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VIA E-FILING

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

Re: *Friedman Wagner-Dobler v. Rasier-PA, LLC*
Docket No. C-2017-2593690

Dear Secretary Chiavetta:

On behalf of Rasier-PA, LLC, enclosed for electronic filing is the Main Brief in the above-captioned matter.

Copies have been served on all parties as indicated in the attached Certificate of Service.

Sincerely,


Brian C. Wauhop

BCW/tlg
Enclosure
cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

FRIEDMAN WAGNER-DOBLER

v.

RASIER-PA, LLC

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:
:
:
:

Docket No. C-2017-2593690

**MAIN BRIEF
ON BEHALF OF
RASIER-PA, LLC**

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Dated: November 30, 2017

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I. STATEMENT OF THE CASE

A. Introduction

This case presents a simple and straightforward issue: should a rider be permitted to circumvent the Pennsylvania Public Utility Commission's ("Commission") lack of jurisdiction over the review and approval of Transportation Network Company ("TNC") rates and have the Commission impose a taxi-like metered price for TNC service when the price a customer agreed to pay in advance for a ride does not meet the customer's subjective expectations regarding price? Rasier-PA, LLC d/b/a Uber ("Uber" or the "Company") respectfully represents that the answer is no, because (i) the Commission has no jurisdiction to determine the basis for TNC process, (ii) the rider was given the option of accepting or rejecting the estimated price and without exception accepted the quoted price, and (iii) it is not reasonable to require TNCs to comply with the subjective price expectations of every customer. Uber riders *are provided with an estimated price of the ride before they accept the ride*. Armed with that information, the Uber rider is free to decline a ride (and the service provided by a TNC) based on the price; change the pickup location or destination to alter the ride price; contact the driver to request a correction to the ride route; or utilize another TNC service, a taxi, or some other transportation option. TNCs are not considered public utilities in Pennsylvania, and indeed, the legal standards that govern TNC service are not the same as the standards applicable to public utility service. As a result, the facts of this case do not support the conclusion that Uber violated any law or regulation that the Pennsylvania Public Utility Commission ("Commission") has jurisdiction to decide, including service issues.

This dispute began on March 14, 2017, when Friedman Wagner-Dobler ("Complainant") filed a Formal Complaint (the "Complaint") at the Commission alleging that Uber overcharged

him for rides he accepted in February-March 2017. For each of the disputed rides, the application accepted a pickup location depicted to be on an on-ramp to a highway near the Lemieux Sports Center.¹ In certain pickup locations, the Company's application selects as the pickup point a road which is different from the pickup point where the rider physically enters the vehicle.² The up-front price accepted by the Complainant for the disputed rides included the distance required to complete the trip on the highway.³

The Complaint demands that Uber be directed to (i) provide Complainant a refund for the several rides specified in the Complaint and complete an audit of all his past rides; (ii) audit all Uber rides taken by all customers in Pennsylvania and refund them any alleged overcharges; and (iii) fix an alleged problem with Uber's "algorithm" involving changes to the pickup point and distance traveled in a ride. The Complaint also demanded that Uber's TNC license be suspended until all these demands are satisfied.

Despite settlement communications between the Company and the Complainant (the "Parties"), the dispute could not be resolved prior to the evidentiary hearing held on September 28, 2017. Nonetheless, for the reasons set forth below, the Complaint should be dismissed and the relief requested by the Complainant denied.

First, the Complainant challenged the prices he was charged for rides he accepted on February 24, March 6, and March 10, 2017. However, the evidence presented at hearing confirmed that Uber provided refunds for the cost of these rides down to the minimum ride charge. Therefore, the Complainant's claims for refunds are now moot.

Second, the bulk of the Complainant's testimony relates to complaints about Uber's charges and requests that the Commission direct relief on behalf of the Complainant and "other

¹ N.T. 80:22-24.

² N.T. 62:16-25, 63:1-2.

³ N.T. 79:16-25, 80:1-11.

customers.” These claims are not within the Commission’s jurisdiction to decide and the Complainant does not have legal standing to prosecute claims on behalf of other customers.

Third, the Complainant has failed to establish a *prima facie* case that the Company provided unreasonable service or committed any violation of the Public Utility Code (“Code”), regulation, or order of the Commission. The evidence presented at hearing does not establish any wrongdoing on the Company’s part.

Finally, to the degree the Complainant could be considered to have carried his burden of proof (which he did not do), the Company successfully rebutted any *prima facie* case with significant evidence unchallenged by the Complainant at hearing. The Company provided evidence rebutting any claims set forth by the Complainant, and the Complainant never rebutted any of the Company’s evidence.

For these reasons, the Commission should dismiss the Complaint.

B. Procedural History

1. On or about March 14, 2017, the Complainant filed the Complaint against the Company.

2. Commission records indicate that the Complaint was served upon Uber on March 16, 2017. Uber’s Answer to the Complaint would therefore be due on April 5, 2017. However, the Commission’s Notice of Complaint and the Complaint itself never reached the legal department at the Company. The Company became aware of the Complaint when it received the Notice of Hearing dated July 17, 2017 scheduling an evidentiary hearing on August 28, 2017 before Administrative Law Judge Katrina F. Dunderdale (“ALJ”).

3. On August 8, 2017, the Company filed an unopposed request for continuance of the August 28, 2017 hearing to allow an investigation of the matter and to attempt resolution of the Complaint.

4. On August 10, 2017, the ALJ issued the First Interim Order granting a request for continuance, but not allowing the full period Uber requested.

5. By Order dated August 11, 2017, the ALJ rescheduled the hearing to September 28, 2017.

6. On September 22, 2017, the Company filed a Motion for Entry of a Procedural Order Setting a Case Management Schedule due to unsuccessful settlement discussions and the presence of significant legal issues affecting the merits of the Complaint.⁴

7. On September 25, 2017, the Complainant filed an Answer to the Company's Motion for Entry of a Procedural Order Setting a Case Management Schedule.

