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PUBLIC SERVICE COMMISSION

January 3, 2014

David Collins
Executive Secretary
Public Service Commission of Maryland
6 St. Paul Street, 16th Floor
Baltimore, Maryland 21202-6806

Re: In the Matter of an Investigation to Consider the Nature
and Extent of Regulation Over the Operations of Uber
Technologies, Inc. and Other Similar Companies

Case No. 9325

Dear Mr. Collins:

Enclosed please find Staff's Reply Brief which was just electronically filed. Copies of were provided to the parties by electronic mail, and first-class mail or hand-delivery. Please feel free to contact me at 410-767-1029 if you have any questions or concerns.

Sincerely,


Chuck McLean
Deputy Staff Counsel

cc: Brian Quinn, Esq., Counsel for Uber
Russell H. Frisby, Esq., Counsel for Uber
John McCaffrey, Esq., Counsel for Uber
Todd Chason, Esq., Counsel for Yellow Cab
Peter Saar, Esq., Office of People's Counsel

IN THE MATTER OF AN *
INVESTIGATION TO CONSIDER THE *
NATURE AND EXTENT OF THE *
OPERATIONS OF UBER *
TECHNOLOGIES, INC. AND OTHER *
SIMILAR COMPANIES *

BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

CASE NO. 9325

REPLY BRIEF

BY THE STAFF

OF THE

PUBLIC SERVICE COMMISSION

Ryan C. McLean
Deputy Staff Counsel

Janice Flynn
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January 3, 2014

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IN THE MATTER OF AN *
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TECHNOLOGIES, INC. AND OTHER *
SIMILAR COMPANIES *

BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND
CASE NO. 9332

REPLY BRIEF

In accordance with COMAR 20.07.02.06, the Staff of the Public Service Commission (“Staff”) files this Reply Brief and makes the recommendations set forth below, in addition to those contained in Staff’s Initial Brief, regarding Uber Technologies, Inc.’s (“Uber” or “the Company”) operations in Maryland.

I. PROCEDURAL HISTORY

The procedural history of this case up through the filing of briefs is detailed in Staff’s Initial Brief. On December 11, 2013, initial briefs were filed by Uber, Yellow Transportation (“Yellow”), the Office of People’s Counsel (“OPC”), and Staff.

In addition to its brief, on December 11, 2013, Uber also filed a Motion to Admit Documents Into the Record. Additionally, on December 18, 2013, Uber filed a letter supplementing the evidentiary record in regards to two issues discussed by Uber witness Rachel Holt. On December 19, 2013, Staff and Yellow filed responses in opposition to Uber’s Motion to Admit Document Into the Record. On December 26, 2013, Staff filed its objection to Uber’s letter supplementing the record.

On December 30, 2013, Chief Public Utility Law Judge (“CPULJ”) Romine issued her ruling on Uber’s December 18, 2013 filing granting in part and denying in part its request to

admit documents into the record, and in relation to Staff's response, granting in part and denying in part its request to strike portions of Uber's Initial Brief.

II. ARGUMENT

A. Uber's Introduction

The Company begins its brief with an explanation as to why Staff's position that Uber should be subjected to the Commission's jurisdiction should be rejected. This portion of Uber's brief references documents and statements not contained in the record of this proceeding, and should be completely disregarded by the Commission.

Public Utilities Article ("PUA") § 3-104(a) states, "A decision and order of the Commission in a contested proceeding shall: (1) be based on consideration of the record;" Thus, if a document or fact is not part of this proceeding's record, it is inappropriate to be cited and relied upon by Uber, and the Commission should disregard any such references.

In the very first paragraph, Uber states, "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."¹ First, Staff's initial finding is not part of the record of this proceeding. Thus, it is inappropriate to reference and rely upon in the Company's Initial Brief. Uber could have introduced this document during the evidentiary hearings, but chose not to do so.

