.g.*, Exhibit Staff-1 at 21-22.

¹³³ Tr. at 60 (Koermer).

attempted to influence the actions of Mr. Koermer and other Commission staff members. For example, soon after the Commission directed its Staff to investigate Uber and other similar applications in response to objections from Yellow Transportation, representatives from Baltimore TAS (Arrow Cab) and Yellow Transportation asked for a meeting with Commission Staff, which occurred on February 26, 2013.¹³⁴ Mr. Koermer attended the February 26 meeting, along with Pat Corrigan of Baltimore TAS, Mr. Kines, Yellow Transportation's counsel, Staff Counsel Chuck McLean and Commission Executive Director Anthony Myers.¹³⁵ Mr. Koermer testified that, at the meeting, the representatives of the taxicab interests expressed concern with Uber's operations.¹³⁶

Further, Mr. Koermer is a member of IATR, and he receives periodic reports and updates from IATR about the transportation industry.¹³⁷ As noted in the statement of the case above, IATR submitted comments in this case referring to Uber and other technology companies as rogue transportation technology companies. Mr. Koermer acknowledged at the hearing that smartphone applications that allow users to request transportation service has been one of the issues on which IATR has focused in recent years.¹³⁸ Although purporting to be an organization of transportation regulators, IATR communications regarding smartphone application companies like Uber are far from neutral assessments of such new technology companies. To the contrary, the IATR communications on the subject of Uber and other smartphone applications express

¹³⁴ See Exhibit UBR-1; Tr. at 63-65 (Koermer).

¹³⁵ Tr. at 63-65 (Koermer). Mr. Koermer could not say if other Staff members were present.

¹³⁶ Tr. at 65 (Koermer). Later, when Lyft began operating in Baltimore, Mr. Kines sent information to Mr. Koermer about Lyft's market entry, which prompted Mr. Koermer to tell Mr. Kines to keep him "in the loop." Exhibit UBR-2 at 3-4; Tr. 68-69 (Koermer).

¹³⁷ Tr. at 71-72 (Koermer).

¹³⁸ Tr. at 72 (Koermer).

vigorous opposition bordering on the hysterical. Mr. Koermer acknowledged that he receives and generally reads the IATR communications,¹³⁹ and that he relies on the IATR updates to learn what other states are doing with respect to smartphone applications that can be used to request transportation.¹⁴⁰

Exhibit UBR-2 includes a particularly overwrought jeremiad authored by the IATR President and received by Mr. Koermer that rails against what IATR calls “rogue apps,” and trumpets the IATR’s role in the campaign to outlaw Uber and other app companies in various states, including Maryland.¹⁴¹ The June 17, 2013 IATR update, entitled “The Ride Stops Here – Regulatory Pushback Against Rogue Apps: Regulators Are Winning the War on Rogue Apps!” opens with the following call to arms:

Below is a regulatory round-up of various localities which have created momentum, and which leads me to conclude that we are winning the war against rogue apps at this time. The house of cards created by those phantom technology transportation companies is beginning to crumble, thanks in large part to IATR members and efforts, working closely with regulated and law abiding industry members and groups like the Taxi, Limousine and Paratransit Association (TLPA). At the end of the day, these services are scary and must be stopped before they seek to completely deregulate the industry.¹⁴²

The update closes in a similar martial vein:

This battle is being fought on several fronts and includes attacks by biased pro-technology media reporting as well as backdoor political lobbying by rogue apps. Transportation authorities across the nation are taking action to protect the public from the threats rogue app companies pose to the public through thoughtful and necessary rulemaking and/or enforcement; requiring the licensure of rogue app

¹³⁹ Tr. at 72-73 (Koermer).

¹⁴⁰ Tr. at 77-78 (Koermer), 161 (Koermer).

¹⁴¹ Exhibit UBR-2 at 5-8.

