**ORDER NO. 87914**

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| IN THE MATTER OF THE PETITIONS OF RASIER, LLC AND LYFT, INC. FOR WAIVER OF PUBLIC UTILITIES ARTICLE SECTION 10-104(b) | * * * * | BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND<br>CASE NO. 9425 |

**Issue Date: December 2, 2016**

On November 22, 2016, Rasier, LLC ("Rasier") and Lyft, Inc. ("Lyft") (together, the "Petitioners") filed a Joint Motion to Strike Testimony of Regina C. Gee (the "Motion"). In the Motion, Petitioners assert that certain portions of Ms. Gee's oral testimony at the hearing on November 21, 2016 should be stricken from the record in this matter. Petitioners contend that the opinion Ms. Gee provided regarding the accuracy and completeness of name-based background reports is based solely on her one-to-one comparison of certain Criminal Justice Information Services ("CJIS") reports with corresponding name-based reports. Petitioners argue that the comparison Ms. Gee performed was found to be "fundamentally unfair" by the Commission, resulting in her written testimony being stricken,[1] and her oral testimony should similarly be stricken.

The Technical Staff of the Public Service Commission of Maryland ("Staff") responded to the Motion on November 28, 2016. Staff, *inter alia*, disagrees with Petitioners' characterization of Ms. Gee's testimony, maintaining that Ms. Gee, in response to questions from counsel for Lyft, provided her opinion of the results of the two types of background checks, based not on direct side-by-side comparison of the

[1] Motion, ¶ 4.

results regarding specific individuals, but rather based on her many years of experience in reviewing fingerprint-based background checks and, for the past year, name-based background checks.[2]

As an initial matter, Petitioners did not object to Ms. Gee's testimony at the time it was elicited, and only belatedly objected at the close of the hearing in this matter. Although we are not bound by the Maryland Rules, Rule 2-517(a) provides that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for the objection become apparent. Otherwise, the objection is waived." Md. Rule 2-517(a). *See also, Javitt v. Cunningham Contracting, Inc.*, 2016 WL 4493367 (Ct. Spec. App.). Counsel for Lyft posed questions that involved the written testimony that Petitioners successfully had stricken. After eliciting the foreseeable response to such questioning, counsel could have objected immediately, but failed to do so, thereby waiving an objection to the testimony remaining in the record. Accordingly, a motion to strike that testimony may properly be denied.

Assuming *arguendo* that Petitioners preserved a timely objection to the testimony, the testimony will not be stricken on the grounds that the same written testimony was stricken earlier in this proceeding. The Commission previously found that it would be fundamentally unfair for the record to include testimony based on a direct comparison for a certain few individuals of two items, only one of which (the name-based background check reports) could be made available to Petitioners.[3] Ms. Gee's oral testimony, elicited

[2] Reply of the Staff of the Public Service Commission of Maryland to Joint Motion to Strike Testimony of Regina C. Gee ("Staff Reply"), ¶¶ 3, 6.

[3] We note that Petitioners successfully argued that such testimony was unfair because they couldn't cross-examine or otherwise "test Staff's assertions that CJIS background check reports are more inclusive," (See Raiser's November 10, 2016 Motion to Strike Testimony, ¶15), then proceeded to attempt to discredit any such assertion through cross-examination of Staff's witness anyway.

by counsel for Lyft on cross-examination, was of her opinion based on her first-hand knowledge in the performance of her duties: "I have been reviewing CJIS and FBI reports for many, many years, and I've been reviewing name-based checks for the past year, and it's my opinion that the name-based checks have not been as comprehensive or accurate as the fingerprint-supported checks, based on the information that I firsthand have reviewed."[4] This testimony was not limited to a direct side-by-side comparison of a few specific individuals. That Ms. Gee's testimony was not so limited is reinforced by Ms. Gee's response to questions from Commissioner Richard:[5] "In reviewing all of the reports that I have been reviewing in the past year and what I've reviewed in the past 16 and a half years with the CJIS report[s], if I'm being honest, I feel that the name-based reports are not as comprehensive and accurate."[6] When Ms. Gee referred to "the reports that I have been reviewing in the past year" she was referring to the name-based background checks, as opposed to the fingerprint-based CJIS background checks she has "reviewed in the past 16 and a half years." Clearly "all of the reports" Ms. Gee has been reviewing in the past year are more than a select few individuals. Ms. Gee's testimony that in her opinion name-based reports are not as comprehensive and accurate as fingerprint-based background check reports was based on her years of experience working in this area, and, as such, has a proper foundation. Her opinion testimony will remain in the record, to be afforded appropriate weight.

[4] Motion, Exhibit 1, p. 675:17-676:8.
[5] The Motion erroneously attributes this question to Chairman Hughes.
[6] Motion, Exhibit 1, p. 693:21-694:3.