8. Also on September 25, 2017, the ALJ issued the Second Interim Order denying the Company's Motion for Entry of a Procedural Order Setting a Case Management Schedule.

9. On September 26, 2017, the Company filed a Motion for Leave to File an Answer *Nunc Pro Tunc*.⁵

10. On September 27, 2017, the ALJ issued the Third Interim Order denying the Company's Motion for Leave to File an Answer *Nunc Pro Tunc*.

11. On September 27, 2017, the Company filed a Hearing Memorandum.

12. On September 28, 2017, the Complainant filed a Prehearing Memorandum.

⁴ Uber was optimistic that settlement may be achievable given that refunds had been provided to the Complainant and the Commission did not have jurisdiction to grant the pricing remedy sought by the Complainant.

⁵ In the Company's view, the request to file an Answer *nunc pro tunc* was reasonable given that the original due date was April 5, 2017 and much of the relief sought by Complainant had already been provided.

13. On September 28, 2017, an evidentiary hearing was held. The Complainant appeared *pro se* and presented direct testimony. The Complainant did not provide any exhibits or documentary evidence. The Company provided evidence in the form of witness testimony from Jordan Holtzman-Constan and its TNC tariff.⁶

14. On October 26, 2017, the Commission received a copy of the transcript of the hearing.

15. On November 2, 2017, the ALJ issued an Interim Order closing the hearing record.

16. On November 7, 2017, the ALJ issued a Post-Hearing Interim Order reopening the record to allow the parties to file briefs in this matter.

17. Uber submits this Brief in accordance with the briefing schedule established in the ALJ's November 7, 2017 Post-Hearing Interim Order reopening the record.

II. APPLICABLE LEGAL STANDARDS

A. Jurisdiction of the Commission

Chapter 26 of the Code makes it clear that generally Title 66 does not apply to a TNC company or a TNC driver, with the exception of Chapter 3 (relating to the Public Utility Commission), Chapter 5 (relating to powers and duties), Chapter 7 (relating to procedures on complaints), Chapter 15 (relating to service and facilities), and Chapter 33 (relating to violations and penalties).⁷ Section 701 of the Code provides that any person may complain, in writing, about any act or thing done or omitted to be done by a public utility in violation, or claimed

⁶ The Company offered a copy of its tariff as an exhibit pursuant to 52 Pa. Code Sec. 5.406(a)(1) authorizing submission of public documents and documents on file with the Commission without being noticed or numbered. At hearing, the ALJ refused to admit the tariff as a public document on file with the Commission but later noted on the record that the Company was relying on the Company's tariff Certificate Number A-2014-2416127 Experimental-PA PUC Number 2. (N.T. 69:7-9; 102:5-10).

⁷ 66 Pa.C.S. § 2603(b)(1).

violation, of any law that the Commission has jurisdiction to administer, or any regulation or order of the Commission.⁸

The Commission has only those duties, powers, responsibilities and jurisdiction as are expressly or by necessary implication given to it by the Legislature.⁹ The Commission must act within, and cannot exceed, its jurisdiction.¹⁰ Jurisdiction may not be conferred by the parties where none exists.¹¹ A challenge to subject matter jurisdiction of a forum to hear a particular dispute is never waived; this jurisdictional question may be raised at any stage of the judicial process.¹²

The Commission requires TNCs operating in Pennsylvania to obtain a license.¹³ However, the Code does not authorize the Commission to set or review rates that TNC drivers charge to riders. Code Section 2607(f) explicitly states “[t]he amount of a donation, charge, fare or other compensation provided or received for transportation network service shall not be subject to review or approval by the commission under Chapter 13 (relating to rates and distribution systems).”¹⁴

It is well established that Commission regulations do not provide for class actions and that this form of action is outside of the Commission’s jurisdiction.¹⁵ This principle was recently

⁸ 66 Pa.C.S. § 701.

⁹ *Rogoff v. The Buncher Company*, 395 Pa. 477, 151 A.2d 83 (1959), *Western Pennsylvania Water Company v. Pa. P.U.C.*, 311 A.2d 370 (Pa. Cmwlth. 1973).

¹⁰ *City of Pittsburgh v. Pa. P.U.C.*, 43 A.2d 348 (Pa. Super. 1945).

¹¹ *Roberts v. Martorano*, 427 Pa. 581, 235 A.2d 602 (1967).

¹² *Commonwealth v. Atlantic & Gulf Coast Stevedores, Inc.*, 422 Pa. 442, 221 A.2d 128 (1966), *see also Lydine Dutton v. Cordia Communications Corporation*, Docket No. F-2010-2201413 (Final Order entered September 22, 2011) (“...jurisdictional issues are never waived...”).

¹³ 66 Pa.C.S. § 2604.

¹⁴ 66 Pa.C.S. § 2607(f).

¹⁵ *See Walter Painter and Donna Painter v. Aqua Pennsylvania, Inc.*, Docket No. C-2011-2239556 (Order entered January 7, 2014); *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).

applied to dismiss demands that the Commission order relief on behalf of all Pennsylvania customers in a complaint filed against Rasier-PA, LLC.¹⁶

B. Safe, reasonable and adequate service

Chapter 26 of the Code deals with TNC service in Pennsylvania. Code Section 2603 explains which laws will and will not apply to TNC companies and service, and includes the following provision:

Except as otherwise provided under this chapter, the following laws and regulations of this Commonwealth may not apply to a transportation network company or transportation network company driver:

(1) This title [the Public utility Code], *except* that the commission may regulate transportation network companies under Chapters 3 (relating to public utility commission), 5 (relating to powers and duties), 7 (relating to procedure on complaints), 15 (relating to service and facilities) and 33 (relating to violations and penalties) and this chapter. If a subject is regulated under this chapter in addition to another chapter under this paragraph, this chapter shall apply.¹⁷

The Commission's jurisdiction over TNC service is articulated by a specific service standard that is narrower than the Commission's general authority over jurisdictional service. Code Section 2604.3, titled "Service standards," provides that in general, "[w]here transportation network services are offered, a transportation network company must take *reasonable steps* to ensure that the service provided by each transportation network company driver who utilizes the digital network is safe, reasonable and adequate."¹⁸ There are no reported cases or Commission decisions interpreting Code Section 2604.3(a). Thus the service standard for TNCs is that they must take "reasonable steps" to provide safe, reasonable and adequate service.