However, in the event the Commission wishes to consider Staff's initial filing, it must be put into context, which Uber has chosen not to do, again. Staff's initial position was in response to Yellow's request that all non-transportation companies cease operating pending further action

¹ Uber's Initial Brief, p. 1. Staff understands that the "Commission's about-face and unsupportable pivot" is referring to Staff's initial recommendation and not the Commission's.

by the Commission.² In Staff's comments, it specifically noted that not only was there no evidence that Uber had actually begun operating in Baltimore, but that the Commission's jurisdiction over App providers would have to be determined on a case by case basis. The alleged "about-face and unsupportable pivot" occurred *after* Staff conducted an investigation in accordance with the Commission's Letter Order. In other words, Staff obtained additional information about Uber and its operations over the course of two months which Staff relied upon in reaching its recommendation. Coloring Staff's positions in February 2013 and May 2013 as an about face is completely inaccurate.

Uber's introduction also makes assertions that are not in the evidentiary record in this proceeding, which is evident from the lack of citations to the record. For example, there is no evidence that Uber "provides higher reliability and access in all neighborhoods, reducing discrimination,"³ or that the App "reduces drinking and driving."⁴ There is no evidence that Uber is a "job creator and economic driver"⁵ or that "these benefits have been proven from Bangalore to Baltimore."⁶ There is no record evidence that Uber makes it easier for riders to request transportation than existing Commission regulated companies.⁷

As such, Uber's introduction should be completely disregarded by the Commission to the extent it relies upon facts not in evidence.

² See ML 143424, dated October 31, 2012.

³ Uber's Brief, p. 2.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

B. Commission Jurisdiction

Uber, noting the obvious, argues that the statutes and regulations at issue in this case were not written with a company like Uber in mind.⁸ Staff does not dispute this and acknowledged it in its brief that this is a case of first impression.⁹ However, the mere fact that the statutes and regulations Staff relies upon in this case did not have a smartphone application in mind is not the issue. Nor is it relevant that the General Assembly has not passed a law, as Uber suggests, that explicitly gives the Commission jurisdiction over a company like Uber. The question is whether Uber and the manner in which it operates falls within the Commission's jurisdiction based on *existing* laws and regulations. When the facts and circumstances are applied to the respective statutes and regulations, it is clear that Uber is a public service company and within the Commission's jurisdiction.

While this particular business model is new, the determination of whether a company qualifies as a common carrier is not. The Court of Appeals has been faced with this exact question. In *Restivo v. Pub. Serv. Comm'n*, the question before the Court was whether the appellant was a common carrier, and it stated:

It is difficult to determine with exactness just when the owner of a motor vehicle is operating as a common carrier, as that term is ordinarily understood in the law, but the courts have not been inclined to excuse the increasing number of those who earn their livelihood by transporting persons or goods for hire in motor vehicles, from the responsibilities of a common carrier simply on technical grounds, and they have been particularly slow to excuse them when their plan of operation bore evidence of being a studied attempt to reap the rewards of common carriers without incurring the corresponding liabilities.¹⁰

⁸ *Id.* at p. 15.

⁹ Staff's Brief, p. 4.

¹⁰ 149 Md. 30, 34-35, 129 A. 884 (1925).

While *Restivo* pre-dates Uber by almost 90 years, the referenced language continues to be applicable today.

Staff continues to maintain that after review of the record in this matter, it is clear that Uber is attempting to do just that – circumvent Commission jurisdiction. Uber criticizes Staff’s interpretation of PUA § 10-101(f)(1), which defines “Operate a motor vehicle for hire” as “to transport *or* offer to transport a person in a motor vehicle in exchange for remuneration.” To support its position, the Company provides its interpretation of what “offer” means based on House Bill 1013, passed in 1997, which is now PUA § 10-101(f)(1), and speculates, “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,”¹¹ Finally, Uber claims that to interpret “offer” as Staff does is “inconsistent with well-established principles of statutory interpretation.”¹²

The law in Maryland on statutory interpretation is clear. In 2013, the Court of Appeals reiterated, that when interpreting statutes:

We begin our analysis by first looking to the normal, plain meaning of the language of the statute, reading the statute as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory. If the language of the statute is clear and unambiguous, we need not look beyond the statute's provisions, and our analysis ends.¹³

In other words, if the statute is clear, there is no need for further analysis and Uber’s position can be disregarded. First, the statute, as currently written clearly created two separate and distinct

¹¹ Uber’s Brief, p. 19.