¹⁴² Exhibit UBR-2 at 5.

companies and mandating that they meet local safety standards. The war is not over, but the tide has turned, and regulators are winning!¹⁴³

Not only are the IATR reports exceedingly anti-Uber, they contain significant inaccuracies. For example, the June 15, 2013 President’s Message incorrectly indicates that “The [Maryland] PSC directed Uber to file for authorization from the PSC” in response to the May 8, 2013 Staff Report.¹⁴⁴ The fact that Mr. Koermer is a *member* of IATR and that he relies upon the IATR updates to keep informed as to issues related to regulation of smartphone applications used to request transportation necessarily call into question Mr. Koermer’s objectivity and neutrality in evaluating whether Uber may be regulated by the Commission under Maryland law. Indeed, the IATR emphasizes its role and the role of its members in opposing Uber in an alleged nationwide “war.” Even if Mr. Koermer did not specifically rely on the IATR information – or information provided by Yellow and Baltimore TAS – in developing his testimony, it is difficult to imagine that Mr. Koermer’s views on the matters at issue in this case were not influenced by these materials and by his association with IATR. For these reasons, Mr. Koermer’s legal conclusions as to the Commission’s jurisdiction to regulate Uber should be given little weight.

7. Uber Does Not Provide Taxicab Services as Defined in PUA § 10-101(h)(2).

At the hearing, the Chief Judge raised the issue of whether a PFH carrier that provides sedan service within the meaning of PUA § 10-101(g)(2) might also be deemed

¹⁴³ *Id.* at 8.

¹⁴⁴ *Id.* at 6.

to be providing taxicab services as defined in PUA § 10-101(h).¹⁴⁵ Uber notes in the first place that providing sedan service and providing taxicab service are both forms of operating a motor vehicle for hire under PUA § 10-101(f). Thus, if Uber’s operations do not fit the definition of “operate a motor vehicle for hire” (which, as discussed above, they do not), then the question of exactly which form of PFH service is provided by Uber’s partner carriers is not relevant to whether the Commission has *jurisdiction* over Uber.

To the extent the Chief Judge believes this issue is nonetheless relevant to this case, Uber submits that a PFH carrier providing sedan services cannot be deemed to be “providing taxicab services” simply because it charges “a fare that is based on the distance traveled, the time elapsed, or both.”¹⁴⁶ Although the Chief Judge has identified an apparent ambiguity in the PUA, the entire structure of Title 10 of the PUA evinces an intention to define passenger-for-hire services as distinct from taxicab services, even though both are forms of operating a motor vehicle for hire.¹⁴⁷ Indeed, PUA § 10-101(j)(2) specifically states that “‘sedan service’ does not include providing taxicab services or limousine services.” Further, as Mr. Kines suggested, PUA § 10-101(h)(2) must be read in conjunction with PUA § 10-210 and other applicable law which requires entities providing taxicab services to charge rates consistent with a Commission-approved posted rate card as measured by a taximeter.¹⁴⁸ Thus, an entity providing sedan

¹⁴⁵ Tr. at 172-74, 215-17.

¹⁴⁶ PUA § 10-101(h)(2).

¹⁴⁷ PUA § 10-101(f).

¹⁴⁸ Tr. at 217 (Kines).

services and charging rates based on time or distance, or both, cannot be deemed to be providing taxicab services by virtue of such rate structure.

8. The Commission Has Not Exercised Jurisdiction Over The Similar TaxiMagic Smartphone Application.

The conclusion that Uber is not a common carrier as defined in the PUA is also supported by the fact that the Commission has not exercised jurisdiction over another smartphone application with similar features operating in Maryland – TaxiMagic.

TaxiMagic, which was developed by Ride Charge, Inc., is a website and smartphone application through which customers can make taxicab reservations online and pre-pay for the transportation.¹⁴⁹ As Ms. Holt explained, the Commission has not exercised jurisdiction over TaxiMagic or Ride Charge. TaxiMagic shares a number of similarities with Uber, as Mr. Koermer acknowledged at the hearing:

- The rider can book transportation (taxicab), either through an application, through a website or through a text;
- The TaxiMagic user has the option of providing his or her credit card information to TaxiMagic during registration in order to pay for the transportation services requested through the application;
- The request (routed through the digital dispatch software of the cab company) is then sent to cabs that are near the user requesting transportation;
- The user requesting transportation can view the progress of the taxicab responding to the request toward the TaxiMagic user.¹⁵⁰

Further, TaxiMagic is paid a fee for each ride requested through the application.¹⁵¹ Given these similarities between the way the TaxiMagic and Uber

¹⁴⁹ Exhibit UBR-11 at 15; Tr. at 142-145 (Koermer).

