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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:

Enclosed for electronic filing please find the Exceptions of Rasier-PA, LLC in the above-captioned proceeding.

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

Sincerely,


John F. Povilaitis

JFP/tlg

Enclosure

cc: Office of Special Assistants (via email ra-OSA@pa.gov)
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

**EXCEPTIONS OF
RASIER-PA, LLC**

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Dated: April 3, 2018

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I. INTRODUCTION

This dispute began on March 14, 2017, when Friedman Wagner-Dobler (“Complainant”) filed a Formal Complaint (the “Complaint”) at the Pennsylvania Public Utility Commission (the “Commission”) alleging that Raiser-PA, LLC d/b/a/ Uber (“Rasier-PA” or the “Company”) overcharged him for rides he accepted in February-March 2017. For each of the disputed rides, the Rasier-PA Application (the “App”) accepted a pickup location depicted to be on an on-ramp to a highway near the Lemieux Sports Center. (N.T. 80:22-24). In very rare circumstances involving large commercial facilities such as the Lemieux Sports Center, the Company’s App selects as the pickup point a road which is different from the pickup point where the rider physically enters the vehicle. (N.T. 62:16-25-63:1-2). The up-front price accepted by the Complainant for the disputed rides included the distance required to complete the trip via the highway. (N.T. 79:16-25, 80:1-11).

The Complainant alleged in his Complaint that he overpaid for three rides during the period in question (February 24, 2017, March 10, 2017 and March 13, 2017), and that the Company was intentionally routing rides in a way that detrimentally affected riders. (*See* Complaint). The Complaint admitted that the Company refunded the Complainant for the February 24, 2017 ride. (*Id.*). Subsequently, the Company refunded the Complainant for all amounts over the minimum charge for the disputed rides. (N.T. 46:6-16). As relief, the Complainant seeks an audit of all of his past rides, an audit of all Rasier-PA rides in Pennsylvania, modification of Rasier-PA’s algorithm used to calculate prices and a suspension of Rasier-PA’s license. (Complaint ¶ 5).

On March 14, 2018, the Pennsylvania Public Utility Commission (the “Commission”) served the Initial Decision (“Initial Decision” or “I.D.”) of Administrative Law Judge Katrina L. Dunderdale (the “ALJ”) in connection with the Complaint filed by the Complainant against

Rasier-PA. The Initial Decision is seriously flawed in the following ways. First, the Initial Decision inappropriately evaluates the rates charged by Rasier-PA. As a matter of law, the Commission is not authorized to review, evaluate or regulate the rates Rasier-PA charges for rides.

Next, the Initial Decision applied the wrong legal standard to evaluate whether the Company's conduct was reasonable. Rasier-PA is not a public utility—it is a transportation network company (“TNC”). Chapter 26 of the Pennsylvania Public Utility Code, 66 Pa.C.S. § 101 *et seq.*, specifically details TNC service obligations, which are statutorily different from the service requirements the Code imposes upon public utilities. The ALJ's fundamental misunderstanding of the differences between a public utility and a TNC permeates the Initial Decision and forms the foundation of the Initial Decision's misapplication of law.

Third, the Initial Decision's determinations are not supported by substantial evidence. Instead, the Initial Decision mischaracterizes testimony and relies on inference to conclude that because Rasier-PA does not price its services like a taxi service with fares only revealed at the end of a ride based on actual time and distance driven, it is not providing reasonable service. Rasier-PA is not required to operate like a taxi service and it is inappropriate for the Commission, through this Initial Decision, to penalize Rasier-PA for its lawful conduct. The Initial Decision also failed to consider significant evidence the Company provided at hearing that the Complainant failed to rebut.

Finally, the presiding officer in this matter made several legal and procedural errors during the proceeding which caused substantial prejudice to Rasier-PA.

For these reasons, Rasier-PA respectfully submits the following Exceptions to the Initial Decision.