¹² *Id.* at p. 20.

¹³ *Friedman v. Hannan*, 412 Md. 328, 337, 987 A.2d 60, 65-66 (2010), citing *People’s Ins. Counsel Div. v. Allstate Ins. Co.*, 408 Md. 336, 351-52, 969 A.2d 971, 979-80 (2009)(quotation marks and citations omitted).

meanings for “Operate a motor vehicle for hire” – to transport *or* offer to transport a person.¹⁴ The operative word in this definition is “or”. If a person, or entity, either transports *or* offers to transport, they fall within PUA § 10-101(f)(1). Staff fails to see what is unclear or ambiguous about the existing definition.

Uber then contends that acceptance of Staff’s position would be inconsistent with how the Commission treats taxicab associations, in that associations are involved in the dispatch and operations of taxicabs, but in that the associations are unregulated.¹⁵ While Staff agrees that associations are technically unregulated, Uber’s position conveniently overlooks several existing regulations regarding taxicabs and associations. First, COMAR 20.90.02.08, titled “Operating Associations”, states:

Every taxicab shall be operated as a unit of an effective *operating group* of sufficient number and equipped with communication facilities for rendering satisfactory call service, unless expressly exempted by the Commission. Owners of small fleets or single taxicabs shall operate as members of a satisfactory *operating association* and *the association* shall be equipped with adequate call facilities, so located as to serve all parts of the City or County, as the case may be, and to make possible the effective direction and supervision of call service.

(emphasis added). This requires taxicabs to be in a taxicab association, which “*shall be equipped with adequate call facilities*”,¹⁶ i.e., dispatch. Operating associations are also required to maintain records and reports, and make annual reports to the Commission.¹⁷ Finally, the Commission also approves the color schemes and requirements for what must appear on each cab that belongs to an association.¹⁸

¹⁴ PUA § 10-101(f)(1) (emphasis added).

¹⁵ Uber’s Brief, p. 20.

¹⁶ COMAR 20.90.02.08; *see also* COMAR 20.90.02.16F(1)(a).

¹⁷ COMAR 20.90.02.12A and D.

¹⁸ COMAR 20.90.02.16A(1).

While the referenced examples are not all inclusive, it is clear that taxicab associations are regulated to some extent by the Commission.¹⁹ Thus, Uber's comparison is not appropriate and the acceptance of Staff's position would neither be inconsistent with nor a departure from how the Commission deals with taxicab associations.

Uber's final argument against Staff's position is that the Company's "terms and conditions make clear that it is the carriers/drivers that are responsible for providing transportation service and that Uber does not exercise any control over drivers or vehicle operations."²⁰ Staff has previously demonstrated the extent to which Uber actually controls the entire operation, from when the transportation is actually requested to the billing for the fare at the end of the trip.²¹ The argument that Uber's internal documents and the way they are written enable the Company to avoid regulation is ridiculous. This is simply a continuation of the Company's repeated assertion that it is not a transportation company, therefore, it cannot be regulated. As the record of this proceeding has demonstrated, whether it likes it or not, and regardless of what the Company's own documents state, Uber is operating as a public service company and is within the Commission's jurisdiction.

C. Uber's Operations

1. Licensed-carriers and drivers

Uber continues to assert that the carriers and drivers that provide the actual transportation are "Commission-licensed transportation companies and their drivers."²² In fact, the brief makes

¹⁹ See also Tr. 202-203.

²⁰ Uber's Brief, p. 20-21.

²¹ See generally Staff's Brief, p. 5-7.