¹⁵⁰ Tr. at 143-145 (Koermer); *see also* Tr. at 269 (Holt). Although the difference between the prepaid fare and the actual fare will be refunded, the user must take the extra step of contacting TaxiMagic or the taxicab company to request the adjustment. *See* Exhibit UBR-11 at Attachment UBR-2, p. 3.

¹⁵¹ Tr. at 221-222 (Kines).

smartphone applications operate, the Commission would need to provide a reasoned basis for asserting jurisdiction over Uber while not finding TaxiMagic to be jurisdictional.¹⁵² If Staff's position is that Uber is a common carrier because it "offers" to transport persons in motor vehicles in exchange for remuneration, even though the actual transportation is provided by Commission-licensed carriers, then the Commission would need to explain why TaxiMagic's non-regulated operations do not also amount to "offering" to transport persons within the meaning of § 10-101(f)(1).

Uber recognizes that differences exist between TaxiMagic and Uber, but, if the Commission were to assert jurisdiction over Uber but not TaxiMagic, it would need to explain *which* differences between the two applications were determinative as to the Commission's jurisdiction and *why*. For example, if the Commission were to focus on the distinction that the TaxiMagic application/software does not forward a User's transportation request to nearby cabs, whereas Uber's software on its servers forwards the request to the nearest Commission-licensed driver that has partnered with Uber and is logged in,¹⁵³ the Commission would need to explain how Uber's approach amounts to offering to transport a person, while TaxiMagic's doesn't. Likewise, if the Commission were to rely on the fact that TaxiMagic is paid a flat per-trip fee as opposed to a per-trip fee calculated as a percentage of the fare,¹⁵⁴ the Commission would need to articulate why such a distinction made a difference to the jurisdictional analysis, particularly given

¹⁵² See, e.g., *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999) (explaining that "an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently.")

¹⁵³ Tr. at 210-211 (Kines).

¹⁵⁴ Tr. at 221-23 (Kines).

that, in both cases, the transportation providers make a payment for each trip requested through the respective application.

9. Any Failure of Carriers with Whom Uber Partners to Comply with the PUA or COMAR Does Not Provide a Basis to Find Uber is a Public Service Company.

In his testimony, Mr. Koermer criticizes [CONFIDENTIAL MATERIAL

BEGINS] [REDACTED]

[CONFIDENTIAL MATERIAL ENDS] Mr. Koermer finds this potential situation

“problematic.”

While Uber would also find it extremely problematic for a driver/carrier to violate the express terms of the License/Agreement by continuing to receive transportation requests after being suspended by the Commission, the potential for such a situation can have no bearing on whether *Uber* is a common carrier under Maryland law. There is no dispute that Uber requires the carriers/drivers to obtain and maintain the applicable Commission-issued license and maintain insurance.¹⁵⁷ If, after having its license suspended, a carrier continues to provide passenger-for-hire services, including for customers that request transportation through the Uber App, in contravention of Uber’s explicit requirements, then the carrier is in violation of Uber’s terms, as well as Maryland

¹⁵⁵ See Staff Exhibit 1-C at 12-13 (Confidential).

¹⁵⁶ *Id.* at 13.

¹⁵⁷ Joint Exhibit-1 at ¶ 11.

law. The hypothetical prospect that a carrier/driver could choose to disregard Maryland law (and breach its agreement with Uber), however, does not affect the legal issue of whether Uber is a public service company under Maryland law. The fact that a jurisdictional PFH carrier does not live up to its legal obligation to maintain a valid PFH license simply does not make the provisions defining the Commission's jurisdiction any more or less applicable to Uber, and Staff never explained how it would.

The same logic applies to carriers' alleged failure to file rates with the Commission reflecting Uber's recommended rates, as required and expected by Uber. Again, there is no dispute that Uber expects the local transportation companies/drivers with which it partners to comply with all applicable rules and regulations, including filing rate schedules with the Commission.¹⁵⁸ If the Commission-licensed companies/drivers have not all complied with the Commission's rate filing requirements, such an omission on the part of the carriers/drivers does not render Uber either more or less subject to the Commission's jurisdiction.