¹⁶ See *Robert Ely v. Rasier-PA LLC*, Docket No. C-2016-2571984. (July 20, 2017 Order Granting in Part and Denying in Part Preliminary Objections, p. 5, holding: "Uber is correct. Class actions are not permitted under the Public Utility Code and Mr. Ely cannot represent the interests of any other customer. The complaint cannot be brought on behalf of 'all others similarly situated,' as is possible in proceedings brought before a Court of Common Pleas.").

¹⁷ 66 Pa.C.S. Sec. 2603(b)(1) (emphasis added).

¹⁸ 66 Pa.C.S. § 2604.3(a).

There are no reported cases or Commission decisions applying Code Section 1501 (relating to public utility service) or Section 2604.3(a) to TNC service. However, the Commonwealth Court has ruled that Code Section 1501 requires a complainant to establish that a public utility violated its duty to provide reasonable service in order to sustain a complaint brought under this section:

We hold that in order for the PUC to sustain a complaint brought under this section, the utility must be in violation of its duty under this section. Without such a violation by the utility, the PUC does not have the authority, when acting on a customer's complaint, to require any action by the utility.¹⁹

Read together, Code Sections 2603(b)(1), 2604.3 and 1501 impose a duty upon TNCs (which are not public utilities) to take reasonable steps to ensure that the service provided by each transportation network company driver who utilizes the digital network is safe, reasonable and adequate. Therefore, in order to sustain a complaint under Code Section 1501, a complaining party must prove that a TNC did not take reasonable steps to provide safe, reasonable and adequate service.²⁰

C. Burden of proof

Code Section 332(a) states that the proponent of a rule or order has the burden of proof in a Commission proceeding,²¹ except as otherwise provided in Code Section 315.²² “Burden of proof” means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party.²³ In order to prevail in this proceeding, the Complainant has the burden of showing that the Company

¹⁹ *West Penn Power Co. v Pa. P.U.C.*, 478 A.2d 947, 949 (Pa. Cmwlth. 1984) (footnote omitted).

²⁰ *Id.*; see also 66 Pa.C.S. § 2604.3(a).

²¹ 66 Pa.C.S. § 332(a).

²² 66 Pa.C.S. § 315.

²³ *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

is responsible or accountable for the problem described in the Complaint.²⁴ The Complainant must establish his case by a preponderance of the evidence.²⁵

If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the public utility.²⁶ If a public utility does not rebut that evidence, a complainant will prevail.²⁷ If the utility rebuts a complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility's evidence by a preponderance of the evidence.²⁸ The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on the complainant.²⁹

Furthermore, to withstand appeal, substantial evidence in the record must support the decision of the Commission.³⁰ The term "substantial evidence" means such relevant evidence that a reasonable mind may accept as adequate to support a conclusion.³¹ More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.³² In addition, the offense must be a violation of the Code, the Commission's regulations, or an outstanding order of the Commission.³³

²⁴ *Patterson v. Bell Telephone Company of Pennsylvania*, Docket No. F-8966524 (Final Order Entered February 8, 1990), *Feinstein v. Philadelphia Suburban Water Company*, Docket No. 20822 (Final Order Entered October 6, 1976).

²⁵ *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600 (Pa. Cmwlth. 1990), alloc. den., 529 A.2d 654, 602 A.2d 863 (1992).

²⁶ *Heller v. Indian Spring Water Co.*, C-2012-2334240 (Final Order Entered June 7, 2013) (citing *Repogle v. Pennsylvania Electric Company*, Docket No. F-06727378 (Final Order Entered October 9, 1980)), and *Waldron v. Philadelphia Electric Company*, 54 Pa. PUC 98 (1980).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *See, e.g.*, Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704, *Yellow Cab Company v Pa. P.U.C.*, 524 A.2d 1069 (Pa. Cmwlth. 1987).

³¹ *Norfolk & Western Ry. Co. v. Pa. P.U.C.*, 489 Pa. 109, 413 A.2d 1037 (1980).

³² *Norfolk & Western Ry. Co. v. Pa. P.U.C.*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Commonwealth, Dep't. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

³³ 66 Pa.C.S. § 701; *West Penn Power Co. v Pa. P.U.C.*, 478 A.2d 947, 949 (Pa. Cmwlth. 1984).

Accordingly, the record in this case must be reviewed to determine whether the Complainant has satisfied his burden of proof, *i.e.*, whether the Complainant has established by a preponderance of the evidence that Uber has failed to take reasonable steps to provide safe, reasonable and adequate TNC service to the Complainant. Additionally, any finding that Uber has provided unreasonable service also must be supported by substantial record evidence.

III. SUMMARY OF THE ARGUMENT

The Complainant is not entitled to relief under any of the theories he has asserted. First, at hearing, the Complainant admitted that Uber has provided refunds to the Complainant for all the rides specified in the Complaint where overcharging was alleged. Uber's witness also confirmed that Uber refunded the Complainant for the rides listed in the Complaint. The Complainant did not identify any other rides requiring a refund, meaning that his demands for refunds are now moot.