²² Uber's Brief, p. 9, citing Ex. Uber-11 at 3.

this statement no less than six times in the first ten pages.²³ Repeating the same uncorroborated statement does not make it true. Uber would like the CPULJ to believe that all of its drivers are licensed by the Commission, but it has not provided any evidence to show that is true.

As noted in Uber’s brief, Staff sought a list of the transportation companies through discovery; however, the Company has refused to provide the list and, after its Circuit Court appeal was dismissed, Uber appealed to the Court of Special Appeals.²⁴ The entire basis for Staff’s request for a list of companies was solely to verify the Company’s claims. Without any evidence to corroborate the Company’s claims, the Commission is effectively left with a “trust us” argument from Uber. Unfortunately, the Company’s unsupported position cannot simply be accepted by the Commission.

Apparently, Uber believes that its “ongoing efforts to confirm that the carriers and drivers with whom it contracts are and remain licensed by the Commission,”²⁵ is good enough. Staff fails to see how checking the Commission’s web-site “at least once a month”²⁶ qualifies as an ongoing effort to ensure carriers and drivers remain in good standing with the Commission. This is especially interesting given that the Company acknowledged that if a carrier or driver is suspended, it could be several days or weeks before Uber becomes aware of it.²⁷

The fact that Uber continues to repeat phrases such as “carriers and drivers licensed by the Maryland Public Service Commission”,²⁸ “Commission-licensed third-party transportation

²³ Uber’s Brief at p. 2, 4, 9, and 10.

²⁴ Uber’s Brief, p. 7, footnote 12; *see also* Staff Ex. 1, Koermer’s Direct Testimony, p. 17.

²⁵ Uber’s Brief, p. 10.

²⁶ Uber Ex. 11, p. 13, l. 8.

²⁷ Tr. 359.

²⁸ Uber’s Brief, p. 2.

companies and drivers”,²⁹ “Commission-licensed passenger-for-hire companies”,³⁰ “Commission-licensed transportation companies and their drivers”,³¹ does not *actually* turn these statements into a fact. There is no evidence upon which the Commission can rely upon to actually corroborate these statements. What the evidence does show is that anyone with the Uber-issued smartphone, a car and a password could attempt to pick up passengers, who would believe through Uber’s advertisements that the person picking them up is licensed.³²

2. Rate Structure / Pricing

In its Brief, Uber continues to advocate its new found position from the evidentiary hearings that its rates are “recommended”, and that those rates are charged by the transportation companies to Uber’s users.³³ The apparent premise of the “recommended” rates is that if the driver wanted to charge another rate for a particular trip, he / she would be permitted to do so, but in practice, that is not the case. While the Company acknowledged that drivers could request reductions in *specific instances*³⁴ that certainly appears to the exception rather than the rule.

The Company’s rates are not “recommended”, which implies the rates are optional. The record simply does not support this premise. Uber sets the rates and has complete control over what the riding public will ultimately be charged. When rates are increased, it is decided not by the drivers, but by the Company which will provide specific notice to users “when rates are increased above the rates posted on Uber’s website during periods of high demand, . . .”³⁵ In other words, the Company, not the carriers and drivers it partners with, sets and controls the rates

²⁹ *Id.* at p. 9.

³⁰ *Id.* at p. 17.

³¹ *Id.* at p. 9.

³² *See* Tr. 341-342.

³³ Uber’s Brief, p. 12.

³⁴ *Id.* at p. 12-13.

³⁵ *Id.* at p. 12.

that are ultimately charged to customers. It takes an incredible stretch of one's imagination to classify Uber's rates as recommended and to determine that customers are actually paying the carriers rather than Uber based on the facts of this case.