B. The Commission Is Preempted from Regulating Uber Because Uber Is a Provider of Information Services, an Area Which Federal Policy Supports Development Unfettered by Federal or State Regulation.

As shown above, there is no basis for the Commission to exercise jurisdiction over Uber as a public service company. Even assuming, *arguendo*, that such a basis existed, the Commission is preempted from regulating Uber because Uber is a provider of information services which may not be regulated by the states.

¹⁵⁸ Joint Exhibit-1 at ¶ 16; *see also* Tr. at 287-88 (Holt).

The doctrine of preemption is based on the Supremacy Clause of the United States Constitution.¹⁵⁹ Preemption exists where, as here, there has been express preemption by a federal statute, or “where a state statute ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’” *i.e.*, conflict preemption.¹⁶⁰ “A state law may pose an obstacle to federal purposes by interfering with the accomplishment of Congress’s actual objectives, or by interfering with the *methods* that Congress selected for meeting those legislative goals.”¹⁶¹ If there is no specific preemption language, Maryland courts “look to the structure and purpose of the statute as a whole as revealed not only in the text, but through the Court’s reasoned understanding of the way in which Congress intended the statute”¹⁶²

1. Action by the Commission to Assert Regulation over Uber Would Conflict with Federal Decisions and Laws Which Prohibit Regulation of Information Services Provided over the Internet.

The first step in analyzing conflict preemption is to determine whether there is a conflict between state and federal laws.¹⁶³ There is a longstanding and well-established federal policy supporting the growth and development of advanced telecommunications and information services by permitting them to develop unfettered by federal or state

¹⁵⁹ See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108, 112 S. Ct. 2374; 120 L. Ed. 2d 73 (1992).

¹⁶⁰ *Wash. Gas Light Co. v. Prince George’s County Council*, 711 F.3d 412, 422 (4th Cir. 2013) (quoting *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317, 101 S. Ct. 1124, 67 L. Ed. 2d 258 (1981)).

¹⁶¹ *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 596 (4th Cir. 2005).

¹⁶² *Hill v. Knapp*, 396 Md. 700, 713, 914 A.2d 1193 (Md. 2007) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996); *Sweeney v. Savings First*, 388 Md. 319, 327, 879 A.2d 1037, 1041 (Md. 2005)).

¹⁶³ *Nat. City Bank of Ind. v. Turnbaugh*, 463 F.3d 325, 331 (4th Cir. 2006) (citing *College Loan Corp.*, 396 F.3d at 595-96). Moreover, “Federal regulations have no less pre-emptive effect than federal statutes.” *Fidelity Federal Sav. & Loan Ass’n v. De La Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982); *Moffett v. Computer Sciences Corp.*, 457 F.Supp.2d 571, 581 (D. Md. 2006).

regulation. In 1996, Congress enacted the Telecommunications Act of 1996, P.L. No. 104-104, 110 Stat. 56 (1996) (“Telecom Act”), for the purpose, among others, of establishing “a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans.”¹⁶⁴ The Telecom Act adopted the long-standing distinction between “telecommunications services,”¹⁶⁵ which are subject to regulation by the Federal Communications Commission (“FCC”) and state regulatory commissions, and “information services,”¹⁶⁶ which are not subject to regulation.¹⁶⁷ In doing so, Congress codified the FCC’s decades old *Computer II* decision deregulating and preempting state regulation of “enhanced services” by renaming “enhanced services” “information services,” and then specifically excluding

¹⁶⁴ H.R. Rep. 104-458 (Conference Report on S.652) (1996), at 1.

¹⁶⁵ “Telecommunications service” is defined as “the offering of telecommunications for a fee directly to the public, or to such classes of Users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. §153(53). “Telecommunications” in this context is defined as, “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. §153(50).

¹⁶⁶ “Information service” is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. §153(24).