Second, the remaining allegations in the Complaint and the Complainant's hearing testimony relate to TNC ratemaking and class actions, issues that are beyond the Commission's jurisdiction to decide. The core of the Complainant's argument is that Uber should be directed to operate and charge rider prices similar to a taxi service, determined at the end of every ride based on actual time and distance traveled. Because the Commission has no jurisdiction to regulate TNC rates, these claims must be dismissed, just as the requests that similar relief be granted to other Uber customers in Pennsylvania (class action) must also be dismissed.

Third, the Complainant failed to satisfy his burden of proof establishing that the Company committed any violation of the Public Utility Code, 66 Pa.C.S. § 101 *et seq.* ("Code") or any regulation, order or rule that the Commission has authority to administer. At hearing, the Complainant admitted multiple times that he accepted the rides after being provided the price of the ride in advance and agreeing to that price. The Complainant made no allegation and

provided no evidence showing that Uber charged him a price that is different than the one he was given prior to accepting the rides.

Finally, to the degree the Complainant may have established a case that Uber committed a service standard violation, Uber rebutted any such *prima facie* case with a preponderance of evidence. On balance, the evidence provided at hearing establishes that at all times relevant to this dispute the Company has taken reasonable steps to provide adequate, safe and reasonable service to the Complainant. Complainant has not presented any evidence showing the existence of reasonable steps that Uber could have taken, but did not, in its provision of service to the Complainant.

IV. ARGUMENT

A. The Complainant's demands for refunds are moot.

The Complainant demands refunds for rides he took with Uber on March 10, 2017 and March 13, 2017.³⁴ In the Complaint and at hearing, the Complainant testified he should have been charged the minimum fare for these rides, which he estimated to be around \$7.30.³⁵

The doctrine of mootness requires that an actual controversy exist at all stages of review, not merely when the complaint is filed.³⁶ An issue can become moot during the pendency of an appeal due to an intervening change in the facts of the case or due to a change in the applicable law.³⁷

At hearing, the Complainant admitted Uber provided refunds for the all the rides he claims he was overcharged.³⁸ In fact, the Complaint states that the Company refunded the

³⁴ Complaint ¶ 5(A).

³⁵ Complaint (description of the "First Case," alleging Uber's "minimum fare" is \$7.30.); N.T. 33:1-23.

³⁶ *XO Communications Services, Inc., v. Verizon Pennsylvania, Inc.*, Docket No. C-2008-2038195 (Final Order entered November 8, 2010) (citing *In re Gross*, 476 Pa. 203, 382 A.2d 116 (1978)).

³⁷ *In re Gross*, 476 Pa. 203, 382 A.2d 116 (1978).

³⁸ N.T. 46:13-16.

Complainant for the February 24, 2017 ride.³⁹ When discussing one example provided in the Complaint, the Complainant testified he did not actually accept a ride on March 3, 2017.⁴⁰ Uber's witness, Jordan Holtzman-Constan confirmed that Uber made refunds to the Complainant for all the trips listed in the Complaint, even though the Complainant agreed to the price before taking such trips.⁴¹ The Complainant could not identify any other rides he took where he was "overcharged" and wanted a refund.

As the evidence presented at hearing establishes, the Company provided Mr. Wagner-Dobler the refunds he is seeking in the Complaint. As a result, the Complainant's claims regarding refunds should be dismissed as moot.

B. The Commission has no jurisdiction to hear and rule upon on allegations involving Uber's prices or rates and the requested class action relief.

In the Complaint and at hearing, the Complainant raised claims related to Uber's prices and asked the Commission to provide relief to all other Uber customers in Pennsylvania. Both of these demands must be dismissed because they are beyond the Commission's jurisdiction to decide.

1. Price of rides

At hearing, the Complainant stated that his principal dispute stems from the price he agreed to pay for trips from the Lemieux Sports Center in Cranberry, Pennsylvania to his workplace, NetApp, which is also located in Cranberry, Pennsylvania.⁴² The Complainant testified that when he requested a ride, he was shown the actual price prior to accepting the

³⁹ Complaint (description of the "First Case"); N.T. 38:9, 39:6.

⁴⁰ Complaint (description of "Second Case"); N.T. 53:22-25, 64:5-8.

⁴¹ N.T. 77:14-23

⁴² N.T. 17:22-24.

ride.⁴³ He admitted that he accepted the price shown to him in advance of each ride,⁴⁴ but argued he should have been charged a minimum price for these rides, roughly \$7.30.⁴⁵ The Complainant requests that the Commission modify Uber's pricing method and direct the Company to charge a fare based on actual time and distance for the ride regardless of the estimated price transparently shown to riders before a trip begins. The Complainant testified he wants the Commission to get involved "...to regulate..." Uber's price practices.⁴⁶

The Commission has only those duties, powers, responsibilities and jurisdiction as are expressly or by necessary implication given to it by the Legislature.⁴⁷ The Code does not authorize the Commission review or approve rates for TNCs. Code Section 2607(f) explicitly states that fares or charges for transportation network service "...shall not be subject to review or approval by the commission..."⁴⁸ The Code defines "Rate" as follows:

"Rate." Every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility, or contract carrier by motor vehicle, made, demanded, or received for any service within this part, offered, rendered, or furnished by such public utility, or contract carrier by motor vehicle, whether in currency, legal tender, or evidence thereof, in kind, in services or in any other medium or manner whatsoever, and whether received directly or indirectly, and any rules, regulations, practices, classifications or contracts affecting any such compensation, charge, fare, toll, or rental.⁴⁹

Here, the Complainant is asking the Commission to review and make determinations about the prices Uber charges for rides. However, Code Section 2607(f) prohibits the Commission from reviewing and approving TNC prices and fares. As a result, the

⁴³ N.T. 33:6-9.

⁴⁴ N.T. 32:8-10, 51:21-22, 54:5-6; 14-17.

⁴⁵ N.T. 33:10-23.