Uber also now asserts, without any basis, that its rates are somehow consistent with Maryland law. Without any supporting cost data or market analysis, Uber asks the CPULJ to find that the rates Uber charges for its service are "just and reasonable."³⁶ Quoting the definition of "just and reasonable" found in PUA § 4-201 and noting the discretion accorded to sedans to set their own rates, Uber states, without supporting precedent to show that the Commission has ever actually made this kind of finding, that "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."³⁷

Recent precedent, however, demonstrates that the Commission is not interested in relaxing the rigorous cost support it requires of regulated companies to justify their rates. The specific rate regime for common carriers is set forth in PUA § 4-302(a) and requires the Commission to determine a fair and equitable operating ratio. PUA § 4-302(b) requires that, among other factors, "the Commission shall consider (1) the inherent advantages of transportation by common carriers; (2) the need, in the public interest, of adequate and efficient transportation services by common carriers at the lowest cost consistent with furnishing those services; and (3) the need of revenue sufficient to enable common carriers to provide these services under honest, economical, and efficient management."

³⁶ *Id.* at p. 44-45.

³⁷ *Id.* at 45.

Dissatisfied with the quality of cost and revenue information provided in its most recent rate case for taxicabs, the Commission ordered Staff to gather annual financial statements from taxicab permit holders and associations as required by COMAR 20.90.02.12.³⁸ The revenue and cost information provided in those reports was presented to the Commission this summer in Case 9184 Phase II.³⁹

Uber has provided no reasoned analysis to justify why the Commission should relax rate regulation for its service. There is no evidence that would support a finding that rates for common carrier services will remain just and reasonable over the years under a regime that would allow carriers to raise rates at times of high demand⁴⁰ or lower rates for certain groups of undefined customers at any time (discounts and promotions).⁴¹ Most particularly in Uber's case, where the service provided competes directly with the taxicab industry, there has been no analysis of the impact Uber's proposed rate regime will have on existing common carrier services. Even if the CPULJ found that such a regime did not violate the PUA (and there is no evidence to support such a finding), there has been no evidence presented to show that, going forward, this regime will be "consistent with the public good" as required by PUA § 4-101(2).

D. The Uber-issued Smartphone Acts as a Meter

Despite a rate structure that is indisputably based on time, distance and speed, Uber nevertheless argues that the smartphone it provides to drivers "cannot be considered a taximeter" because it "does not have the functionality associated with taximeters."⁴² As Mr. Koermer

³⁸ *Re Taxicab Service in Baltimore City and Baltimore County*, 101 Md. P.S.C. 499, 506 (2010).

³⁹ *In the Matter of Rates for Taxicab Service in Baltimore City and Baltimore County*, Case No. 9184, Phase II. A decision in that case is pending.

⁴⁰ See Uber's Brief, p. 12.

⁴¹ See Uber's Brief, p. 12-13, and 45-46.

⁴² Uber's Brief, p. 43.

testified, however, “taxi meters measure distance and time, then convert those measurements into a fare.”⁴³ Yellow witness Kines, with more than 25 years of experience in the taxicab business in the Baltimore area, stated that he is not aware of a definition of a taximeter in the Commission regulations⁴⁴ but that Uber’s operations are “essentially the same” as a taxicab association. While enumerating a list of similarities between Uber and taxicab associations, Mr. Kines stated that “at the end of the trip, payment is collected from passengers for a fee that is based on time and distance.”⁴⁵ At the end of an Uber trip as well, payment is collected from the passenger based on time and distance.

Uber witness Holt admits that she is “not an expert on how taxi meters work” and yet she claims that the Uber App “is simply just not a taxi meter.”⁴⁶ Uber’s reliance on Ms. Holt’s self-serving explanation that it is not the smartphone that calculates the fare but Uber’s servers in California⁴⁷ is misplaced. The fact that the server is using data collected on the smartphone does nothing to assuage Staff’s concern that Uber is charging a fare based on time and distance and the fare is calculated from information generated by the smartphone. COMAR 20.95.01.19A(2) prohibits a sedan service from equipping the vehicle with a meter. Uber’s argument that *any* instrument that measures time and distance, such as a wristwatch or odometer, could be considered to be a taximeter ignores the obvious difference between a manual calculation based

⁴³ Staff Ex. 1, p. 19, l. 22-23.

⁴⁴ Tr. 214, l. 16-21.

⁴⁵ Yellow Ex. 1, Kines’ Direct Testimony, at p. 3.