¹⁶⁷ The distinction between telecommunications services and information services parallels the distinction drawn by the FCC nearly 20 years earlier whereby it deregulated “enhanced service” and “customer premises equipment” and preempted state regulation in its 1980-81 orders collectively referred to as “Computer II” (Final Decision, *In re Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C. 2d 384 (1980) (*Computer II Final Decision*); Memorandum Opinion and Order, *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 84 F.C.C. 2d 50 (1980) (*Computer II Reconsideration Decision*); Memorandum Opinion and Order on Further Reconsideration, *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 88 F.C.C. 2d 512 (1981) (*Computer II Further Reconsideration Decision*)), which concluded the “basic service” should continue to be regulated under Title II of the Communications Act of 1934, but that regulation of “enhanced services” is not required in furtherance of any overall statutory objective and that freeing such enhanced services from traditional public utility regulation would offer the best means of achieving the potential of advanced telecommunications networks. The FCC’s *Computer II* decision was affirmed “in its entirety” by a unanimous panel of the Court of Appeals for the D.C. Circuit. *Communications Indus. Assn. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied, Louisiana Pub. Serv. Comm’n v. FCC*, 461 U.S. 938 (1983).

information services from the ambit of Title II of the Communications Act pertaining to regulation of common carriers. “Congress indicated, consistent with the Commission’s long-standing policy of nonregulation, that information services not be regulated.”¹⁶⁸ “This meant no franchise, no tariffs, no traditional common carrier regulation of any kind.”¹⁶⁹

The Uber App and corresponding Driver App are classic information services in that at their core the applications offers the “capability for generating, acquiring, storing, transforming, processing retrieving, utilizing or making available information via telecommunications.” Users and drivers utilize the Uber App and Driver App as an information service which permits them to generate, retrieve and utilize information and not as common carrier transportation service. Moreover, as previously noted, the Uber App is simply one of an increasing number of internet applications provided by non-utilities which permit consumers to maximize their use of various regulated energy, telecommunications, transportation and other services.

2. Imposing Commission Regulation on Uber Would also Conflict with Federal Policies Prohibiting Federal or State Regulation of Information Service Providers.

Congress has clearly expressed certain of its goals relating to the internet.

Subsection 230(b) of Title 47 of the United States Code states that:

It is the policy of the United States—

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

¹⁶⁸ *In the Matter of Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Pub. Utils. Comm’n*, WC Dkt. No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd. 22404, n.118 (2004).

¹⁶⁹ PETER W. HUBER, MICHAEL K. KELLOG & JOHN THORNE, *FEDERAL TELECOMMUNICATIONS LAW* § 12.4.2 (2d ed. 2011).

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize User control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services.¹⁷⁰

In the Fourth Circuit, the Court of Appeals recognized that “Section 230 [of Title 47] was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.”¹⁷¹

The federal policy prohibiting regulation of information services has been cited and relied upon in a number of decisions preempting state regulation of such services. In *Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, for example, the U.S. District Court for the District of Minnesota overturned an order of the Minnesota PUC requiring Vonage to comply with Minnesota state laws regulating telephone corporations and to pay state regulatory fees.¹⁷² The court did so on grounds that although Vonage provides a means for transmitting voice communications, it does so through VoIP, an interactive computer service that federal policy clearly states should be “unfettered by federal or state regulation.”¹⁷³ The court stated, “Congress’s expression of its intent to not have Title II [Common Carrier regulation] apply to enhanced services demonstrates its intent to occupy the field of regulation of information services” and thus state “regulations that have the effect of regulating information services are in conflict with federal law and must be pre-empted.”¹⁷⁴ State courts have also relied upon this policy in

¹⁷⁰ 47 U.S.C. § 230(b).

¹⁷¹ *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

¹⁷² *Vonage Holdings Corp. v. Minnesota Public Utils. Comm’n*, 290 F.Supp.2d 993 (D. Minn. 2003).

¹⁷³ 47 U.S.C. § 230(b)(2).

¹⁷⁴ *Id.* at 1002.

holding information service providers immune from civil suit under certain circumstances. In *Gentry v. eBay, Inc*, the California Court of Appeals held that state law causes of action brought against eBay by an individual who purchased autographed sports memorabilia that was allegedly fraudulent from a third party seller through eBay's internet auction website were preempted by the Telecom Act.¹⁷⁵ In holding eBay immune from state law causes of action, the court relied upon a specific bar in 47 U.S.C. §230 (c)(1) on civil "publisher liability" of "interactive computer services" arising from information provided on or through the Internet from another information content provider.¹⁷⁶

Uber is a technology company.¹⁷⁷ Its Uber App and Driver App simply create a platform for buyers of transportation service to connect with third party providers of transportation service.¹⁷⁸ As a technology company, Uber is an information service provider, making information available via telecommunications, without managing, controlling, or operating a telecommunications system or service. Therefore, extending Commission regulation to Uber would unquestionably be inconsistent with federal policy favoring continued development of the internet. Further, action by the Commission to assert regulation over Uber would conflict with Congress's chosen method of refraining from regulating information services to accomplish its goal of allowing and encouraging unrestrained growth of such services. The Commission is thus preempted from regulating Uber.

