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December 13, 2017

VIA E-FILING

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

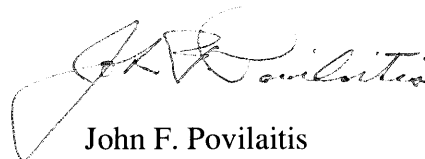
Re: *Robert Ely v. Rasier-PA, LLC*
Docket No. C-2016-2571984

Dear Secretary Chiavetta:

On behalf of Rasier-PA, LLC, enclosed for electronic filing is a verified Motion to Dismiss in the above-captioned matter, as well as a Notice to Plead.

Copies have been served on the presiding Administrative Law Judge and the Complainant as indicated in the attached Certificate of Service.

Sincerely,


John F. Povilaitis

JFP/tlg
Enclosure
cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Administrative Law Judge
Joel H. Cheskis

ROBERT ELY

v.

RASIER-PA LLC

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:
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Docket No. C-2016-2571984

NOTICE TO PLEAD

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

Pursuant to 52 Pa. Code § 5.103(c), you are hereby notified that, if you do not file a written response to the enclosed Motion to Dismiss of Rasier-PA, LLC (“Motion”), within **twenty (20) days** from service of this Notice, the Motion may be granted. All 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.

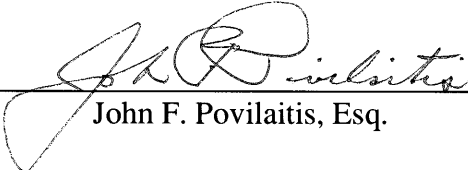
File with:

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
Brian C. Wauhop
Buchanan Ingersoll & Rooney, PC
409 North Second Street, Suite 500
Harrisburg, PA 17101

Dated: December 13, 2017


John F. Povilaitis, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ROBERT ELY

v.

RASIER-PA LLC

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Docket No. C-2016-2571984

RASIER-PA LLC'S MOTION TO DISMISS

Pursuant to 52 Pa. Code § 5.103, Rasier-PA, LLC (“Rasier-PA” or “Company”), by and through its attorneys, John F. Povilaitis, Brian C. Wauhop and Buchanan Ingersoll and Rooney PC, moves the Pennsylvania Public Utility Commission (“Commission”) and Administrative Law Judge (“ALJ”) Joel H. Cheskis for the entry of an order dismissing the complaint filed by Robert Ely (“Ely” or the “Complainant”) for failure to establish a *prima facie* case against the Company. In support of this Motion to Dismiss, Raiser-PA states as follows:

I. INTRODUCTION AND PROCEDURAL HISTORY

1. This matter commenced on October 18, 2016 when the Complainant, Mr. Robert Ely, filed a Formal Complaint at the above-captioned docket. Rasier-PA filed an Answer and New Matter and Preliminary Objections to the Complaint on November 15, 2016. On November 25, 2016 and December 6, 2016 respectively, Mr. Ely replied to Rasier-PA’s Preliminary Objections and the Company’s Answer and New Matter.

2. On July 20, 2017, ALJ Cheskis issued an Order granting in part and denying in part Rasier-PA’s Preliminary Objections. The ALJ dismissed the Complainant’s driver and customer claims related to class actions and driver compensation issues between Rasier-PA and its drivers. The ALJ also dismissed the allegations regarding use of personally owned, non-commercially licensed vehicles, the means by which those vehicles are obtained, and retaining

staff to use those vehicles. The ALJ observed that these were either matters known to the Commission when it granted the Company authority to operate in Pennsylvania or are matters of managerial discretion not subject to Commission jurisdiction. *See Order Granting in Part and Denying in Part Preliminary Objections*, Docket No. C-2016-2571984, p. 5-7. (Order entered July 20, 2017) (hereinafter “July 20, 2017 Order”). The ALJ did not dismiss the entire complaint, holding that Complaint’s averments regarding “exploiting” drivers or in regard to leasing or using driver provided cars relating to his time as a driver using the Uber app, viewed in the light most favorable to the Complainant, may give rise to a violation of the Code. *Id.*, p. 7. The ALJ also deemed the Complainant’s allegation of driver “exploitation” to be sufficient to deny Raiser-PA’s objection to Mr. Ely’s standing to pursue his allegations. *Id.*, p. 8-9. An initial call-in telephonic hearing was set for this matter on September 1, 2017.

3. On August 7, 2017, Raiser-PA served Interrogatories and Requests for Production of Documents on the Complainant. By email dated August 24, 2017, Mr. Ely requested that the hearing scheduled for September 1, 2017 be continued for at least 45 days.

4. Raiser-PA did not oppose the continuance request and the ALJ granted a continuance of the September 1, 2017 hearing. The ALJ set a new initial hearing date of October 19, 2017 for this matter.

