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November 15, 2016

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

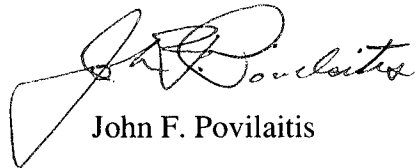
Re: Robert Ely v. Rasier-PA, LLC; Docket No. C-2016-2571984

Dear Secretary Chiavetta:

On behalf of Raiser-PA, LLC, I have enclosed for electronic filing a Notice to Plead and the Preliminary Objections of Rasier-PA LLC to the Complaint of Robert Ely, in the above-captioned matter.

Copies have been served on all parties as indicated in the attached certificate of service.

Sincerely,


John F. Povilaitis

JFP:bb
Enclosure
cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ROBERT ELY

v.

RASIER-PA, LLC

:
:
:
:
:

Docket No. C-2016-2571984

NOTICE TO PLEAD

TO: Robert Ely
1163 Miller Road
Lake Ariel, PA 18436

Pursuant to 52 Pa. Code § 5.101(b), you are hereby notified that, if you do not file a written response to the enclosed Preliminary Objections of Rasier-PA LLC to the Formal Complaint of Robert Ely within **ten (10) days** from service of this Notice, the Preliminary Objections may be granted. All responsive pleadings must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for Rasier-PA LLC, and where applicable, the Administrative Law Judge presiding over the case.

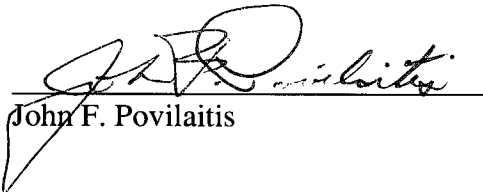
File with:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

With a copy to:

John F. Povilaitis
Alan M. Seltzer
Buchanan Ingersoll & Rooney, PC
409 North Second Street
Suite 500
Harrisburg, PA 17101

Dated: November 15, 2016



John F. Povilaitis

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ROBERT ELY	:	
	:	
v.	:	Docket No. C-2016-2571984
	:	
RASIER-PA, LLC	:	

**PRELIMINARY OBJECTIONS OF RASIER-PA, LLC
TO THE COMPLAINT OF ROBERT ELY**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

Rasier-PA, LLC (“Rasier-PA”), by and through its counsel John F. Povilaitis, Alan M. Seltzer and Buchanan Ingersoll & Rooney PC, files these Preliminary Objections pursuant to Section 5.101(a) of the Pennsylvania Public Utility Commission (“Commission”) regulations, 52 Pa. Code § 5.101(a), seeking to dismiss the Formal Complaint (“Complaint”) filed by Robert Ely (“Complainant”), and in support thereof, avers as follows:

I. Introduction, Background and Legal Standard

1. On October 18, 2016, the Complainant filed a Complaint against Rasier-PA. The Complaint was served on Rasier-PA on October 19, 2016. On November 8, 2016 the Commission granted Rasier-PA an extension of time until November 15, 2016 to file an Answer and any other appropriate pleadings to the Complaint. Rasier-PA filed an Answer and New Matter to the Complaint on November 15, 2016.

2. The Complaint purports to be on behalf of “all of Uber’s partner/drivers” and alleges that Uber has promised “life changing money” for drivers connecting with riders through the Uber platform, and requests that the Commission: 1) increase driver compensation, 2) increase Rasier-PA’s Commission assessment fee, 3) increase Rasier-PA’s charges to customers, 4) deny Rasier-PA permanent motor carrier authority and 5) require Rasier-PA to purchase

vehicles and hire drivers as employees rather than as independent contractors. The Complaint is legally deficient on several bases and should be summarily dismissed.

3. The Complaint must be dismissed in its entirety because the Commission lacks jurisdiction over class actions, the terms of compensation between Rasier-PA and its drivers, and Rasier-PA's managerial discretion with respect to use of vehicles and drivers. In addition, the Complainant lacks standing to propose increases in Rasier-PA's charges to customers or Rasier-PA's Commission assessment. The Complainant may become a taxi driver or engage in any method of for-hire vehicle in Pennsylvania that he wishes; Rasier-PA is only one option of many for earning money in Pennsylvania, and only one option of many for earning money driving a vehicle for hire. The Complainant is free to terminate his independent contractor relationship with Rasier-PA at any time, for any reason or for no reason. Indeed, the relationship between Rasier-PA and its drivers is entirely voluntary and free of coercion. If the Complainant or indeed any driver is dissatisfied with the terms and conditions of the relationship with Rasier-PA, all they need do is terminate the relationship and cease utilizing the digital platform Rasier-PA makes available to qualified and eligible drivers.