¹⁷⁵ 99 Cal. App. 4th 816 (2002).

¹⁷⁶ *Id.* 47 U.S.C. § 230 (c)(1) states: "(1) Treatment of publisher or speaker – No provider or User of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

¹⁷⁷ *See* Exhibit UBR-11 at 2-3.

¹⁷⁸ *Id.*, p. 4-5, 6-8.

C. Uber's Operations are Consistent With Maryland Law

As the sections above establish, Uber is not subject to regulation by the Commission as a public service company, and, moreover, Commission regulation of Uber is preempted by federal communications law. However, the Commission Staff and Yellow raised a number of other arguments and objections that do not necessarily assume that Uber is itself a public service company subject to the Commission's jurisdiction. Certain of these issues are addressed below.

1. The Uber-issued Smartphone is Not a Taximeter.

Mr. Koermer asserted that the smartphone supplied by Uber to carriers/drivers can be considered a taximeter, and he notes that PFH carriers are prohibited by COMAR § 20.95.01.19A(2) from equipping vehicles with taximeters.¹⁷⁹ The Uber-supplied iPhones are not taximeters, and carriers/drivers using the iPhone do not violate Maryland laws or regulations by their use.

It is important to recognize at the outset that neither the PUA nor COMAR contain a definition of "taximeter."¹⁸⁰ Thus, when Mr. Koermer argues that the Uber-supplied iPhone can be considered a taximeter, he was necessarily applying his own "general understanding" of which constitutes a taximeter.¹⁸¹ Mr. Koermer acknowledged, however, that the definition of taximeter formulated by the National Institute of Standards and Technology ("NIST") is generally accepted in the transportation industry,¹⁸² and he conceded that the smartphone issued to drivers by Uber

¹⁷⁹ Staff Exhibit-1 at 19-20.

¹⁸⁰ Tr. at 153 (Koermer); Exhibit UBR-10.

¹⁸¹ Exhibit UBR-10 at 1.

¹⁸² Tr. at 153 (Koermer). Indeed, COMAR § 20.90.02.1619(3) cross-references the NIST requirements for approval and methods of testing of taximeters. Tr. at 153 (Koermer); Exhibit UBR-10 at 1.

is *not* a taximeter under the NIST standards.¹⁸³ Further, no governmental agency has ever found that a GPS-enabled iPhone is a taximeter.

The rates charged by PFH companies providing sedan service may be based on time or distance, or both, as Mr. Koermer acknowledged at the hearing.¹⁸⁴ Mr. Koermer agreed that a PFH sedan service company could charge both an hourly charge and a mileage charge for the same ride, so long as the rates were reflected in a filed tariff.¹⁸⁵ Charging a rate based on time and/or distance, however, necessarily pre-supposes some way to measure time and/or distance and to compute the fare based on those variables. Thus, it cannot be the case that *any* instrument that a carrier utilizes to measure time and/or distance is a taximeter. If that were the rule, then a driver's wristwatch, or the car's odometer could be called a taximeter. In the case of PFH transportation requested through the Uber App, the iPhone issued to the driver is used in transmitting date and time data (although, as discussed below, the iPhone does not itself measure or calculate anything), which goes into the calculation of the price for the transportation provided, as allowed by the regulations.

Further, the smartphone that Uber provides to drivers cannot be considered a taximeter because it does not have any of the functionality associated with taximeters. The smartphone neither measures distance, nor speed, nor does it calculate a fare based on a combination of variables. The only information available from the driver's iPhone is its location at certain points in time, as obtained from the GPS satellite.¹⁸⁶ During a

¹⁸³ Exhibit UBR-10 at 2.