II. EXCEPTIONS

Rasier-PA Exception No. 1: Rasier-PA excepts to the Conclusion of Law that Rasier-PA charged the Complainant an “excessive” rate. (Conclusion of Law No. 4).

The Initial Decision concluded that Rasier-PA charged the Complainant a “significantly higher rate” for some trips as compared to others.¹ (I.D. p. 12, and Conclusion of Law No. 4). This conclusion is a determination regarding the rates charged by Rasier-PA, something the Commission is without jurisdiction to decide. The Initial Decision’s improper review and holding regarding Rasier-PA’s rates must be reversed.

The Commission has only those duties, powers, responsibilities and jurisdiction as are expressly or by necessary implication given to it by the Legislature.² The Commission must act within, and cannot exceed, its jurisdiction.³ Jurisdiction may not be conferred by the parties where none exists.⁴ 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.⁵

As explained in on pages 12-14 of Rasier-PA’s Main Brief, Chapter 26 of the Code provides that in general, 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

¹ No refunds were directed by the ALJ because the Company had already, without any admission of liability, refunded the Complainant all amounts paid for the rides in question over the minimum fare charged for rides. As such the Complainant is no longer aggrieved.

² *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).

³ *City of Pittsburgh v. Pa. P.U.C.*, 43 A.29 348 (Pa. Super. 1945).

⁴ *Roberts v. Martorano*, 427 Pa. 581, 235 A.29 602 (1967).

⁵ *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 (Order entered September 22, 2011) (“...jurisdictional issues are never waived...”).

facilities), and Chapter 33 (relating to violations and penalties).⁶ In particular, 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 ...”⁷

The Initial Decision ignores all of the legal authority mentioned above and, contrary to law, makes specific determinations about Rasier-PA’s rates and charges. At the beginning of the “Discussion” section, the Initial Decision purports to avoid delving into issues regarding Rasier-PA’s rates: “The formal complaint does not concern the rate structure or any algorithms used by Raiser when calculating its charges.” (I.D. at 7). But beginning on page 9, the I.D. takes up the Complainant’s argument that Rasier-PA charged a “rate” that was “ten times the estimated rate.” (I.D. at 9). The Initial Decision then modifies its analysis to avoid the word “rates” by referring to “charges,” eventually determining that Rasier-PA charged the Complainant “in excess of what [Rasier-PA] provided the Complainant...” (Conclusion of Law No. 4).

Contrary to established law, Conclusion of Law No. 4 improperly evaluates Rasier-PA’s rates and charges and finds them excessive. The Commission must reject and reverse the Initial Decision’s findings regarding Rasier-PA’s rates and charges because the Commission is not authorized by law to make such determinations.

Rasier-PA Exception No. 2: Rasier-PA excepts to Conclusion of Law No. 3 because the Initial Decision applied the incorrect legal standard in the analysis evaluating whether Rasier-PA provided reasonable service. (Finding of Fact No. 2, Conclusion of Law No. 3).

The ALJ erroneously characterized the Complainant’s excessive pricing allegation as a “reasonableness of service” issue which renders the I.D.’s analysis under Section 1501 of the

⁶ 66 Pa.C.S. § 2603(b)(1).

⁷ 66 Pa.C.S. § 2607(f).

Code *dicta*. The Complainant did not allege there was anything unsafe, unreasonable or inadequate with the rides the Complainant received, and the record is devoid of any evidence that the rides were unsafe, unreasonable or inadequate. He only alleged that he was charged too much for some of those rides. Nevertheless, the Commission should correct this legal error as it could be detrimental to the evolving jurisprudence of Chapter 26.⁸

The Initial Decision cites Section 1501 as the legal standard for evaluating TNC service and then holds that Rasier-PA violated that standard. (I.D. at 8, Conclusion of Law No. 3). While certain sections of the Code apply to TNCs, Section 1501 is not the part of the Code that establishes service standards for TNC service. Rather, TNCs must comply with Code Section 2604.3(b).

