

**UBER IN PENNSYLVANIA:
Is It Allowed to Operate . . . and Can Municipalities Say “No”?**

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Executive Summary

Uber Technologies, Inc. began to operate its “ride-sharing” services—which use a smartphone app and GPS technology to connect passengers with the company’s drivers, who then pick them up in their own private vehicles—in Pennsylvania in early 2014. Uber’s entry into the state’s transportation market soon made clear that, as things stood, Pennsylvania’s regulatory apparatus was ill-equipped to handle such a novel business model. Two important issues emerged: (1) whether Uber is permitted to operate in Pennsylvania at all, and, if so, (2) whether municipalities can “veto” Uber’s operation.

(1) The PUC granted Uber a two-year “experimental license” to operate throughout most of Pennsylvania—but, notably, not in Philadelphia—on November 13, 2014. The license is, however, conditional. In order to retain the PUC’s permission to operate legally, Uber must accept and comply with a list of conditions requiring drivers to undergo background checks, vehicles to be at most eight to ten years old, Uber to provide insurance to cover time periods during which vehicles are used for ride sharing, and drivers to notify their insurance companies that they are engaging in ride-sharing activities.

(2) If the municipality is statutorily granted the authority to regulate the taxi cab industry, the PUC lacks the necessary jurisdiction to permit Uber to operate and is, in essence, “preempted” by the local agency. This is the case in Philadelphia, where taxi services are regulated by the Philadelphia Parking Authority pursuant to a statutory grant of authority from the General Assembly, and Uber’s two-year PUC permit does not, therefore, apply. Unlike Philadelphia, a municipality that wishes to bar Uber from operating but has not been granted the authority to regulate taxi services must attempt to challenge the PUC’s order in court. Because the courts’ review of administrative agency actions is highly deferential, however, a municipality in this situation faces an uphill battle that is unlikely to succeed.

Factual Background

“Ride sharing” companies such as Uber and rival Lyft use a smartphone app to connect passengers with drivers, who then pick the passengers up and transport them to their pre-arranged destinations.¹ Uber neither employs these drivers in a traditional sense nor owns the vehicles; rather, drivers use their own personal vehicles and “partner” with Uber, which takes

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1. Order Granting Interim Emergency Relief and Certifying Material Question, No. P-2014-2426846, slip op. at 1 (Pa. Pub. Util. Comm’n Jul. 1, 2014) [hereinafter “PUC Order”]; Marc Levy, *Lyft Gets Pennsylvania Regulatory Nod, Not Philly*, WTAE.COM (Dec. 18, 2014, 7:13 PM), <http://www.wtae.com/news/uber-lyft-ridesharing-permits-approved/26879322>.

twenty percent of their earnings.² Since its start in San Francisco in 2010, Uber has expanded its operations to 230 cities worldwide.³

Uber began to operate in Pittsburgh in March 2014⁴ but did not seek a transportation brokerage license from the Pennsylvania Public Utility Commission (“PUC”), the agency charged by the General Assembly with the regulation of taxi cabs and other professional driver services.⁵ The statute provides that “[n]o person or corporation shall engage in the business of a broker in this Commonwealth”—that is, “one who sells, provides, furnishes, contracts, or arranges for . . . transportation”—“unless such person holds a brokerage license issued by the commission.”⁶ On June 5, 2014, the PUC filed a complaint alleging that Uber was acting as a broker without PUC authority.⁷ For its part, Uber “avers that it is not a broker, but instead, is a software company that licenses a smartphone application.”⁸

In June 2014 the PUC’s investigative arm petitioned two PUC administrative law judges for an interim emergency order enjoining Uber from operating during the pendency of the proceedings.⁹ The PUC argued that Uber’s unlicensed operation “unilaterally deprived the Commission of its obligation to ensure driver integrity, vehicle safety and the maintenance of sufficient insurance coverage.”¹⁰ The judges agreed that the lack of oversight as to vehicle insurance and inspection and driver records “could be catastrophic” in the event of an accident and ultimately granted the PUC’s request to enjoin Uber from operating in Pennsylvania without a PUC license on July 1, 2014.¹¹

After a series of hearings in August 2014, the administrative law judges recommended in September that the PUC deny Uber’s application for a license.¹² The judges explained that while they recognized the potential value of Uber’s ride-sharing services, Uber nonetheless had not “sustain[ed] its burden of demonstrating that it is also committed to protecting the public—both drivers and passengers.”¹³ Meanwhile, although the General Assembly was expected to consider amending the PUC’s regulations to cover ride-sharing under the new category of “transportation network services,” several attempts at such bills failed.¹⁴

2. Maryclaire Dale, *Uber Gets OK for Much of Pennsylvania, Not Philly*, MYWAY.COM (Nov. 13, 2:18 PM), <http://apnews.myway.com/article/20141113/us--uber-pennsylvania-912d9e769f.html>.