⁴⁶ Tr. at 239-40. Ms. Holt lists no experience in the transportation industry prior to getting her job with Uber a little over two years ago. On cross-examination, Ms. Holt was unable to answer many basic questions about the industry, or even Uber’s own operations. For example, Ms. Holt could not state how a rider would perceive the calculation of the fare through the App (Tr. 270), how sedan companies typically operate (Tr. 271), that rate discrimination is prohibited by statute (Tr. 324), what the charge of regulatory agencies are with regard to fairness in markets or protecting consumers (Tr. 300-302) or even whether the terms of its own contracts are negotiable (Tr. 340-41).

⁴⁷ Uber’s Brief, p. 44.

on several separate instruments, and a device that is pre-programed to make a fare calculation immediately at the end of a trip. The Uber App directly mimics a taximeter (as its operations mimic taxicab service). The use of the App outside the regulatory requirements applicable to taxicabs should be prohibited.

Finally, the Company notes that even if the Commission determines the smartphone is a taximeter, the Commission cannot regulate its use.⁴⁸ To support its position, Uber relies upon a Federal Communications Commission (“the FCC”) decision from 1980.⁴⁹ However, the Company’s reliance on this decision is misplaced. In reaching its ultimate decision, the FCC found, “that the offering of CPE *in conjunction with regulated communications services* has a direct effect on rates charged for interstate services when such equipment is subject to the separations process.”⁵⁰ This case is not, and has never been, about attempting to regulate communication services, and the smartphone is not being used in conjunction with a regulated communication service. Rather, the Uber-issued smartphone is being used in conjunction with a transportation service, which should be regulated by the Commission.

E. Staff Witness Koermer’s Testimony

Uber continues its attacks on Staff, specifically on Mr. Koermer’s pre-filed testimony in that it contains legal conclusions, and since Mr. Koermer has only been with the Commission for approximately 1 year, his interpretations of how statutes apply to Uber should be given no weight.⁵¹ If the Company was so concerned about the contents of Mr. Koermer’s testimony, it

⁴⁸ Uber’s Brief, p. 44, fn. 189.

⁴⁹ *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C. 2d 384 (1980).

⁵⁰ *Id.* at 446, para. 159. (emphasis added)

⁵¹ Uber’s Brief, p. 28.

certainly could have filed a motion to strike those portions of the testimony Uber believed were inappropriate. Given the Company's failure to file a motion or object to the introduction of his testimony into the record, it is inappropriate for the Company to now complain about the contents of Mr. Koermer's testimony.

Additionally, Mr. Koermer's tenure with the Commission should have absolutely no bearing on his credibility. Staff is unaware of, and the Company has not cited, any authority that specifies how long a witness must be employed prior to being qualified to testify and provide interpretations of regulations and statutes for which they are responsible. As the Director of Transportation, he "manage[s] the Commission's programs for the enforcement of its *laws and regulations* governing the safety and service of Maryland's intrastate for-hire passenger carriers and taxicab industries and overseeing the adequacy of service provided by carriers."⁵² Clearly, a large part of Mr. Koermer's responsibilities are the enforcement of the transportation-related statutes and regulations, and if he was unfamiliar with them, Mr. Koermer would likely not be in his current position.

Staff surmises the Company's concern is Mr. Koermer's references to particular PUA statutes; however, it is unclear how exactly Mr. Koermer could justify his position, let alone complete his job as Director of Transportation, without applying the facts and circumstances presented in the case to the applicable statutes and regulations. Mr. Koermer's testimony clearly stated that one of his duties involved "preparation of charging documents".⁵³ It is both logical and reasonable to conclude that in the preparation of such documents, that Mr. Koermer would apply the facts and circumstances surrounding a particular incident to the applicable

⁵² Staff Ex. 1, p. 1, l. 8-11. (emphasis added)

⁵³ *Id.* at p. 1, l. 17.

Transportation-related statutes and regulations. In other words, it is part of his position as the Director of Transportation, and Mr. Koermer has done absolutely nothing different in this proceeding despite Uber's contentions.