Code Section 2603 explains which laws will and will not apply to transportation network 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 [Chapter 26] in addition to another chapter under this paragraph[Chapter 15], this chapter [Chapter 26] shall apply.*⁹

As a result, TNC service is governed by a specific service standard that is narrower than the Commission's general authority over jurisdictional public utility service. Chapter 26, Code Section 2604.3, titled "Service standards," provides that in general, "[w]here transportation

⁸ Rasier-PA argues in the alternative that even if Complainant's allegations are viewed as an issue of whether the Company took reasonable steps to provide reasonable service, it has effectively rebutted the Complainant's allegations.

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

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.”¹⁰ (Emphasis added). This is in contrast to the Section 1501 service standard used by the ALJ that every public utility “*shall* furnish and maintain adequate, efficient, safe, and reasonable service and facilities.” (emphasis added). There are no reported cases or Commission decisions interpreting Code Section 2604.3(a). However, the above-highlighted portion of Section 2603(b)(1) explains that if a subject is regulated by both Chapter 26 and another chapter of the Code, then it is Chapter 26 that will apply—and displace any other Code provision on the same subject. Thus, the correct service standard for TNCs is that they must take “reasonable steps” to ensure that the service provided by each driver who utilizes the platform is safe, reasonable and adequate. Clearly a TNC’s burden to satisfy its service standard under Chapter 26 is different from the service standard specified in Chapter 15 because it emphasizes not the resultant service itself, but focuses on whether the Company has taken reasonable steps to position its drivers to provide safe, reasonable and adequate service.

The enactment of Act 164 established Chapter 26 of the Code governing TNC service. There are no post-Act 164 reported cases or Commission decisions applying Code Section 1501 (relating to public utility service) to TNCs, and rightfully so: Section 2603(b)(1) provides that Section 1501 *is subordinate to* Section 2604.3(a) regarding service standards applicable to TNCs. Read together, Code Sections 2603(b)(1) and 2604.3 impose a duty upon TNCs (which are not public utilities) to take reasonable steps to ensure that the service provided by each

¹⁰ 66 Pa.C.S. § 2604.3(a).

transportation network company driver who utilizes the digital network is safe, reasonable and adequate.

In addition, existing legal authority indicates a complainant would have to prove a violation of Section 2604.3(a) to establish a TNC did not fulfill its obligation to provide reasonable service. 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.¹¹

The excerpt above suggests the Commonwealth Court would likely hold that similar to claims raised under Code Section 1501 regarding public utilities, Code Section 2604.3(a) requires a complainant to establish that a TNC violated its statutory duty in order to sustain a complaint brought under that section. Therefore, in order to sustain a complaint under Code Section 2604.3, a complaining party must prove that a TNC did not take reasonable steps to ensure that the service provided by each driver who utilizes the platform is safe, reasonable and adequate.¹²

When broaching this subject, the Initial Decision first erroneously declares that "...Rasier-PA is a public utility providing ride services to customers..." (Finding of Fact No. 2). This is not true. By excluding transportation network companies from the definition of "common carrier by motor vehicle," Code Section 102 specifically excludes transportation network service companies from the definition of "public utility."¹³ The Initial Decision compounds this error by holding "...a TNS [sic] company is subject to the Commission's

¹¹ *West Penn Power Co. v Pa. P.U.C.*, 478 A.2d 947, 949 (Pa. Cmwlth. 1984) (footnote omitted).

¹² *Id.*; see also 66 Pa.C.S. § 2604.3(a).

¹³ See 66 Pa.C.S. § 102.

regulations concerning, *inter alia*, the procedures to follow for service to customers.” (I.D. at 9). But the Commission has not adopted any regulations regarding TNC service and the Initial Decision fails to identify any regulations whatsoever that Rasier-PA violated. These misunderstandings of law form the basis for the Initial Decision’s penultimate erroneous holding that Code Section 1501 applies when evaluating the reasonableness of Rasier-PA’s service. Rasier-PA is a TNC, not a public utility. The Initial Decision is wrong. Code Section 2604.3, which applies only to TNC service, is the correct legal standard for TNC service.