3. *Id.*

4. PUC Order, at 2. Lyft also began Pittsburgh operations in early 2014. Kim Lyons, *PUC Grants Uber License to Operate Experimental Service*, PITTSBURGH POST-GAZETTE (Nov. 13, 2014, 11:43 PM), <http://www.post-gazette.com/business/2014/11/13/Uber-gets-license-approval-from-Pennsylvania-PUC/stories/201411130305>.

5. PUC Order, at 2 (citing 66 Pa. Consol. Stat. § 2505(a) (2006)).

6. 66 Pa. Consol. Stat. §§ 2501(b), 2505(a).

7. PUC Order, at 1-2.

8. *Id.* at 4.

9. *Id.* at 3.

10. *Id.*

11. *Id.* at 13-16.

12. Lyons, *supra* note 4.

13. *Id.*

14. *Id.*

Discussion

(1) Uber currently operates under a two-year PUC license in most Pennsylvania counties.

On November 13, 2014, the PUC rejected the administrative law judges' recommendation and voted 4-1 to grant Uber a two-year experimental license applicable to forms of transportation that, like ride sharing, do not fit within the PUC's existing categories.¹⁵ The license would enable Uber to operate legally throughout most of Pennsylvania, with the exception of the nine counties that were not included on its application as well as Philadelphia, where taxi service is governed by a local agency rather than the PUC.¹⁶

Importantly, Uber's PUC license is conditional; for it to have legal effect, the PUC must issue a certificate of public convenience.¹⁷ This, in turn, would depend upon Uber's willingness and ability to satisfy a list of conditions.¹⁸ The conditions include:

- background checks for drivers,¹⁹
- use of vehicles not more than eight to ten years old,²⁰
- insurance coverage for vehicles while operating for ride-sharing purposes,²¹ and
- written notification by drivers to their personal insurance companies of their participation in ride sharing.²²

While the PUC did appear willing to take the ride-sharing companies' concerns into account and modify some rules accordingly,²³ the board made clear that the list of conditions was the agency's "final offer" and "not a negotiation."²⁴

15. *Id.* A similar license was granted to Lyft on December 18, 2014. Levy, *supra* note 1.

16. Lyons, *supra* note 4; Dan McQuade, *UberX Approved in Pennsylvania—But Not in Philadelphia*, PHILA. (Nov. 13, 2014, 1:09 PM), <http://www.phillymag.com/news/2014/11/13/uber-approved-pennsylvania-philadelphia/#1FPuxOR9mbD0gPr2.99>. The excluded counties include Beaver, Lawrence, Mercer, and several in the Philadelphia area. Lyons, *supra* note 4.

17. McQuade, *supra* note 16. The PUC granted ride-sharing companies temporary authority to operate until the experimental license could go into effect. Lyons, *supra* note 4.

18. Identical conditions have been imposed upon Uber and Lyft. Levy, *supra* note 1 (discussing conditions with respect to Lyft).

19. Lyons, *supra* note 4.

20. Levy, *supra* note 1. Because Lyft complained that the eight-year rule would "wipe out one-third of [its] driving force in Pittsburgh," the PUC has "all but approved" a new rule raising the age-of-vehicle limit to ten years. *Id.*

21. Lyons, *supra* note 4. With respect to the insurance issue—one of the most complicated—Uber would "provide insurance coverage from the time a driver opens the app until he logs off the system," while "the driver's personal auto insurance policy would be in effect" at all other times. *Id.*

22. *Id.* The PUC hoped that this notification requirement would mitigate their concern "that Uber drivers may not understand that this commercial use of their personal vehicles could void their existing personal vehicle insurance, which would otherwise apply" while they are not driving for Uber. *Id.* (quoting PUC commissioners).

Once Uber accepts the PUC’s conditions—it was given until January 5 to do so, and there has been no indication that it has not²⁵—it has thirty days to comply.²⁶ Two PUC board members noted that “[m]any of the conditions set forth . . . by the PUC mirror Uber’s existing operating practices . . . as well as state regulations already in place.”²⁷ Other PUC board members, however, have indicated that compliance is by no means a guarantee. Vice Chairman John Coleman, who voted against Uber’s license, wrote in his dissenting opinion that while he respected his colleagues’ willingness to accommodate the new ride-sharing technology and ensure its safe use, he remained “very skeptical that [Uber] will satisfy these conditions.”²⁸ Board member John H. Cawley, who “who reluctantly voted yes,” was even more forceful, saying, “Let me put it in plain English, Uber. This is your last chance with this commission . . . to abandon [your] anarchist ways and to finally become a responsible, lawful corporate citizen.”²⁹

(2) Municipalities generally lack “veto power” over PUC orders permitting ride sharing.