⁴⁶ N.T. 44:21-25; 45:1-8 (stating he wants the Commission to "...take the appropriate steps to regulate...").

⁴⁷ *Rogoff v. The Buncher Company*, 395 Pa. 477, 151 A.2d 83 (1959), *Western Pennsylvania Water Company v. Pa. P. U.C.*, 311 A.2d 370 (Pa. Cmwith. 1973).

⁴⁸ 66 Pa.C.S. § 2607(f).

⁴⁹ 66 Pa.C.S. § 102.

Complainant's claims regarding Uber's prices are beyond the Commission's jurisdiction and must be dismissed.

2. Class action relief

Similarly, the Complainant's claims for class action relief are beyond the Commission's jurisdiction. It is well established that Commission regulations do not allow for class actions and that this form of action is outside of the Commission's jurisdiction.⁵⁰

In both the Complaint and at hearing, the Complainant requested that the Commission provide relief to other Uber customers besides himself. In the Complaint, he demanded the Commission order an audit of "...all Uber trips by any customers in Pennsylvania, to determine excessive amounts charges, and refund such amounts."⁵¹ At hearing, he appeared to abandon claims for class action relief,⁵² but later testified that the Commission could afford greater relief to "...consumers in general...,"⁵³ and the point of his Complaint was to bring "...to the Commission's attention a systematic behavior of charging customers outside the published tariff."⁵⁴

Demands for audits of all rides provided by Uber in Pennsylvania and that refunds be made to these customers are class action claims. As such, the Complainant's claims for class action relief should be dismissed for lack of Commission jurisdiction.

C. The Complainant failed to meet his burden of proof.

The Complainant has the burden of proving the Company violated the Code or did not take reasonable steps to provide reasonable service. Review of the evidence submitted in this

⁵⁰ See *Robert Ely v. Rasier-PA LLC*, Docket No. C-2016-2571984. (July 20, 2017 Order Granting in Part and Denying in Part Preliminary Objections); *Walter Painter and Donna Painter v. Aqua Pennsylvania, Inc.*, Docket No. C-2011-2239556 (Order entered January 7, 2014); *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).

⁵¹ Complaint ¶ 5(C).

⁵² N.T. 27:17-21.

⁵³ N.T. 42:3.

⁵⁴ N.T. 44:22-24.

case shows that the Complainant did not prove either of these things. Indeed, the Complainant's case relies solely on his testimony and the allegations set forth in the Complaint. This is not substantial evidence, and therefore, the Complaint must be dismissed.

As the party seeking relief from this Commission in this case, *i.e.*, a finding that Uber had failed to provide reasonable service, the Complainant has the burden of proof in this matter.⁵⁵ The Complainant must establish his case by a preponderance of the evidence.⁵⁶ The Commission's findings and conclusions must at a minimum be based on substantial evidence.⁵⁷ The term "substantial evidence" means such relevant evidence that a reasonable mind may accept as adequate to support a conclusion.⁵⁸ More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.⁵⁹ In addition, the offense must be a violation of the Code, the Commission's regulations, or an outstanding order of the Commission.⁶⁰

At hearing, the complainant supported his claims by reference to the complaint. He did not move the Complaint into evidence as an exhibit, an action authorized by the Commission's regulations.⁶¹ As such, he did not provide any additional evidence, *i.e.* than his testimony, in support of the complaint.

⁵⁵ See *supra*, p. 10-12.

⁵⁶ *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600 (Pa. Cmwlth. 1990), alloc. den., 529 A.2d 654, 602 A.2d 863 (1992).

⁵⁷ See, e.g., Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704, *Yellow Cab Company v Pa. P.U.C.*, 524 A.2d 1069 (Pa. Cmwlth. 1987).

⁵⁸ *Norfolk & Western Ry. Co. v. Pa. P.U.C.*, 489 Pa. 109, 413 A.2d 1037 (1980).

⁵⁹ *Norfolk & Western Ry. Co. v. Pa. P.U.C.*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Commonwealth, Dep't. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

⁶⁰ 66 Pa.C.S. § 701; *West Penn Power Co. v Pa. P.U.C.*, 478 A.2d 947, 949 (Pa. Cmwlth. 1984).

⁶¹ See 52 Pa. Code § 5.405(b), providing that "[e]xcept as provided in subsection (c) and in the case of a noncontested proceeding, a pleading, or any part thereof may not be considered as evidence of a fact other than that of filing thereof unless offered and received into evidence." The two exceptions in this regulation do not apply: first, at no time to Uber admit any adverse fact in an Answer filed under oath; and second, this was a contested proceeding. Thus, the Complainant failed to enter the Complaint into evidence.

The Complainant's testimony was filled with argument and provided few additional facts. For example, he made numerous unsubstantiated allegations interspersed with personal beliefs and conjecture:

- "I believe that there is...a systematic problem whereby Uber optimizes its profit officially by charging fares in whatever way they do that, that in some cases are not correct."⁶²
- "I have a hunch this is systematic...I think this is clearly systematic..."⁶³
- "I do believe that it is most probable that similar small advantages to Uber are exploited in the same way...while I can only prove it for these particular occasions..."⁶⁴
- [referring to the price he was charged for rides] "I do believe that is unconscionable and goes contrary to the expectations that are contained in the app."⁶⁵
- "There may be an additional trip. I am not sure about it, and if there is, it would be something else of the same order [trips where he was charged \$18-19.00]."⁶⁶

When challenged on this type of testimony, the Complainant admitted he was speculating.⁶⁷ As a matter of law, conjecture, unsubstantiated allegations, personal beliefs and speculations are not substantial evidence.⁶⁸ The Complainant's personal beliefs and speculations are not evidence that can satisfy the Complainant's burden of proof in this matter. Importantly, the Complainant presented absolutely no evidence showing that there were reasonable modifications of its Application or mapping service that Uber could have implemented, but did not.