As explained in greater detail below, the Complainant failed to establish a *prima facie* case that Rasier-PA violated Code Section 2604.3, and even if he did, the Company successfully rebutted that evidence. But at the threshold, the Initial Decision committed a significant error of law by applying the incorrect service standard when evaluating Rasier-PA’s conduct. For this reason alone, the Commission should vacate the Initial Decision.

Rasier-PA Exception No. 3: Rasier-PA excepts to the Conclusion of Law that the Complainant met his burden of proving that the Company did not provide reasonable service. (Findings of Fact Nos. 2, 6, 12, 14, 15, 17; Conclusion of Law No. 4).

The conclusions reached in the Initial Decision must be based on substantial evidence.¹⁴ The term “substantial evidence” means such relevant evidence that a reasonable mind may accept as adequate to support a conclusion.¹⁵ More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.¹⁶ In addition, the offense must be a violation of the Code, the Commission’s regulations, or an outstanding order of the Commission.

¹⁴ 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).

¹⁵ *Norfolk & Western Ry. Co. v. Pa. P.U.C.*, 489 Pa. 109, 413 A.2d 1037 (1980).

¹⁶ *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).

A. The Findings and Conclusions Reached By The Initial Decision Are Not Based On Substantial Evidence.

At hearing, the Complainant supported his claims by oral reference to the Complaint. He did not move the Complaint into evidence as an exhibit, an action authorized by the Commission's regulations.¹⁷ As such, he did not provide any additional evidence, other than his testimony, in support of the Complaint.¹⁸ To overcome the Complainant's failure to present facts sufficient to support the Complainant's claims, the Initial Decision mischaracterizes testimony, ignores other record evidence, creates facts and concludes that by not operating like a taxi service (a service which does not provide a rider with an up-front price and charges prices based on actual time and distance for the ride), the Company failed to provide reasonable service. But in the end, the conclusions reached by the Initial Decision are not based on substantial evidence.

First, as explained above, Finding of Fact No. 2 erroneously states that Rasier-PA is a public utility. Rasier-PA is a TNC, not a public utility. There are no facts in the record to suggest that Rasier-PA is a public utility, so this finding is factually incorrect, and it is an error of law to apply standards applicable to public utilities to Rasier-PA.

Next, Finding of Fact No. 6 is based on page 17 of the transcript and finds that the Complainant only relied on Rasier-PA for transportation service. This finding is incorrect; the Complainant clearly stated (in the same sentence on page 17 of the transcript cited by Finding of Fact No. 6) that he relied on "...either Rasier-PA or Lyft or a taxi service..." for transportation service. (N.T. 17: 16-18). By omitting record testimony to the contrary, Finding of Fact No. 6

¹⁷ 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 did Rasier-PA 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.

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

creates the unsupported inference that the Complainant had no choice but to rely upon Rasier-PA for all his transportation service needs.

Similarly, Finding of Fact No. 12 mischaracterizes the Complainant's testimony. After listing the ride dates at issue in this matter, Finding of Fact No. 12 cites to page 34 of the transcript for the finding that "[o]n all other trips provided by Rasier between Complainant's workplace and the Lemiex Center for therapy, Rasier charged Complainant approximately \$7." (Finding of Fact No. 12). This is not the Complainant's testimony:

JUDGE DUNDERDALE (inquiring of Complainant): Can you give me an indication how many times you might have gotten a trip where is only cost you around \$7.00?

MR. WAGNER-DOBLER: I'd have to go through all the receipts. I think it was less than half the trips, maybe three or four, something like that.

JUDGE DUNDERDALE: All right. So the majority of the trips that you were taking for this therapy you were charged a higher amount?

MR. WAGNER-DOBLER: I believe that's correct. Yes, Your Honor.