4. The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code § 5.101(a)(1)-(7). *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa. P.U.C. LEXIS 69, Docket No. C-00935435 (July 18, 1994). The grounds for preliminary objections are set forth in 52 Pa. Code § 5.101(a) as follows:

- a. Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- b. Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- c. Insufficient specificity of a pleading.
- d. Legal insufficiency of a pleading.

- e. Lack of capacity to sue, non-joinder of a necessary party or misjoinder of a cause of action.
- f. Pendency of a prior proceeding or agreement for alternative dispute resolution.
- g. Standing of a party to participate in the proceeding.

5. The Commission's procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. *Equitable Small Transportation Intervenors, supra*.

6. The moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the preliminary objection, all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts. *County of Allegheny v. Commw. of Pa.*, 490 A.2d 402 (Pa. 1985). However, the Commission need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Stanton-Negley Drug Co. v. Dep't of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Cmwlth. 2007).

II. Argument

A. Preliminary Objection 1: The Commission Lacks Jurisdiction Over the Complainant's Class Action, Driver Compensation, Vehicle Ownership and Driver Status Claims.

7. The Complainant claims to be representing in the Complaint "all of Uber's partner/drivers." This is clearly in the nature of a "class action" since it purports to address relief to more than just the Complainant. It is well established that Commission regulations do not provide for such class actions and that this form of action is outside of the Commission's jurisdiction. In *Walter Painter and Donna Painter v. Aqua Pennsylvania, Inc.*, Docket No. C-2011-2239556 (January 7, 2014) the Administrative Law Judge ruled that the Commission lacked jurisdiction to resolve the Complainants' claims related to class action status, citing with

approval ALJ Cheskis' similar determination in *Pettko v. Pennsylvania American Water Company*, Docket No. C-2011-2226096 (Order Denying in Part Motion for Judgment on the Pleadings dated October 5, 2011). The Complainant has established no legal basis for the Commission's adjudication of a Rasier-PA driver class action.

8. The Complaint also alleges that Rasier-PA's compensation to drivers is inadequate and requests that the Commission direct Rasier-PA to "pay drivers a living wage, as they do not allow tips, they must guarantee at least the minimum IRS deductible plus minimum wage whenever the driver is on APP."¹ Compensation is a private matter between Rasier-PA and the drivers it utilizes governed by contract between those parties and not by any law administered by the Commission or by any rule or regulation lawfully promulgated by it. The Commission does not have jurisdiction to set or review the adequacy of driver compensation. In *Richard Scloppert v. City Delivery Service, Inc.*, Docket No. C-2015-2478408 (July 9, 2015), a driver for City Delivery Service, a public utility authorized to provide motor carrier service, alleged that he was not being compensated correctly. Administrative Law Judge Haas considered Preliminary Objections filed by City Delivery Service that argued the dispute was outside Commission jurisdiction. ALJ Haas ruled in favor of City Delivery Service and granted the Preliminary Objection, stating as follows:

Complainant alleges a dispute between an employee and an employer regarding the employee's compensation. The Complainant claims he is being paid incorrectly. Such a claim, even if proven to be true, does not constitute a violation of the Public Utility Code or a Commission regulation or order but, rather, constitutes a private contractual dispute. The Commission lacks jurisdiction to adjudicate contractual disputes. Here, as in the cases cited above, the Commission is not the appropriate tribunal to adjudicate this complaint. It is clear from the face of the complaint that the Complainant's dispute is a private dispute with his employer concerning the amount he is being compensated.

¹ As indicated in Rasier-PA's Answer to the Complaint, it is denied that Respondent does not allow drivers to accept tips.

There is no genuine issue of material fact relating to the Complainant's compensation as a driver or any other requested relief in the Complaint that is within the Commission's jurisdiction. Therefore, Rasier-PA is entitled to judgment as a matter of law and the Complaint must be dismissed.