Counsel's continued questioning of Ms. Gee on this subject actually supports the above conclusion. After eliciting the testimony that Petitioners now seek to have stricken, counsel for Lyft continued on in an attempt to have Ms. Gee admit that without a side-by-side comparison of the two [types of background check reports] she couldn't definitively say that a name-based background check was not as accurate and comprehensive as a finger-print based check.[7] Ms. Gee declined such admission, and was then asked if her answer was based on her personal experience.[8] Ms. Gee answered in the affirmative and again referenced her experience in reviewing background information in general (not a few specific individuals).[9]

Furthermore, to the extent Ms. Gee's general opinion, based on her experience in reviewing CJIS reports for several years and name-based checks for the past year, was established in part on specific background checks that she reviewed (which, as set forth above, we do not find), the Motion must be denied because counsel for Petitioners asked the questions that elicited the testimony. It is a general rule that a party introducing evidence cannot complain that the evidence was erroneously admitted, *Ohler v. U.S.*, 529 U.S. 753, 755 (2000), a rule that applies with equal force to both criminal and civil cases. *Barr v. City of Albuquerque*, 2015 WL 11089524 (D. N.M. 2015); *see also Brown v. State*, 373 Md. 234, 239 (2003). Stated another way, an objection to the admission of evidence is waived where the same evidence has been elicited by the objector. *Ohler v. U.S.*, 529 U.S. at 755; *see also, 21 M.L.E. Trial §39* (Dec. 2016 Update). Although not

[7] Transcript, p. 676:23-677:13.
[8] Transcript, p. 677:5-7.
[9] Transcript, p. 677:8-13.

elicited on direct examination through a Lyft witness, this "common sense principle"[10] is easily applied to the cross-examination testimony in this case.[11] The questions posed by counsel did not somehow inadvertently elicit the testimony now sought to be stricken; the line of questioning went straight to Ms. Gee's opinion of how the two types of background checks compare based on a side-by-side comparison of them.[12] Petitioners cannot now complain that the very evidence that was elicited straightforwardly from their cross examination questions is part of the record. And Ms. Gee's response to Commissioner Richard's inquiry need not be stricken because she had already provided almost that exact same testimony in response to a question from counsel for Lyft. There is no reason to strike the response to Commissioner Richard's question when the same answer was already in evidence, elicited by Petitioners.

As Staff correctly states in its Reply to the Motion, it is Petitioners' burden to

[10] *Ohler v. U.S.*, 529 U.S. at 756.

[11] The following example in *Lustine v. State Roads Commission*, 217 Md. 274 (1958) is illustrative:
'By Mr. Murray: (on direct examination)
'Q. Mr. Bojanowski, are you familiar with the access that that property had prior to the State taking it?
A. Well, the only access to that that we found in going over it with the former owner was through this land—
'Mr. DeBlasis: I object. He is beginning to tell us what Mr. Brooks said.
'Mr. Murray: He is not going to say what Mr. Brooks said. He said the only access they were able to find after talking to Mr. Brooks, Your Honor.
'The Court: Go ahead.
'The Witness: (continuing)-on physical inspection was this lane to Marlboro Pike which is approximately 2800 feet from the right-of-way line.'
'By Mr. Boswell: (of the same witness, on cross-examination)
'Q. Could you tell me how you determined that this right-of-way was in use for a number of years?
'Mr. Murray: Objection.
'The Court: Overruled.
'The Witness: I talked with Mr. Brooks—
'Mr. Boswell: I move anything he says in this regard be stricken as hearsay.
'Mr. Murray: He asked him for it.
***'The Court: You asked it and now you have got it.'*** [emphasis added].

[12] Motion, Exhibit 1, p. 675:17-676:8.

show that the name-based background checks performed by consumer reporting agencies on their behalf are as comprehensive and accurate as the fingerprint-based supplemental background checks Maryland law currently requires to be performed on passenger-for-hire driver applicants.[13] This is the standard set forth in Public Utilities Article, Ann. Code of MD ("PUA"), §10-404(e)(2)(i). By his subsequent questions to Ms. Gee, Commissioner Richard was attempting to clarify testimony in the record that five to ten percent of applications were flagged for further review.[14] Commissioner Richard inquired as to whether the electronic information the TNCs supply to Staff is sufficient for Staff to flag applicants that require extra review, which is of course relevant to any alternative process that the Commission might approve under PUA §10-404(e)(2)(ii). There is simply no justification to strike Ms. Gee's appropriate response that includes that in her experience she has uncovered some instances in which the name-based background report showed no criminal history but the applicant did in fact have a criminal history.[15] The foregoing testimony illuminates the reasoning behind Ms. Gee's entire response, and makes complete her answer to Commissioner Richard's question which sought information relevant to this proceeding.

For all of the above reasons, the Joint Motion to Strike Testimony of Regina C. Gee is denied in its entirety.

**IT IS THEREFORE,** this 2nd day of December, in the year Two Thousand and

[13] Staff Reply, ¶8.
[14] Transcript, p. 695:13-697:21.
[15] Motion, Exhibit 1, p. 697:19-21.

Sixteen, by the Public Service Commission of Maryland,

**ORDERED:** That the Joint Motion to Strike Testimony of Regina C. Gee is hereby DENIED.

By Direction of the Commission,

*/s/ David J. Collins*

David J. Collins
Executive Secretary