(N.T. 34:7-19; see also 47:11-25, 48:1-8). In this exchange, the Complainant never testified that "all" trips other than the February 24, March 10 and March 13, 2017 trips were estimated at "around \$7.00." Instead, the Complainant admits *he does not know the answer* and would "...have to go through all the receipts." Later in the Initial Decision, the ALJ correctly characterized this precise testimony to hold that the Complainant had *not* established he was entitled to further refunds: "Complainant continued to aver at the initial hearing that he did not think he had received a refund from all of the trips but admitted he was unclear and uncertain. As a result, Complainant failed to show he was not reimbursed for all the trips..." (I.D. at 10). The ALJ's conclusion on page 10 is inconsistent with Finding of Fact 12, which in order to be factually correct, would require evidence of the prices of *all other trips*. The facts adduced at hearing simply do not support Finding of Fact No. 12.

Nor does the record evidence support Finding of Fact No. 14 which finds that after his first initial trips with Rasier-PA, the Complainant did not always remember to check the estimated fare to see if the estimate was \$7 or \$18 to \$20. The Initial Decision refers to a large section of the transcript, pages 35-55, as support for this proposition. But in those 20 pages of the transcript, the Complainant never testified that he did not always remember to check the up-front price Rasier-PA provided for rides he requested. On the contrary, the transcript establishes that the Complainant *admitted many times* that he did receive an estimated price in advance of accepting the ride. (N.T. 32:8-10, 51:21-22, 54:5-6). The ALJ modifies the Complainant's testimony to infer a particular result: that the Complainant had no advance warning of the cost of the ride. Not only did the Complainant admit that he did receive the ride price in advance, and that he was charged the price he was provided, the Complainant admitted he would not have cared what the price was, even if he saw it: "It is possible, and I believe Rasier-PA will maintain that I was given an estimate in the range of \$20. I certainly, with my arm in a sling, didn't care at the time..." (N.T. 32:9-12). The Complainant's direct testimony contradicts Finding of Fact No. 14's assertion that the Complainant did not remember to check the estimate.

Furthermore, on page 11, the Initial Decision concludes that "Mr. Wagner-Dobler testified he was positive however, that he had reviewed the estimate many times and the estimate was always approximately \$7." (I.D. at 11). No finding of fact supports this conclusion and no citation to record evidence is provided on page 11 to establish that the Complainant actually testified to this statement. Like the discussion regarding Finding of Fact No. 12 above, the Initial Decision's conclusion on page 11 is inconsistent with Finding of Fact No. 14. Simple logic destroys the fallacy created by the Initial Decision on page 11: if the Complainant did not always remember to check the estimated price (Finding of Fact No. 14), then there is no way he could be

“...positive...that he had reviewed the estimate many times and the estimate was always approximately \$7.” (I.D. at 11). The ALJ’s conclusion—that the Complainant did not know or otherwise become aware of the cost of the ride before accepting—is unsupported and contradicted by the record evidence.

Finding of Fact 15 also misstates the facts adduced at hearing. Rasier-PA’s witness Jordan Holtzman-Constan testified that the Rasier-PA App determines the pickup location, not the website. (N.T. 62:9-15). Finding of Fact No. 15 states that “...Rasier’s *website* might estimate the charge using the exact address...” (emphasis added). The distinction is critical, because as Mr. Holtzman-Constan testified, the pickup point can be affected when the rider is requesting service at a large facility. (N.T. 62:16-25, 63:1-13). Use of the App, not the Rasier-PA website, is needed to obtain a new or different pickup point to change the price of the ride. (N.T. 63:3-13). In Finding of Fact No. 15, the ALJ ignored Rasier-PA’s uncontroverted testimony on how pickup points are established or changed, and failed to consider that the pickup point can be affected when the rider is requesting service from a large commercial facility such as the Lemieux Sports Center. Moreover, the Initial Decision ignores that the issue forming the basis of this proceeding is extremely rare: which is legally significant, since perfect service in all circumstances is not the service standard. (N.T. 84:3-15).