9. Similarly, the Complaint's requests that Rasier-PA be directed to purchase vehicles and hire drivers as employees are outside Commission jurisdiction. First, when the Commission granted Rasier-PA authority to operate in Pennsylvania, it was aware of Rasier-PA's business model as a transportation network company ("TNC") service provider. That model uses non-employee drivers and their personal vehicles to provide TNC service. In its Orders granting Rasier-PA authority to operate in Pennsylvania, the Commission understood and actually stated that Rasier-PA's service would be provided using "independent drivers or operators" using "their personal, non-commercially licensed vehicles".²

10. Not only does the Complaint make an impermissible and unlawful collateral attack on the Commission's previous decision to grant Rasier-PA authority to provide TNC service using independent drivers and their personal vehicles, it ignores that the Commission has traditionally considered the means by which vehicles are obtained and the retention of staff to use those vehicles to be matters of managerial discretion, not subject to Commission regulation. *Re Adegbola Iget/a Globe Limousine Service*, Docket No. A-00108943 (Order Entered August 7, 1991)("Whether applicant initially acquires by purchase or lease one or two limousines is a

² *Application of Rasier-PA LLC, a limited liability company of the State of Delaware, for the right to begin to transport, by motor vehicle, persons in the experimental service of shared-ride network for passenger trips between points in Pennsylvania, excluding those which originate or terminate in the Counties of Beaver, Clinton, Columbia, Crawford, Lawrence, Lycoming, Mercer, Northumberland and Union*, Docket No. A-2014-2424608 (Order Entered December 5, 2014) at 15; *Application of Rasier-PA LLC, a limited liability company of the State of Delaware, for the right to begin to transport, by motor vehicle, persons in the experimental service of shared-ride network for passenger trips between points in Allegheny County*, Docket No. A-2014-2416127 (Order Entered December 5, 2014) at 27.

managerial decision; the same is true of the garaging of the vehicle or vehicles and the hiring of an employee or employees to operate the vehicle or vehicles.”). Rasier-PA is entitled to judgment as a matter of law regarding its use of drivers and vehicles and all allegations and relief requested in the Complaint relating thereto must be dismissed with prejudice.

B. Preliminary Objection 2: The Complainant Lacks Standing to Challenge the Amount of Rasier-PA’s Assessment or the Level of Its Charges to Customers.

9. Under well-established Pennsylvania law, a party does not have standing to participate in a legal proceeding absent a showing that it is aggrieved. A party that is not adversely affected by the matter it seeks to challenge has no standing to obtain a judicial resolution. It is not sufficient for the person claiming to be aggrieved to assert the common interest of all citizens. *William Penn. Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975). Therefore, to the extent the Complaint asserts claims on behalf of a class of unnamed drivers who the Complainant believes have been aggrieved, the Complaint must be dismissed pursuant to Section 5.101(a)(7) of the Commission’s regulations, 52 Pa. Code § 5.101(a)(7).

10. Standing to participate in proceedings before an administrative agency is primarily within the discretion of the agency. *Pennsylvania National Gas Association v. T.W. Phillips Gas and Oil Co.*, 75 Pa. PUC 598, 603 (1991). Generally, the Commission has held that a person or entity has standing when the person or entity has a direct, immediate, and substantial interest in the subject matter of the proceeding. *Joint Application of Pennsylvania-American Water Co.*, A-21228F0046/47 and A-210870F01 (July 9, 1998). Requiring a person or entity to have a direct, immediate, and substantial interest in the subject matter of a proceeding helps avoid frivolous, harassing lawsuits whose costs are ultimately borne, at least in part, by utility

ratepayers. *Pa. Pub. Util. Comm'n v. National Fuel Gas Distribution Corp.*, 73 Pa. PUC 552 (1990).

11. In order to bring a complaint before the Commission, a complainant must first demonstrate that it has standing to maintain the action. *Nye v. Erie Exchange*, 470 A.2d 98 (Pa. 1983). For its interest to be direct, immediate, and substantial, a complainant must show (a) that it is adversely affected by the actions challenged in the complaint; (b) that there is a close causal nexus between its asserted injury and the actions challenged in the complaint; and (c) that it has a discernible interest other than the general interest of all citizens in seeking compliance with the law. *Ken R. ex rel. C.R. v. Arthur Z.*, 682 A.2d 1267 (Pa. 1996); *In re El Rancho Grande, Inc.*, 437 A.2d 1150 (Pa. 1981); *Empire Coal Mining & Development, Inc. v. Department of Environmental Resources*, 623 A.2d 897 (Pa. Cmwlth. 1993). Mere conjecture about possible future harm does not confer a direct interest in the subject matter of a proceeding. *Official Court Reporters of the Court of Common Pleas of Philadelphia County v. Pennsylvania Labor Relations Board*, 467 A.2d 311 (Pa. 1983).