A municipality’s power to evade the PUC’s grant to Uber of a two-year license to operate is a more complicated issue. An important threshold question is whether the PUC has the authority to permit ride-sharing activity in that municipality in the first place. Philadelphia provides an important example. When UberX, Uber’s most popular service and the version operating in Pittsburgh, officially debuted in Philadelphia on October 24, it encountered “staunch resistance”; the Philadelphia Parking Authority (“PPA”) impounded its vehicles and imposed \$1,000 fines, and the head of the Philadelphia Taxi Association compared it to terrorist organization ISIS.³⁰ The PPA “considers ride-sharing companies [to be] unlicensed cabbies because they do not have taxi medallions, which can run as much as a half-million dollars.”³¹

Because the PPA regulates taxi service in Philadelphia, the PUC’s order does not apply there.³² This is a result of the operation of the Parking Authority Law,³³ also known as “Act

23. See Levy, *supra* note 1 (discussing debate over age-of-vehicle rule); Lyons, *supra* note 4 (noting that PUC “accepted as sufficient Uber’s proposal” for a compromise on the insurance issue); see also *supra* notes 21-20 and accompanying text.

24. Levy, *supra* note 1.

25. *Id.*

26. Lyons, *supra* note 4.

27. *Id.*

28. *Id.*

29. Dale, *supra* note 2.

30. Lyons, *supra* note 4; McQuade, *supra* note 16. Uber Black, a high-end version of Uber, is considered a “livery service” for regulatory purposes and is permitted to operate in Philadelphia. McQuade, *supra* note 16. Even though UberX is not, its drivers continue to serve Philadelphia, with Uber footing the bill for their fines. Dale, *supra* note 2; McQuade, *supra* note 16.

31. Levy, *supra* note 1. The PPA has not foreclosed the possibility of UberX ever legally operating in Philadelphia. PPA director Vincent Fenerty explained that without a PPA license, Uber’s drivers are “operating as hack cabs,” but “[i]f the Legislature changed the law, where people could ride-share, and set the proper guidelines . . . the PPA would abide by [that].” Dale, *supra* note 2 (alterations in original).

32. See Levy, *supra* note 1; Lyons, *supra* note 4.

94.”³⁴ This law initially placed the PUC in charge of regulating taxi services throughout the state.³⁵ However, Chapter 57 amended this law to instead charge the PPA “with regulating the taxicab and limousine activities that take place in the City of Philadelphia.”³⁶ The net result is that the PUC lacks jurisdiction over taxi services where Chapter 57 assigns authority to the PAA: within the city, originating within the city, or centrally dispatched from a point outside the city to a point within it.³⁷ These are thus outside the PUC’s control, and “[t]he PUC ‘cannot . . . invest itself with authority or powers not . . . within the legislative grant.’”³⁸ The battle in Philadelphia, therefore, remains between Uber and the PAA, and it is the PAA’s prerogative to license its operation or not.

Where the PUC does have jurisdiction to issue Uber a license to operate within a certain geographic area, the question becomes whether a municipality can “veto”—or, more precisely, mount a successful court challenge to—that PUC action. Two factors make that unlikely. First, administrative law is marked by a highly deferential standard of review, and review of the actions of the PUC, an agency, is no exception. A court is obliged to affirm a PUC finding except where (1) there has been a constitutional violation, (2) there has been an error of law, or (3) “the crucial findings are not supported by substantial evidence.”³⁹ Although the third factor might initially appear to be a promising avenue of attack for a litigator saddled with bad facts, the word “substantial” here is a misnomer, as the Commonwealth Court has required only “such relevant evidence as a reasonable mind can accept as adequate to support a conclusion.”⁴⁰

Second, Pennsylvania’s courts have on many occasions rejected challenges to PUC orders that require municipalities to permit certain activity. In *East Lampeter Township v. Pennsylvania State Horse Racing Commission*, for example, the Commonwealth Court applied that generous definition of “substantial” and concluded that “the necessary documentation needed to proceed on [the] application” and “a slide presentation which addressed the concerns of the local community” were sufficient to uphold against a municipality’s challenge a PUC

33. 53 Pa. Consol. Stat. §§ 5501-17, 5701-45 (2006).

34. *Germantown Cab Co. v. Pa. Pub. Util. Comm’n*, 97 A.3d 410, 411-12 (Pa. Commw. Ct. 2014).