¹⁸⁴ Tr. at 113 (Koermer).

¹⁸⁵ *Id.*

¹⁸⁶ Exhibit UBR-11 at 9; Tr. 238-39 (Holt).

trip requested through the Uber App, the Driver App sends time and location data to Uber's servers in Northern California, and Uber's software on the servers uses the time and location data sent by the driver's iPhone to determine the charge after the trip is completed.¹⁸⁷ As Ms. Holt explained:

The iPhone with GPS functionality does not calculate the charge for transportation, it merely pushes location data to Uber's servers. At the end of the trip, software on the Uber servers in Northern California calculates the total distance traveled, the speed traveled at points throughout the trip, and the total time expired. The software on Uber's servers then applies a formula to calculate the total charge to be paid by the User for the transportation service received from the driver.¹⁸⁸

Because the Uber-issued smartphone merely participates in the function of measuring time and distance to establish a fare, as permitted by Maryland law for sedan service rates, and because the iPhone does not have the functionality associated with a taximeter, it cannot be considered a taximeter within the meaning of the COMAR.¹⁸⁹

2. The Rates Charged for Transportation Arranged Through the Uber Software Are Consistent with Maryland Law.

Although not specifically included on the list of issues adopted by the Chief Judge in this matter, Commission Staff has at least indirectly challenged Uber's recommended rates as inconsistent with Maryland law. If the Chief Judge reaches this issue, Staff's objections to Uber's rates should be rejected.

¹⁸⁷ Exhibit UBR-11 at 8-9; Tr. 238-39 (Holt).

¹⁸⁸ Exhibit UBR-11 at 9.

¹⁸⁹ Even if the smartphone provided to drivers by Uber could be considered a taximeter, the Commission would not have authority to regulate its provision and use. The iPhones supplied to drivers fall under the category of "customer premises equipment" ("CPE"), defined as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications." 47 USC § 153(16). In the previously mentioned *Computer II* decision, the FCC deregulated the provision of such CPE and preempted state regulation or tariffing of same based on its ancillary jurisdiction pursuant to Title I of the Communications Act. See *Computer and Commc'ns Ind. Assoc. v. FCC*, 693 F.2d at 213; 16 FCC Rcd 6417, 6457; 1999 FCC LEXIS 4804 at 113 (FCC's determination that its Title I ancillary jurisdiction is held over both carriers and non-carriers).

The overarching requirement for common carrier rates is that they must be “just and reasonable.”¹⁹⁰ The PUA defines a just and reasonable rate for a common carrier as “a rate that: (1) does not violate any provision of the [PUA]; [and] (2) fully considers and is consistent with the public good.”¹⁹¹ As Mr. Koermer acknowledged, transportation companies (other than taxicabs) have significant discretion in determining the rates that they will charge for providing transportation service.¹⁹² Contrary to Mr. Koermer’s suggestion,¹⁹³ the Commission would have the authority to accept an “up to” rate under the just and reasonable standard even in the absence of specific statutory authority. However, the Commission has explicit authority to accept maximum and minimum rates as just and reasonable rates under PUA § 4-102(b). If carriers that use the Uber Driver App to receive transportation requests were permitted to file “up to” rates that encompassed surge pricing levels, there would be no need for Uber to file rate changes for the surge prices.

Contrary to Mr. Koermer’s assertions,¹⁹⁴ Uber’s practice of offering promotional discounts on the recommended rates for transportation service requested through the Uber App does not violate PUA § 4-503(b). As Ms. Holt explained, discounts are available to all users of the Uber App.¹⁹⁵ For example, the one promotional discount that was discussed on the record was the first-time user promotion. Ms. Holt explained that

¹⁹⁰ See PUA § 4-201.

¹⁹¹ PUA § 4-101. Unlike other public service companies, common carriers are exempted from the requirement that their rates be established so as to provide “a reasonable return on the fair value of the public service company’s property used and useful in providing service to the public.” PUA § 4-101(3). *But see* PUA § 4-302.

¹⁹² Tr. at 113 (Koermer); *See also* Exhibit UBR-4 at 2.

¹⁹³ Exhibit Staff-1 at 17-18.

¹⁹⁴ Staff Exhibit-1 at 15-16.