Uber also questions Mr. Koermer's objectivity based on the taxicab industry's attempts to influence Staff.⁵⁴ The Company cites to a meeting in February 2013 and Mr. Koermer's membership with the International Association of Transportation Regulators ("IATR").⁵⁵ First, the mere fact that the meeting took place is not evidence that Mr. Koermer's objectivity was compromised by the taxicab industry. As previously noted by Staff, it is extremely common for companies to request meetings with Staff to discuss various matters.⁵⁶ Furthermore, Uber asserts that the taxicab industry has "attempted to influence the actions of Mr. Koermer and other Commission staff members."⁵⁷ Whether or not that meeting constituted an attempt to influence Staff can only be answered by the taxicab industry, but assuming it was such an attempt, there is absolutely no evidence that Staff was influenced in any way, shape or form, and Uber has pointed to no such evidence.

Next, Mr. Koermer's membership in IATR has nothing to do with Uber or this proceeding. He explained that IATR "is an organization where regulators for the transportation industries can gather information" and that he attended his first IATR conference this year.⁵⁸ Additionally, Mr. Koermer stated that he "generally" reads the bi-weekly or monthly correspondence from IATR.⁵⁹ It should not be a surprise that a person charged with "the

⁵⁴ Uber's Brief, p. 28-29.

⁵⁵ *Id.* at p. 29.

⁵⁶ See Staff's Response to Uber's Motion to Admit Document into the Record, p. 9, para. 19.

⁵⁷ Uber's Brief, p. 28-29.

⁵⁸ Tr. 71, l. 12-17.

⁵⁹ Tr. 73, l. 21-23.

enforcement program for the Transportation Division, including investigations, preparation of charging documents and Commission hearings”,⁶⁰ would be part of an organization of transportation regulators. Similarly, it should not be a revelation that the Director of the Commission’s Transportation Division would “try to review any information that’s presented to me in relationship to anything that affect[s] the industry.”⁶¹ This is exactly the same as a lawyer being a member of a particular bar association which issues publications to keep its members abreast of developments in a given area of the law. The mere fact that the contents of some of IATR’s publications are adverse to Uber fails to demonstrate that Staff was influenced by, or relied upon, those publications.

In fact, Uber’s brief on this particular topic appears to be more of an attack on IATR and that organization’s stance on smartphone applications. For instance, the Company noted that the IATR reports “contain significant inaccuracies”⁶² and that its June 15, 2013 message “incorrectly indicates that ‘The [Maryland] PSC directed Uber to file for authorization form the PSC’ in response to the May 8, 2013 Staff Report.”⁶³ The accuracy of the content of IATR’s emails is irrelevant, and Mr. Koermer acknowledged that, at least with respect to Uber Exhibit 2, it mischaracterized Staff’s May 2013 Report.⁶⁴

Uber concludes:

Even if Mr. Koermer did not specifically rely on the IATR information – or information provided by Yellow or 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.⁶⁵

⁶⁰ Staff Ex. 1, p. 1, l. 16-18.

⁶¹ Tr. 77, l. 12-14.

⁶² Uber’s Brief, p. 31.

⁶³ *Id.*

⁶⁴ Tr. 74-75.

⁶⁵ Uber’s Brief, p. 31. (emphasis added)

While it may be difficult for Uber to imagine that Staff actually formed its own position in this proceeding that is exactly what occurred. More importantly with respect to Uber's assertions, there is not a scintilla of evidence that Mr. Koermer was influenced by any party or organization. The Company is simply attempting to muddy the waters and create issues where none exist.

F. Federal Telecommunications Law Does Not Preempt Commission Jurisdiction Over Transportation Laws

Uber states that it is an information service provider that may not be regulated by the states.⁶⁶ According to Uber, there is a “long-standing 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 regulation.”⁶⁷ In support of this theory, Uber describes the cases that were in place prior to the adoption of the Telecommunications Act of 1996 (“the Act”) and describes the distinction made between “telecommunications services” and “information services” that was codified in the Act.