Finding of Fact No. 17 misstates the record evidence concluding that Rasier-PA’s “solution” to Complainant’s issue is a series of workarounds. The ALJ characterized Rasier-PA’s descriptions of workarounds as placing a “responsibility” upon the rider “...to fidget with the website application if the estimate assumes the wrong pickup point...” (I.D. at 11). These findings and conclusions wholly ignore the fact that a rider does not have to accept a ride that he or she requested. As explained in the Company’s Main Brief, riders are free to reject a ride if

they do not like the price they are shown on the application. (Rasier-PA's Main Brief p. 1). This critical distinction is one of the reasons TNC service *is different than* public utility service and regulated differently, because often a public utility customer has very little or no choice to reject service and obtain it from another public utility. Riders have no obligation to accept a ride they request UNLESS they affirmatively accept the ride using the Rasier-PA App. Riders can decline at any time up to that point. In Finding of Fact 17 and page 11 of the Initial Decision, the ALJ continues to hold Rasier-PA to the same standard as taxi service by concluding (without any supporting evidence) that Rasier-PA riders are limited only to a series of workarounds if they do not like an estimated price of a ride. This is not true; Rasier-PA riders have the threshold choice of whether or not to accept a ride.

None of the findings in the Initial Decision establish that Rasier-PA failed to take reasonable steps to ensure that the service provided by each driver who utilizes the platform is safe, reasonable and adequate. Importantly, the Complainant presented absolutely no evidence showing that there were reasonable modifications of its application or mapping service that Rasier-PA could have implemented, but did not.

The Commission has already opined about the nature of service and its reasonableness 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. In *Re Metropolitan Edison Co.*,¹⁹ 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

¹⁹ 80 Pa. PUC 662, 672 (1993).

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.”²⁰

Importantly, although the ALJ has characterized this Complaint as a service matter and not a rate complaint, the Complainant never alleged or argued that Rasier-PA 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, which Complainant would have seen in the App at the time of requesting his trip.²¹ Public utilities—and TNCs, pursuant to Code Section 2604.3—are not required to provide perfect service.²² The Complainant was not provided inadequate service and was treated properly: he accepted rides requested through Rasier-PA (after agreeing to the price of the ride, N.T. 32:8-10, 51:21-22, 54:5-6; 14-17) from the Lemieux Sports Center to NetApp in Cranberry, Pennsylvania. When the Complainant challenged the price he paid, he was reimbursed. (N.T. 46:13-16, 77:14-23).

There is simply no basis in the record to sustain the Initial Decision’s conclusion that the Company provided inadequate and unreasonable service to the Complainant.

²⁰ 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).

²¹ N.T. 62:22-25, 63:1-2, 79:7-13, 81:1-6, 84:7-8, 11-15.

²² *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.

B. The Company Rebutted Any Prima Facie Case.

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.

If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the respondent.²³ If a respondent does not rebut that evidence, a complainant will prevail.²⁴ If the respondent rebuts a complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the respondent's evidence by a preponderance of the evidence.²⁵ 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.²⁶

Here, the Company presented the testimony of Jordan Holtzman-Constan, Senior Operations Manager for Rasier-PA. (N.T. 60:7-11). Mr. Holtzman-Constan presented testimony establishing the following critical facts:

- When a customer requests a ride, the App gives the customer an up-front price for the ride (N.T. 82:13-16, 62:4-7)²⁷;
- The App analyzes and applies a number of factors in creating the up-front price (N.T. 61:19-25, 62:1-8) and the website screenshot provided by the Complainant includes some of those factors (N.T. 89:17-22);
- Barring extraordinary circumstances, the rider always pays the up-front price shown when ordering the ride (N.T. 85:10-23, 90:25, 91:1-4, 94:22-23);

²³ *Heller v. Indian Spring Water Co.*, Docket No. C-2012-2334240 (Order Entered June 7, 2013) (citing *Replogle v. Pennsylvania Electric Company*, Docket No. F-06727378 (Order Entered October 9, 1980)), and *Waldron v. Philadelphia Electric Company*, 54 Pa. PUC 98 (1980).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ ("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.").