¹⁹⁵ Tr. at 251 (Holt); *see also* Tr. at 325-327 (Holt).

this promotion is available to all first-time Users of the Uber App. Thus, by definition, all Uber Users will receive the opportunity to take advantage of this promotion. Further, as the text of the statute makes clear, PUA § 4-503(b) generally only forbids charging different rates to customers “under substantially similar circumstances.” Trying the Uber App for the first time is a reasonable basis to distinguish between Users, and, thus, a first-time User taking advantage of the promotional discount is not similarly-situated to a regular Uber User.

3. Uber is Not a Taxicab Association.

Mr. Kines’ position that Uber functions as a taxicab association incorrectly assumes that the carriers providing PFH service to Uber App Users are providing *taxicab* services.¹⁹⁶ The carriers that provide the transportation requested through the Uber App are providing sedan service, not taxicab service. As Mr. Kines admitted at the hearing, there is no requirement under Maryland law for limo or sedan companies to join an association.¹⁹⁷ Thus, even assuming for the sake of argument that Uber performs functions for these carriers analogous to the role a taxicab association plays for taxicabs (which it does not), there is no such thing as a “sedan association” regulated or supervised by the Commission.

D. Uber’s Operation in Baltimore Provides Benefits to Consumers.

Commission Staff and the taxicab industry representatives have argued that Commission regulation of Uber is necessary to protect the public interest. The record shows this to be incorrect. Uber provides significant benefits to consumers while leaving the existing PFH regulatory framework of Commission-licensed, insured carriers to

¹⁹⁶ As noted above, taxicab associations are not public service companies. *See* footnote 83, *supra*.

¹⁹⁷ Tr. at 205 (Kines).

provide transportation to customers. Users of the Uber App could arrange for the same transportation through more traditional methods, such as calling the transportation company or a broker directly and then waiting for a response. The Uber App makes this same transaction much easier, by providing an innovative and efficient way for existing transportation customers to connect with existing transportation companies.¹⁹⁸ By making it easier for riders to request transportation service from existing transportation companies, Uber facilitates greater competition and customer choice among the existing transportation providers in the State.¹⁹⁹

Allowing users of transportation services to arrange and pay for transportation services from Commission-licensed PFH carriers and drivers more efficiently provides benefits to both consumers and the drivers. Recognizing these kinds of benefits, the Federal Trade Commission (“FTC”) has argued that “a regulatory framework should not restrict the introduction of use of new types of applications, or novel features they provide, absent some evidence of public harm.”²⁰⁰ Here, the existing regulatory framework does not contemplate treating a software technology company like Uber as a common carrier. Further, no party has pointed to any specific, non-hypothetical harm to consumers from Uber’s entrance to the Baltimore market. Conversely, adopting the Staff position would harm the public interest by eliminating competitive choice and generally making transportation service in Maryland less convenient and below the standard available in other major U.S. cities and in cities around the world.²⁰¹ At the behest of the taxicab industry, the Commission would essentially elect to use its regulatory powers not

¹⁹⁸ Exhibit UBR-11 at 11.

¹⁹⁹ *Id.*; *see also*, Tr. at 412-413 (Holt).

²⁰⁰ Exhibit UBR-11 at 14-15.

²⁰¹ *See* Exhibit UBR-11 at 3.

to the benefit of consumers, but to quash innovative, consumer friendly products that increase public safety while protecting the business interests of private, incumbent transportation providers at the expense of the public interest.

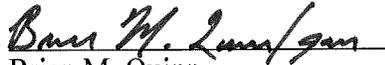
V. CONCLUSION

Based on the foregoing, the Chief Judge should issue a recommended decision finding that: (1) Uber is not a public service company as defined in the PUA, and, thus, may not be regulated by the Commission; (2) even if there were some basis for a finding that Uber is subject to Commission jurisdiction as a common carrier, Commission regulation of Uber and the Uber-issued smartphone are preempted by federal communications law; and (3) Uber's rate model and the use of the Uber-issued iPhone in the computation of a fare are fully consistent with Maryland law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 11th day of December, 2013, a copy of the foregoing Initial Post-Hearing Brief of Uber Technologies, Inc. was delivered by electronic mail to counsel in this proceeding.



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