35. *See id.*

36. *McT Transp. v. Phila. Parking Auth.*, No. 594-CD-2012, 2012 Pa. Commw. Unpub. LEXIS 982, *1 (Pa. Commw. Ct. 2012) (unpublished); *cf. Port Auth. v. Pa. Pub. Util. Comm’n*, 431 A.2d 243, 246 (Pa. 1981) (legislature enacted statute divesting PUC of regulatory control over Allegheny County’s public buses, which it assigned to the statutorily created local Port Authority, but leaving taxicab regulation under PUC’s control).

37. *Germantown Cab*, 97 A.3d at 412 (citing 53 Pa. Consol. Stat. §5714(c)).

38. *Susquehanna Area Reg’l Airport Auth. v. Pa. Pub. Util. Comm’n*, 911 A.2d 612, 621 (Pa. Commw. Ct. 2006) (quoting *Commonwealth v. Am. Ice Co.*, 178 A.2d 768, 773 (Pa. 1962)) (holding that grant of regulatory authority to local airport authority essentially preempted the PUC from regulating in that area).

39. *Ridgway v. Pa. Pub. Util. Comm’n*, 480 A.2d 1253, 1257 (Pa. Commw. Ct. 1984); *accord Mun. Auth. of W. View v. Pa. Pub. Util. Comm’n*, 41 A.3d 929, 932 n.5 (Pa. Commw. Ct. 2012) (citing *Rohrbaugh v. Pa. Pub. Util. Comm’n*, 727 A.2d 1080 (Pa. 1999)).

40. *E. Lampeter Twp. v. Pa. State Horse Racing Comm’n*, 704 A.2d 703, 708 (Pa. Commw. Ct. 1997) (per curiam) (quoting *D & H Corp. v. Pa. Pub. Util. Comm’n*, 613 A.2d 622 (Pa. Commw. Ct. 1992)).

order permitting the operation of an off-track betting facility.⁴¹ The court, perhaps fearful of criticism, included in its opinion a reminder that “[t]he legislature has vested wide discretion with the [PUC], and the Court must grant deference to the latter’s orders unless there is a clear abuse of discretion.”⁴² The Supreme and Commonwealth Courts were equally deferential in rejecting challenges brought by a borough and another state agency to PUC orders permitting, respectively, the operation of a private sewage service that connected to public systems,⁴³ and a solid waste landfill.⁴⁴ Given such a deferential standard of review, it is hardly surprising that municipalities’ challenges to PUC orders permitting certain conduct tend to find little traction.

Conclusion

In November 2013, Uber obtained a two-year experimental license from the PUC to operate in every Pennsylvania county except Philadelphia, where taxi service is governed by a local regulatory authority, and a few other counties that were not included on its application. This PUC license is conditional, however; once it agrees to the conditions, Uber must, within thirty days, ensure that its drivers undergo background checks, the vehicles used are no more than eight to ten years old, insurance coverage is provided while drivers are operating their personal vehicles “on the clock,” and drivers notify their personal auto insurance companies of their ride-sharing activities. If Uber does not meet these requirements, its license is subject to revocation. Given several PUC board members’ reservations about Uber’s ability to fulfill the license’s conditions, its compliance will likely be carefully monitored—and strictly enforced.

The coverage area of Uber’s license extends only to areas that fall under the PUC’s jurisdiction. Where a local regulatory agency such as the Philadelphia Parking Authority has been statutorily granted the authority to regulate taxi service, the PUC’s ride sharing rules and licenses have no effect. For this reason, Philadelphia’s ban on most ride sharing remains in effect despite the experimental licenses granted to Uber and its competitors by the PUC.

If a municipality lacks its own regulatory authority, however, it is unlikely to be able to, in essence, “veto” the PUC license and bar companies like Uber from engaging in ride sharing within its borders. Should the municipality attempt to challenge the license in court, as is the case in other administrative law contexts, the standard of review of the PUC’s decision would be highly deferential. Although there is no Pennsylvania case law directly on point, cases involving similar scenarios illustrate that a municipality challenging Uber’s license would probably not be able to make the requisite showing. For a municipality to “veto” the PUC’s grant of a license to Uber would, therefore, be a tall order.

41. *Id.*

42. *Id.*

43. *Ridgway*, 480 A.2d at 1255-57 (“This Court’s scope of review of matters such as this requires that we affirm the decision of the PUC unless there has been a violation of constitutional rights or an error of law or unless the crucial findings are not supported by substantial evidence.”).

44. *Commw., Pa. Game Comm’n v. Commw., Dep’t of Env. Resources*, 555 A.2d 812, 813 (Pa. 1989) (describing the standard of review in a similar case as follows: “the court’s review of such decision was limited to errors of law or violations of constitutional rights”).