- Rasier-PA investigates and works to make sure the Rasier-PA App is working properly and to correct inconsistencies (N.T. 73:1-6);
- The mapping issue identified by the Complainant in this case is extremely rare (N.T. 84:3-15.);
- Rasier-PA'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 (N.T. 70:1-4.); and
- Rasier-PA is currently reviewing its tariff and will update it in the future (N.T. 70:5-15.).²⁸

Importantly, Mr. Holtzman-Constan testified about the numerous ways a rider can use the Company's App 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.

(N.T. 63:6-13). Mr. Holtzman-Constan further clarified that the Rasier-PA App will 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).

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 issues for certain requested ride routes.

The Initial Decision ignored virtually all of Mr. Holtzman-Constan's testimony which rebuts any *prima facie* case the Complainant may have established. Importantly, the Complainant never rebutted the Company's evidence at any time. The Initial Decision erred in

²⁸ Consistent with its practices and hearing testimony, Uber updated its tariff on file with the Commission effective November 30, 2017.

holding that the Complainant established a *prima facie* case that was not rebutted by the Company's evidence.

Rasier-PA Exception No. 4: Rasier-PA excepts to the errors of law committed by the ALJ before and during the Formal Complaint hearing.

The ALJ committed several errors of law prior to and during the September 28, 2017 evidentiary hearing which significantly prejudiced the Company. As a result, the Commission must vacate the Initial Decision.

First, as Rasier-PA explained to the ALJ in its September 26, 2017 Motion for Leave to File an Answer *Nunc Pro Tunc* (the "Motion")²⁹ and at hearing, Rasier-PA did not receive the Complaint even though a return receipt was received by the Commission showing that a copy was delivered to 114 South 13th Street, Third Floor, Philadelphia, PA 19107. (*See* Motion ¶¶ 2, 11). Rasier-PA first became aware of the existence of the Complaint when Rasier-PA received the Notice of Hearing dated July 17, 2017. At this point, there was no possibility the Company could file a timely answer to the Complaint. At no point in the Motion or at hearing did Rasier-PA argue or assert that the Commission did not serve the Complaint upon Rasier-PA; rather, Rasier-PA explained its legal department had no record of it receiving the Complaint. Attached to the Motion as Exhibit A was a copy of the Answer that Rasier-PA filed.

The ALJ denied the Motion on September 26, 2017 and purported to strike Rasier-PA's Answer from the hearing record. (*See* Third Interim Order, Ordering Paragraph 2). This action prejudiced Rasier-PA by preventing it from moving its Answer into evidence. As explained in the Motion, the Company met the standard for the Answer to be accepted, *nunc pro tunc*. At

²⁹ The Company delayed the filing of its Answer in the hope of informally resolving the Complainant's concerns, consistent with its view that the Complaint was focusing on the non-jurisdictional issue of whether the rider was charged an improper amount for rides. The filing of an Answer could not be further delayed, however, because the ALJ on September 25, 2017, denied Uber's Motion for Entry of a Procedural Order Setting a Case Management Schedule which would have postponed the evidentiary hearing.

hearing, the ALJ insisted that Rasier-PA had alleged the Commission failed to serve the Complaint upon Rasier-PA as evidenced in her response to an objection made by Rasier-PA's counsel that the Complainant was raising new allegations not contained in the Complaint for the first time at hearing:

MR. POVILAITIS: Complainants are not free to create a new complaint the day of hearing. I think Your Honor would agree with that. It makes it impossible for the respondent to defend allegations.

JUDGE DUNDERDALE: Well, the respondent does not have clean hands in this case when it comes to the pleadings.

MR. POVILAITIS: Well, we disagree with that, Your Honor. We don't understand, frankly, some of the facts you have assumed for purposes of the rulings. You know, we—the company became aware of this Complaint in August. It has not delayed anything.