⁶² N.T. 27:21-25.

⁶³ N.T. 26:25, 27:5.

⁶⁴ N.T. 36:3-7.

⁶⁵ N.T. 42:8-10.

⁶⁶ N.T. 48:20-22.

⁶⁷ N.T. 36:14-18 ("...yes, you're right, I'm speculating. I think there is good reason to assume that, but I have no evidence, and I can't produce the evidence based on the material I have.").

⁶⁸ *Norfolk & Western Ry. Co. v. Pa. P.U.C.*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Commonwealth, Dep't. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

It is helpful in this matter to consider what the Commission has said about reasonable service in the context of public utility service. Both the Code and the Commission's regulations require only that a public utility provide service that is reasonably continuous and without unreasonable interruptions.⁶⁹ In *Re Metropolitan Edison Co.*,⁷⁰ the Commission adopted the Recommended Decision of ALJ John H. Corbett, Jr. as follows:

The Code only requires a public utility to furnish reasonable service. 66 Pa. Code § 1501. It does not mandate perfect service nor must a public utility provide the best possible service. Most certainly, a public utility is not a guarantor of either perfect service or the best possible service.

The same principle was affirmed in *Emerald Art Glass v. Duquesne Light Co.*: “[s]ection 1501 of the Code does not translate into a duty to provide ‘perfect’ service.”⁷¹

The Complainant never alleged or argued that Uber provided service that was unsafe or inadequate. As explained by the Company's witness, the Complainant's claims about the up-front price provided to the Complainant stem from a rare inconsistency in the Company's mapping system that placed the Complainant's pickup point on a highway on-ramp, and which Complainant would have seen in the App at the time of requesting his trip.⁷² Public utilities—and TNCs, pursuant to Code Section 2604.3—are required to provide reasonable service, not perfect service.⁷³ That is exactly what Uber provided to the Complainant here: he accepted rides requested through Uber (after agreeing to the price of the ride)⁷⁴ from the Lemieux Sports Center

⁶⁹ See Section II.B *supra*, p 6-7.

⁷⁰ 80 Pa. PUC 662, 672 (1993).

⁷¹ Docket No. C-00015494 (Order entered June 14, 2002), at 7 (“Emerald Art Glass”); see also *Analytical Laboratory Services, Inc. v. Metropolitan Edison Co.*, Docket No. C-20066608 (Order entered December 21, 2007).

⁷² N.T. 62:22-25, 63:1-2, 79:7-13, 81:1-6, 84:7-8, 11-15.

⁷³ *Emerald Art Glass*, at 7; see also *Analytical Laboratory Services, Inc. v. Metropolitan Edison Co.*, Docket No. C-20066608 (Order entered December 21, 2007); 66 Pa.C.S. § 2604.3(a); 66 Pa.C.S. § 1501.

⁷⁴ N.T. 32:8-10, 51:21-22, 54:5-6; 14-17.

to NetApp in Cranberry, Pennsylvania. When the Complainant challenged the price he paid, he was reimbursed.⁷⁵

Finally, there is no basis for the Complainant's argument that he is entitled to calculate his own fare and then require Uber to honor that amount instead of the up-front price provided to him before an actual ride.⁷⁶ He provided no evidence that Uber advertises customers may, on their own, calculate the prices they will pay for rides. Instead, the Complainant presented a screenshot allegedly taken from the Uber website listing the cost of the base fare, cost per minute, cost per mile, booking fee, minimum fare and cancellation fee is the advertised minimum price and argued that Uber should have charged him the minimum charge for a ride regardless of the estimated price he accepted.⁷⁷

Review of the alleged screenshot contained in the Complaint establishes that it is not the advertised price of a ride from the Lemieux Sports Center to NetApp in Cranberry, Pennsylvania. Nor did the Complainant establish that the alleged screenshot is the "published fare" of a ride from the Lemieux Sports Center to NetApp in Cranberry, Pennsylvania. Importantly, the screenshot includes the following explicit notice: "Your fare will be the price presented before the trip, or based on the rates above and other applicable surcharges and adjustments."⁷⁸ The Complainant admitted he had overlooked this disclaimer when inserting the screenshot in the Complaint materials,⁷⁹ which obviously contradicts his argument that Uber advertises rides should be the lesser of a rider's fare calculation and the up-front price of a ride provided by the application prior to a ride.

⁷⁵ N.T. 46:13-16, 77:14-23.

⁷⁶ N.T. 20:7-14, 26:7-19.

⁷⁷ N.T. 19:19-25, 32:18-21, 54:23-25, 55, 56:1-4.

⁷⁸ Complaint (attachment describing "First Case"); N.T. 55:25, 56:1-4.

⁷⁹ N.T. 57:23-25, 58:1.

On balance, these facts do not establish a *prima facie* case of unreasonable service. Therefore, the Complainant has failed to carry his burden of establishing a *prima facie* case in support of his claims.

D. The Company successfully rebutted the Complainant's case with substantial evidence.

Even assuming *arguendo* that the Complainant established a *prima facie* case against the Company (which he did not do), the Company rebutted the Complainant's case with evidence at hearing.

First, the Company presented the testimony of Jordan Holtzman-Constan, Senior Operations Manager for Uber.⁸⁰ Mr. Holtzman-Constan presented testimony establishing the following critical facts:

- When a customer requests a ride, the application gives the customer a fixed price for the ride;⁸¹
- The application analyzes and applies a number of factors in creating the up-front price,⁸² and the screenshot provided by the Complainant includes some of those factors;⁸³
- Barring extraordinary circumstances, the rider always pays the up-front price shown when ordering the ride;⁸⁴
- Uber investigates and works to make sure the Uber application is working properly and to correct inconsistencies;⁸⁵
- The mapping issue identified by the Complainant in this case is extremely rare;⁸⁶
- Uber's tariff explains how its prices for rides are calculated using time and distance components, real-time market dynamics and any surcharges that may apply;⁸⁷ and

⁸⁰ N.T. 60:7-11.