12. The Complaint contains no alleged facts demonstrating that the Complainant's interest in the subject matter is direct with respect to Rasier-PA's current rates.³ Although the Complaint alleges that the Complainant is a "consumer" of Rasier-PA as a partner/driver," the Complainant engages with Rasier-PA on this basis as an independent contractor on his own volition, during hours of his own choosing. The Complaint contains no factual allegations supporting the Complainant's status or standing as a customer of Rasier-PA that must pay its

³ The Complainant has also requested that Rasier-PA be denied permanent motor carrier certificate of public convenience authority and that its current authority be cancelled if its tariff does not reflect "realistic compensation" for drivers. In addition to the fact that the certificate of public convenience regulatory regime for transportation network companies has been supplanted by newly enacted Act 167 and its use of a license form of regulation, this relief sought by the Complainant is premised on the Commission having jurisdiction over driver compensation levels. As demonstrated above, the Commission lacks jurisdiction over driver compensation so such relief must fail as a matter of law.

rates. Rather, the Complainant is a driver/partner who alleges at best some indirect relationship between his compensation and Rasier-PA's charges. Such an interest is not sufficient to establish standing to complain about Rasier-PA's rates, which have been accepted by the Commission and included in Rasier-PA's tariff. 13. Nor does the Complainant have a direct interest in the level of Rasier-PA's assessment fee from the Commission for regulatory expenses. The Complaint asserts that the Commission should charge Rasier-PA "an assessment to offset costs of adjudicating and enforcing regulations." The Complainant has no direct interest in the level of Rasier-PA's assessment for regulatory expenses. This fee is set by the Commission and paid by Rasier-PA. Pursuant to Section 510 of the Public Utility Code ("Code"), the Commission calculates the amount of its expenditures for the administration of the Code and allocates to each public utility a share of those expenses. The statute provides for the filing of objections to the level of amounts charged to public utilities, but only by public utilities. 66 Pa.C.S. § 510(c). It is the Commission, with input from public utilities, that determines the appropriate level of Rasier-PA's assessment as part of an administrative process, not driver/operators such as the Complainant. The Complainant has not established any direct interest in the level of Rasier-PA's regulatory assessment.

C. Conclusion

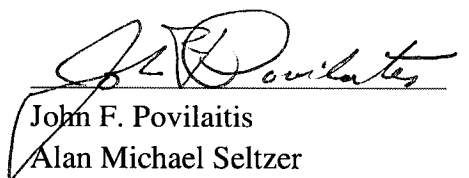
13. The Complaint should be dismissed in its entirety. None of the eight items listed in paragraph 5 (Requested Relief) of the Complaint can be adjudicated by the Commission. As a preliminary matter, the Commission lacks jurisdiction over the Complaint to the extent it purports to raise "class action" claims. Second, the Complainant has no standing under Pennsylvania law to challenge the amount of Rasier-PA's assessment (Requested Relief items 2 and 4) or Rasier-PA's charges to customers (Requested Relief items 1, 2, 3). Third, since

compensation is a private contractual matter between Rasier-PA and its drivers, the Commission has no legal authority to resolve any issues raised by the Complaint or relief requested with respect to this issue (Requested relief item 5). Challenges to Rasier-PA's existing authority to operate and provide TNC services in Pennsylvania (Requested Relief items 6 and 8) are essentially collateral attacks on previously granted Commission authority to Rasier-PA that are not supported by any material changes in the law or facts that existed when such authority was granted. Finally, the Complaint's request that the Commission mandate that Rasier-PA "invest in their own vehicles and hire drivers" (Request for Relief item 7) constitutes an unlawful and impermissible intervention into Rasier-PA's business model and managerial discretion, neither of which are permissible under Pennsylvania law.

WHEREFORE, Rasier-PA, LLC hereby requests that these Preliminary Objections be granted, that the Complaint filed by Mr. Robert Ely be dismissed in its entirety with prejudice, and that the Commission grant Rasier-PA, LLC such other relief as is just and reasonable under the circumstances.

Respectfully submitted,

Dated: November 15, 2016


John F. Povilaitis
Alan Michael Seltzer
Buchanan Ingersoll & Rooney PC
409 North Second Street
Suite 500
Harrisburg, PA 17101
(717) 237-4820

Attorneys for Rasier-PA, LLC

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Robert Ely	:	
	:	
Complainant,	:	
	:	Docket No. C-2016-2571984
v.	:	
	:	
Rasier-PA LLC	:	
	:	
Respondent.	:	

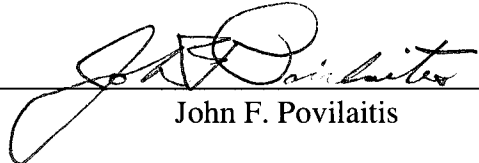
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

Via E-Mail and First-Class Mail

Robert Ely
1163 Miller Road
Lake Ariel, PA 18436

Dated this 15th day of November, 2016.



John F. Povilaitis