5. The parties held several resolution conference calls but were unable to settle the dispute. On October 11, 2017, the Company filed a motion requesting entry of a procedural order converting the October 19, 2017 hearing to a prehearing conference to resolve the fact that because the Complainant had failed to respond to discovery requests, the Company could not adequately prepare for hearing because it did not know what claims would be tried.

6. In response the ALJ scheduled a conference call on October 18, 2017. The parties and the ALJ convened as planned on October 18, 2017 and discussed the issues raised by Rasier-PA in its October 11, 2017 motion. The ALJ determined the October 19, 2017 hearing would proceed under a modified format wherein the Complainant would be permitted to present his case and then the Company could elect to move for dismissal of the complaint or schedule a subsequent hearing to present its case in response to the Complainant's case.

7. The hearing convened as scheduled October 19, 2017, and the Complainant presented his case generating a 31-page transcript. Two exhibits were identified but none were entered into the record.

8. The Company moved to dismiss at the close of the Complainant's case. (N.T. 42:8-25, 43, 44:1-11).

9. The ALJ did not rule on the oral motion to dismiss, but allowed the Company the opportunity to present a written motion within 60 days of the date the hearing transcript is filed.

10. Rasier-PA hereby files this Motion to Dismiss in compliance with the ALJ's direction.

II. LEGAL STANDARDS

11. As explained in *Application of King Cab LLC For Approval to Provide Taxi Service Between Points in Dauphin, Cumberland And Lancaster Counties*, Docket No. A-2015-2514005 (Final Order entered), "[a]lthough the Commission's regulations do not specifically provide for a motion to dismiss, Section 5.103 allows 'a request may be made by motion for relief desired.'" The Commission has sustained motions to dismiss made during the course of hearing. *See, e.g., Susan K. Pickford, et al., v. Pennsylvania-American Water Company*, Docket Nos. C-20078029 *et al.* (Final Order entered May 14, 2009, sustaining, in part, respondent's oral

motion to dismiss for failure to establish a *prima facie* case with respect to three issues raised in the proceeding).

12. Importantly, Section 5.103(d)(3) of Commission regulations provides that “[i]f a motion involves a question of jurisdiction, the establishment of a *prima facie* case or standing, the presiding officer may render a final determination with regard to a motion prior to the termination of hearings by issuing an initial or recommended decision.” 52 Pa. Code 5.103(d)(3); *see also Marie Jurena v. Bell Atlantic-Pennsylvania, Inc.*, Docket No. C-00003736 (Final Order entered December 22, 2000 holding that ALJ properly granted motion to dismiss prior to issuing initial decision pursuant to 52 Pa. Code 5.103(d)(3)). The presiding officer may require motions stated orally at hearing be reduced to writing. 52 Pa. Code 5.103(b).

13. Code Section 332(a) states that the proponent of a rule or order has the burden of proof in a Commission proceeding. 66 Pa.C.S. § 332(a). “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. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). In order to prevail in this proceeding, the Complainant has the burden of showing that the Company is responsible or accountable for the problem described in the Complaint. *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). The Complainant must establish his case 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).

14. If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the public utility. *Heller v. Indian Spring Water Co.*, C-2012-2334240

(Final Order Entered June 7, 2013) (citing *Replogle 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). If a public utility does not rebut that evidence, a complainant will prevail. *Id.* 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. *Id.* 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. *Id.*

15. Furthermore, substantial evidence in the record must support the decision of the Commission. 66 Pa.C.S. § 332(b) (“No sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the **reliable, probative and substantial** evidence.” (emphasis added)); *see also Yellow Cab Company v Pa. P.U.C.*, 524 A.2d 1069 (Pa. Cmwlth. 1987). The term “substantial evidence” means such relevant evidence that a reasonable mind may accept as adequate to support a conclusion. *Norfolk & Western Ry. Co. v. Pa. P.U.C.*, 489 Pa. 109, 413 A.2d 1037 (1980). 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). In addition, the offense must be a violation of the 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).

16. 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 [TNC] driver who utilizes the digital network is safe, reasonable and adequate.” 66 Pa.C.S. § 2604.3(a). Thus the customer service standard for TNCs is that they must take “reasonable steps” to provide safe, reasonable and adequate service.

17. While it is clear that Rasier-PA has obligations to its customers and must adhere to specific technical requirements regarding the use of vehicles and drivers involved in providing TNC service, Chapter 26 does not appear to impose any requirements on the Company relative to driver economic issues. Accordingly, the record in this case must be reviewed to determine whether the Complainant has satisfied his burden of proof regarding violations of law or his alleged “exploitation” as a driver, *i.e.*, whether the Complainant has established by a preponderance of the evidence that Rasier-PA has failed in some statutory obligation it had to Mr. Ely during the time he was a TNC driver. Additionally, any finding against Rasier-PA in this regard must be supported by substantial record evidence.