⁸¹ N.T. 82:13-16, 62:4-7 ("Uber shows what that price estimate is upfront to the rider before they kind of accept that price or request a car so that there's knowledge on how they're going to pay for it.").

⁸² N.T. 61:19-25, 62:1-8.

⁸³ N.T. 89:17-22.

⁸⁴ N.T. 85:10-23, 90:25, 91:1-4, 94:22-23.

⁸⁵ N.T. 73:1-6.

⁸⁶ N.T. 84:3-15.

- Uber is currently reviewing its tariff and will update it in the future.⁸⁸

Importantly, Mr. Holtzman-Constan testified about the numerous ways a rider can use the Company's application to ensure the ride—including the price—meets a rider's expectations:

Prior to accepting an up-front price quote, if a rider doesn't like it, there are work-arounds they can take such as closing the app and restarting the app and then trying to enter a different address, such as maybe a different unit number, or adjust the street name to try to get the correct pick-up point they want.⁸⁹

Mr. Holtzman-Constan further clarified that the Uber app will recalculate the up-front price of a ride if the pickup point is moved and then the app is closed and restarted.⁹⁰

As such, the Company provided evidence rebutting the Complainant's claims that the price he was charged was the result of a deliberate Company policy to overcharge riders and that there is no way to avoid a fare based on a pickup point that is different from the rider's location due to rare mapping defects for certain requested ride routes.

Therefore, the Complaint should be dismissed because the Complainant failed to carry his burden of proof establishing a *prima facie* case that the Company committed any violation. Furthermore, to the degree that the Complainant could be viewed to have established a *prima facie* case against the Company (which the Complainant failed to establish), the Company presented evidence sufficient to rebut the Complainant's *prima facie* case. The Complainant never rebutted the Company's evidence at any time.

V. PROPOSED FINDINGS OF FACT

1. The Complainant is Friedman Wagner-Dobler, 5729 Walnut Street, Pittsburgh, Pennsylvania, 15232. (Complaint, ¶ 1).

⁸⁷ N.T. 70:1-4.

⁸⁸ N.T. 70:5-15. Consistent with its practices and hearing testimony, Uber has updated its tariff on file with the Commission effective November 30, 2017.

⁸⁹ N.T. 63:6-13.

⁹⁰ N.T. 64:14-17.

2. The Respondent is Rasier-PA, LLC a wholly-owned subsidiary of Uber Technologies, Inc., and a licensed transportation networking company (“TNC”) providing TNC service in the Commonwealth of Pennsylvania.

3. When a customer uses the Uber application to request a ride from a TNC driver using the Uber app, the application offers the customer a specific price for the ride. (N.T. 82:13-16, 62:4-7).

4. The Uber application analyzes and applies a number of factors in calculating the up-front price. (N.T. 61:19-25, 62:1-8).

5. Barring extraordinary circumstances, the rider always pays the up-front price shown when accepting the ride. (N.T. 85:10-23, 90:25, 91:1-4, 94:22-23).

6. On March 14, 2017 the Complainant filed a Formal Complaint at the Commission disputing the prices Uber charged him for rides he requested and accepted in February 2017 and March 2017. (*see generally*, Complaint).

7. On February 24, 2017, March 10, 2017 and March 13, 2017, the Complainant requested and accepted Uber rides from the Lemieux Sports Center in Cranberry, Pennsylvania. (Complaint).

8. The Complainant was charged \$18.35 for the February 24 ride; \$18.85 for the March 10 ride; and \$18.67 for the March 13 ride. (Complaint).

9. For each of these rides, Uber provided an up-front price to the Complainant prior to him agreeing to the ride. (N.T. 32:8-10, 33:6-9).

10. The Complainant agreed to the up-front price provided him prior to each ride and did not elect any of the alternative transportation options available to him. (N.T. 51:21-22, 54:5-6).

11. After accepting the rides, Complainant disputed the agreed-upon prices he was charged for the rides. (Complaint).

12. Complainant has requested that the Commission direct Uber to cease providing riders with the transparency of pre-trip, up front prices and instead establish new fares based on actual, post-trip time and distance traveled—much like taxi service. (N.T. 26:12-19).

13. Uber provided Complainant refunds for the February 24, 2017, March 10, 2017 and March 13, 2017 rides. (N.T. 46:13-16, 77:14-23).

14. While rare, Uber's mapping systems may select a pickup point that is a different physical location than where the rider prefers to be picked up. (N.T. 62:22-25, 63:1-2, 79:7-13, 81:1-6, 84:7-8, 11-15).

15. Riders can change the pickup location for a ride by closing the app and restarting the app and changing the address, unit number, or street name associated with the pickup point. (N.T. 63:6-13).

16. The Uber application will also recalculate the up-front price of a ride if the pickup point is moved and then the app is closed and restarted. (N.T. 64:14-17).

17. The Company addresses operational issues when it discovers them. (N.T. 73:1-6).

18. Uber's tariff explains how its prices for rides are calculated using time and distance components, real-time market dynamics and any fees, costs or surcharges that may apply. (N.T. 70:1-4).

19. Uber is reviewing its tariff and will update it in the future. (N.T. 70:5-15).

VI. PROPOSED CONCLUSIONS OF LAW

1. The doctrine of mootness requires that an actual controversy exist at all stages of review, not merely when the complaint is filed. *XO Communications Services, Inc., v. Verizon*

Pennsylvania, Inc., Docket No. C-2008-2038195 (Final Order entered November 8, 2010) (citing *In re Gross*, 476 Pa. 203, 382 A.2d 116 (1978)). An issue can become moot during the pendency of an appeal due to an intervening change in the facts of the case or due to a change in the applicable law. *In re Gross*, 476 Pa. 203, 382 A.2d 116 (1978).