Describing the Uber App and Driver App as “classic information services”, Uber claims that its service 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.”⁶⁸ However, Uber has failed to provide any legal precedent that supports its theory however. The only cases cited involve internet service providers, including the decisions in *Zeran v. America Online, Inc.*⁶⁹ and *Vonage*

⁶⁶ Uber's Brief at 36.

⁶⁷ *Id.* at 37.

⁶⁸ *Id.* at 39.

⁶⁹ 129 F.3d 327 (4th Cir. 1997).

*Holding Corp. v. Minnesota Public Utils. Comm'n.*⁷⁰ *Zeran* involved an action for defamatory speech against America Online, an internet service provider, which was determined to be protected by the immunity provided by 47 U.S.C. § 230.⁷¹ *Vonage* was an action by the Minnesota Public Utilities Commission against a voice over internet protocol provider.⁷² Neither case involved a content provider or the application of a transportation statute.

Uber asks the CPULJ to rely on *Gentry v. eBay, Inc.*,⁷³ a case in which eBay was held immune from a state action for fraud when one of its third party sellers sold allegedly fraudulent sports memorabilia. As Uber describes it, “the court relied on 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.”⁷⁴ Uber notably fails to explain how it can rely on 47 U.S.C. § 230(c). Unlike eBay, where the transaction is conducted between a buyer and a seller through an auction website that posts third-party information, Uber is not publishing content. This is not a case about fraud, defamation or immunity. Uber is directing vehicles to pick up passengers in Maryland. It is setting rates for each trip based on time and distance travelled in Maryland and it is directly charging passengers’ credit cards and other accounts for fares based on those rates. The Company is not simply posting content; it is creating the content and providing a transportation service.

⁷⁰ 290 F. Supp. 2d 993 (2003).

⁷¹ 129 F.3d at 332.

⁷² 290 F. Supp. 2d 993.

⁷³ 99 Cal. App. 4th 816 (2002).

⁷⁴ Uber’s Brief, p. 41; *see also eBay*, 99 Cal. App. 4th at 820.

Uber has cited no case (and Staff has found none) that holds that the Act preempts state regulation of state transportation statutes and regulations.⁷⁵ Notably, the most recent decision Uber has cited in making its preemption argument was decided in 2003. That is ancient history in the world of internet applications (smartphones were not yet on the market), and yet, Uber has no further support for its theory. The CPULJ should not prevent the application of Maryland's transportation laws to Uber, and which the Commission has the duty to administer to ensure the safety and efficiency of common carrier transportation, on the unsupported claim that these laws have been preempted.

G. Uber Has Not Supported Its Claim That It Benefits Consumers

Uber states that it provides significant benefits to consumers while leaving the regulatory framework of Commission-licensed, insured carriers to provide transportation to customers.⁷⁶ Once again, despite its many claims that it is working with Commission licensed carriers, it has steadfastly refused to provide any proof of that claim to Staff. Uber's claim that it is not providing transportation service is also not supported by the facts. Uber is indeed acting as a common carrier, which could work within the State's current regulatory framework for common carriers, but it has actively chosen not to. Staff is not seeking to foreclose Uber from providing an innovative service, but the manner in which Uber currently operates, it is within the Commission's jurisdiction and the Company's services must be provided within the existing regulatory framework.

⁷⁵ Such a far-reaching conclusion would result in sweeping preemption of State law. For example, the Commission regularly issues electric supplier licenses to brokers who provide internet links to competitive electricity suppliers in regions of the State. Uber's overly broad reading of *Vonage* and its progeny would prevent regulation of such brokers.

⁷⁶ Uber's Brief at 46-48.

III. CONCLUSION

For the reasons set forth in this Reply Brief, as well as its Initial Brief, Staff respectfully requests that the Commission adopt Staff's recommendations.



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CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the above document was provided by e-mail, and either first-class mail or hand-delivery this 3rd day of January 2014, to the Service List of Case No. 9325.



Ryan C. McLean