III. MOTION TO DISMISS

18. Complainant’s hearing testimony can be divided into four categories: (i) claims regarding his relationship with Rasier-PA as a TNC driver; (ii) complaints about vehicles with advanced technologies; (iii) complaints about drivers using vehicles that are registered in another state; and (iv) claims that he was “exploited” by Rasier-PA under a supposedly-enacted law he called the “Franchise Act.” However, at hearing, the Complainant failed to present evidence to support any of these claims. Therefore, the Complainant has failed to meet his burden of proof and the Complaint should be dismissed accordingly.

A. The Complainant failed to establish a claim regarding his relationship with Rasier-PA

19. At hearing, the Complainant testified that he felt he was treated unfairly when he worked as a TNC driver. (N.T. 8:1-4, 9:19-25, 10:1-1-4, 12:7-9, 13:24-25, 14:1-4, 16:21-22). His testimony concerned the private independent contractor relationship between himself and Rasier-PA (*Id.*), specifically, that the contract changed from the time he first agreed to drive using the Uber application provided by Rasier-PA (*Id.*).

20. As explained by the ALJ in the July 20, 2017 Order, “[t]he Commission does not have jurisdiction over complaints where the allegations raised arise from duties owed under a private contract between utilities and other parties. The appropriate venue for disputes of this nature is the court of common pleas.” *July 20, 2017 Order*, p. 6 (internal citations omitted).

21. Here, the Complainant has simply repeated claims that the ALJ already dismissed as beyond the Commission’s jurisdiction. The Complainant’s hearing testimony related to non-jurisdictional issues does not establish a valid claim against the Company.

22. Accordingly, the Complainant’s claims regarding his independent contractor agreement with the Company should be dismissed for the same reasons outlined in the July 20, 2017 Order.

B. The Complainant failed to establish a claim related to vehicles with advanced technologies

23. Next, the Complainant testified that Rasier-PA violated the Code because “...drones are picking up people without authority from the PUC, unlawfully, and that affects other drivers that work for [Rasier-PA] because drones are unmanned autonomous vehicles and I think they affect the safety of every other motorist on the road, and they shouldn’t be out there, they’re operating against the PUC rules.” (N.T. 13:15-21). The Complainant further testified

that he believed accidents with “unmanned drones” had occurred. (N.T. 14:20-25, 15:1). The Complainant offered no facts to support these allegations.

24. The Complainant’s argument fails for two important reasons. First, he utterly failed to provide any facts to substantiate his claims. His testimony merely consisted of his conclusory beliefs regarding autonomous vehicles, which the Complainant called “drones,” in an attempt to substantiate his claims. Statements of belief do not constitute substantial evidence of a violation of the Code. *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).

25. Second, there is nothing unlawful about Rasier-PA’s use of vehicles with advanced technologies in TNC service. As a matter of law, the Commission’s order issuing Rasier-PA a TNC license *explicitly authorized* Rasier-PA to use “autonomous vehicles or vehicles with advanced driver assistance systems and technologies,” subject to compliance with all applicable Pennsylvania Department of Transportation vehicle safety rules and regulations. (N.T. 25:1-10). *See Application of Rasier-PA, LLC for Transportation Network Service License*, A-2016-2580821 (Order entered January 26, 2017) (“An affiliate of Applicant [Rasier-PA], UATC, LLC (UATC), is currently developing vehicles in Pittsburgh with the goal that those vehicles would be able to operate autonomously. UATC’s vehicles are highly automated, but are not able to drive without the active physical control or monitoring by a human operator. Applicant’s Legal Director of Regulatory Development, Matthew Burton, has stated that, to the extent it uses UATC vehicles that include advanced driver assistance systems or, in the future,

make use of vehicles with autonomous technology, such vehicles providing TNC services will comply with applicable Pennsylvania Department of Transportation regulations.”) (*Id.* at 3-4).

26. Therefore, the Complainant’s bald assertions—even if true—would not establish a *prima facie* case against the Company for any wrongdoing, because the Commission has authorized the Company to utilize “autonomous vehicles or vehicles with advanced driver assistance systems and technologies” in Pennsylvania.

C. The Complainant Failed to establish a claim related to out-of-state registered vehicles

27. The Complainant testified that he believed the Company created “...unfair competition among its own drivers by having out-of-state cars operate in-state doing intrastate calls...” (N.T. 17:25, 18:1-2). He further stated that “...there are cars coming in from Ohio, Maryland, Delaware, New Jersey...” (N.T. 18:12-14), concluding that “...any car operating interstate in Pennsylvania from New Jersey is operating unlawfully, unsafely...” (N.T. 19:3-4). The Complainant offered two insurance forms which were numbered for the record as Ely Exhibit Nos. 1 and 2. (N.T. 23:1-5). However, Mr. Ely presented no evidence authenticating these documents. Nor did he provide any evidence establishing a foundation for their relevance, purpose or relationship to any of his allegations.