2. The Commission has only those duties, powers, responsibilities and jurisdiction as are expressly or by necessary implication given to it by the Legislature. *Rogoff v. The Buncher Company*, 395 Pa. 477, 151 A.2d 83 (1959), *Western Pennsylvania Water Company v. Pa. P.U.C.*, 311 A.2d 370 (Pa. Cmwlth. 1973). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. P.U.C.*, 43 A.29 348 (Pa. Super. 1945).

3. The Code does not authorize the Commission review or approve rates for TNCs. Code Section 2607(f) explicitly states that fares or charges for transportation network service “...shall not be subject to review or approval by the commission...”

4. Commission regulations do not allow for class actions and that this form of action is outside of the Commission’s jurisdiction. See *Robert Ely v. Rasier-PA LLC*, Docket No. C-2016-2571984. (July 20, 2017 Order Granting in Part and Denying in Part Preliminary Objections); *Walter Painter and Donna Painter v. Aqua Pennsylvania, Inc.*, Docket No. C-2011-2239556 (Order entered January 7, 2014); *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).

5. The Complainant carries the burden of showing that the Respondent is responsible or accountable for the problem described in the Complaint in order to prevail. *Patterson v. Bell Telephone Company of Pennsylvania*, Docket No. F-8966524 (Final Order

Entered February 8, 1990), *Feinstein v. Philadelphia Suburban Water Company*, Docket No. 20822 (Final Order Entered October 6, 1976).

6. The burden of proof must be carried by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. den.*, 529 A.2d 654, 602 A.2d 863 (1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

7. Any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. P.U.C.*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. P.U.C.*, 623 A.2d 6 (Pa. Cmwlth. 1993), 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. P.U.C.*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Commonwealth, Dep't. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

8. The offense must be a violation of the Public Utility Code, the Commission's regulations, or an outstanding order of the Commission. 66 Pa.C.S. § 701; *West Penn Power Co. v. Pa. P.U.C.*, 478 A.2d 947, 949 (Pa. Cmwlth. 1984).

9. In order to sustain a complaint against a TNC under the Code, a complaining party must prove that a TNC violated its duty to take reasonable steps to provide safe, reasonable and adequate service. *West Penn Power Co. v. Pa. P.U.C.*, 478 A.2d 947, 949 (Pa. Cmwlth. 1984); 66 Pa.C.S. § 1501; 66 Pa.C.S. § 2604.3(a); 66 Pa.C.S. § 2603(b)(1).

10. The “burden of proof” is composed of two distinct burdens: the burden of production and the burden of persuasion. *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super. 2000).

11. The burden of persuasion determines which party must produce sufficient evidence to meet the applicable standard of proof. *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super. 2000).

12. The burden of persuasion never leaves the party on whom it is originally cast, but the burden of production may shift during the course of the proceedings.” *Riedel v. County of Allegheny*, 633 A.2d 1325, 1328 n. 11 (Pa. Cmwlth. 1993).

13. The Commission does not have jurisdiction over Complainant’s claims regarding TNC prices and class actions.

14. The Complainant failed to meet his burden of proving he is entitled to relief or that the Company did not take reasonable steps to provide safe, adequate and reasonable service. 66 Pa.C.S. § 332(a).

15. The Company’s ongoing efforts to eliminate pickup point issues in the mapping system constitute reasonable steps to provide safe, adequate and reasonable service. 66 Pa.C.S. § 2604.3(a).

16. The Company has taken reasonable steps to provide reasonable, safe and adequate service to the Complainant. 66 Pa.C.S. § 1501; 66 Pa.C.S. § 2604.3(a); 66 Pa.C.S. § 2603(b)(1).

VII. PROPOSED ORDERING PARAGRAPHS

Uber proposes the following Ordering Paragraphs:

THEREFORE,

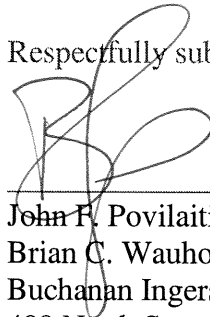
IT IS ORDERED:

1. That the complaint of Friedman Wagner-Dobler versus Rasier-PA, LLC d/b/a Uber at Docket No. C-2017-2593690 is hereby dismissed because the Commission lacks jurisdiction to review issues regarding TNC rates or class action claims; the Complainant failed to carry his burden proving the Respondent committed a violation of the Public Utility Code or a rule or regulation that the Commission has jurisdiction to administer; and the Company provided a preponderance of substantial evidence rebutting the Complainant's case.
2. The Secretary shall mark the case closed.

VIII. CONCLUSION

Based upon the foregoing, it is respectfully requested that the Complaint of Friedman Wagner-Dobler be dismissed with prejudice.

Respectfully submitted,



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Attorneys for Rasier-PA, LLC

Dated: November 30, 2017

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

FRIEDMAN WAGNER-DOBLER

v.

RASIER-PA LLC

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:
:
:
:

Docket No. C-2017-2593690

CERTIFICATE OF SERVICE

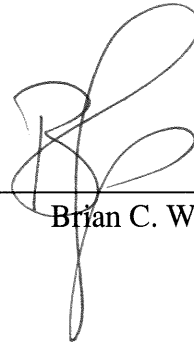
I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party):

Via E-Mail and First-Class Mail

Hon. Katrina L. Dunderdale
Administrative Law Judge
Piatt Place, Suite 220
301 5th Avenue
Pittsburgh, PA 15222
kdunderdal@pa.gov

Friedman Wagner-Dobler
5729 Walnut Street
Pittsburgh, PA 15232
friedmanwd@gmail.com

Dated this 30th day of November, 2017.



Brian C. Wauhop