28. At hearing, Rasier-PA’s counsel explained that the Code itself authorizes TNC service to be provided by vehicles registered outside the Commonwealth. (N.T. 25:15-24). Code Section 2606, titled “Personal vehicle requirements,” provides that vehicles registered outside the Commonwealth must be inspected by a facility approved by the Pennsylvania Department of Transportation. 66 Pa.C.S. § 2606(c)(1). Thus, the Code does not prohibit TNC drivers in Pennsylvania from using vehicles registered in other states as long as requirements such as inspections, are satisfied.

29. Once again, the Complainant cannot establish a *prima facie* case against the Company by offering his testimonial beliefs. The Complainant did not provide any facts showing a vehicle registered out-of-state failed to comply with the requirements set forth at Code Section 2606(c) or that Rasier-PA committed any other violation the Code. Ely Exhibit Nos. 1 and 2 do not establish a violation of the Code; if anything, they establish the Company has obtained insurance as required by law.

30. As a result, the Complainant has failed to establish a *prima facie* case related to vehicles registered out-of-state.

D. Franchise Act claims are beyond the Commission’s jurisdiction

31. Finally, the Complainant testified that he considered himself a “franchisee” of Rasier-PA when he was driving for the Company (N.T. 14:1-12, 16:8-25, 17:1-14, 20:20-25). He argued that the Company committed violations of House Bill 1620 from the 2015-2016 session of the General Assembly, known as the Pennsylvania Responsible Franchise Practices Bill. (N.T. 20:6-25, 21, 22:1-13). The Complainant offered a copy of House Bill 1620 as an exhibit. (N.T. 20:4-5).

32. The Complainant produced no evidence that House Bill 1620 was enacted into law. Indeed, House Bill 1620 was not enacted into law.¹ There are no other laws dealing with franchise practices in Pennsylvania.

33. Even if the General Assembly had enacted a law governing franchise practices, the Commission does not have jurisdiction over “franchise” issues which are not addressed in the Public Utility Code. (N.T. 26:6-8). Rather, as detailed in the June 20, 2017 Order,

¹ HB 1620 was introduced October 15, 2015 and referred to the Commerce Committee. On October 19, 2015, the bill was referred to the Consumer Affairs Committee where it “died,” as no additional action has taken place since then. See <https://legiscan.com/PA/bill/HB1620/2015> (last visited November 30, 2017).

The Commission cannot exceed its jurisdiction and must act within it. Jurisdiction may not be conferred by the parties where none exists. Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. The mere fact that a party to an action qualifies as a regulated public utility does not confer subject matter jurisdiction on the Commission.

June 20, 2017 Order, p. 6 (internal citations omitted).

34. The Complainant provided no basis for requesting Commission relief for alleged violations of statutes relating to franchise issues; as a matter of law, the Code itself does not extend the Commission's jurisdiction to the subject matter raised by the Complainant. Therefore, even assuming House Bill 1620 was enacted into law, the Commission is not empowered to enforce that law.


35. The Complainant again failed to establish a *prima facie* case that the Company violated the Public Utility Code or a regulation or order administered by the Commission.

IV. CONCLUSION

36. For the reasons set forth above, Rasier-PA, LLC respectfully requests that the ALJ and the Commission dismiss the Complaint filed by Robert Ely for failing to establish a *prima facie* case and grant Rasier-PA, LLC any other relief as appropriate.

Dated: December 13, 2017

Respectfully submitted,



John F. Povilaitis, Esquire
Brian C. Wauhop, Esquire
BUCHANAN INGERSOLL & ROONEY PC
409 North Second Street, Suite 500
Harrisburg, PA 17101-1357

Counsel for Rasier-PA, LLC

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CERTIFICATE OF SERVICE

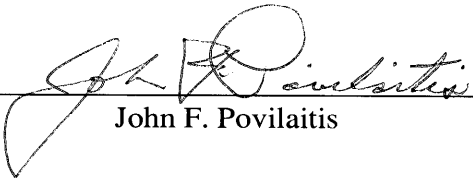
I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

Via Regular U.S. Mail and electronic mail:

Administrative Law Judge Joel Cheskis
PO Box 3265
Harrisburg, PA 17105-3265
jcheskis@pa.gov

Robert Ely
1163 Miller Road
Lake Ariel, PA 18436
callacarwb@gmail.com

Dated this 13th day of December, 2017.



John F. Povilaitis