JUDGE DUNDERDALE: Mr. Povilaitis, I have already clearly ruled. I have a United States Postal Service receipt that shows the tracking number that your client got this complaint—got notice of the complaint back at 1:48 p.m. on March 20, 2017. The argument that you continue to provide that you guys had no idea until July when you got the hearing notice is a dead issue. If I have to take the United States Postal Service's word over the respondent's, I'm going to do that because I really don't have any concern about how it got from the receptionist's desk, or whoever signed for it on the 3rd floor in Philadelphia, and how it did not make its way over to the Legal Department is your client's fault. That's your client's issue. That's not the Commission's issue. The Commission did what it said it did, which is it provided notice to Rasier back on March 20, 2017, that this complaint had been filed. So any attempt by you to try and make an argument going forward that Rasier had no idea is a dead issue. I will not hear anything on that. I have already ruled three times. I have told you, you received notice, your client received notice back at 1:48 p.m., on March 20, 2017. So I don't expect to hear anything more from you on that issue.

MR. POVILAITIS: Your Honor, we don't want to debate that issue with you.

JUDGE DUNDERDALE: There is no debate, Mr. Povilaitis. Mr. Povilaitis, there is no debate about when your client got notice of the Formal Complaint.

MR. POVILAITIS: Your Honor, just to clarify please, we are not challenging the Commission record that you have access to that we do not have access to, indicating that a complaint was delivered. The fact that we have put before you was that company personnel were not aware of the complaint being delivered, and therefore, it did not reach the legal department until – well, actually the complaint

never reached the Legal Department. They received the notice of hearing and that was their first ... point at which they understood that any complaint had been filed against the company. We are not disputing...what you had said about US Postal Service records. We are not.

JUDGE DUNDERDALE: Well, you have been.

MR. POVILAITIS: No, Your Honor, I think if you look—if you look at what we have put before you—

JUDGE DUNDERDALE: I have.

MR. POVILAITIS: --it indicated that company staff did not—did not have a record of this having been delivered and did not get it to Legal until a certain date. That is all we are representing.

JUDGE DUNDERDALE: I have in—

MR. POVILAITIS: We are not challenging the Commission's service process.

JUDGE DUNDERDALE: Yes, you are, Mr. Povilaitis. When I look at your Motion for Nunc Pro Tunc, in there you clearly indicate that you did not—that the Commission did not serve this on you.

MR. POVILAITIS: I don't think so, Your Honor.

JUDGE DUNDERDALE: Well, be that as it may; it is a dead issue.

(N.T. 22:7-25, 23, 24, 25:1-17). Rasier-PA's Motion never alleged that the Commission did not serve the Complaint; the Motion alleged the Legal Department never received it at all. It was abuse of discretion for the ALJ to make these determinations.³⁰ Refusing to permit Rasier-PA to file an Answer under these circumstances was prejudicial.

In addition, the ALJ caused further prejudice to the Company by refusing to admit Rasier-PA's tariff as a hearing exhibit rendering it impossible to adduce direct testimony on that

³⁰ "...abuse of judicial discretion is defined as 'not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice bias or ill will, as shown by the evidence or the record.'" *Pa. P.U.C. v. Dauphin Consolidated Water Supply Co.*, Docket No. R-00932604 (Order entered July 9, 1993) (quoting *Commonwealth v. Underwood*, 500 A.2d 820, 823 (1985)).

topic from the Company's witness. Rasier-PA's tariff is a public document on file with the Commission at A-2014-2416127. The ALJ's refusal is a clear violation of 52 Pa. Code § 5.406.

Counsel for Rasier-PA attached a copy of the tariff to the Company's Hearing Memorandum filed and served upon the Complainant on September 27, 2017. At hearing, counsel for Rasier-PA attempted to introduce that document:

MR. POVILAITIS: Do you have a copy of the company's tariff in front of you?

MR. HOLTZMAN-CONSTAN: Yes.

MR. POVILAITIS: Your Honor, at this point the witness is referring to the tariff that's on file with the Commission. As such, it doesn't need to be produced for identification [] here under Code Section 5.406(a)(1), and the company would like to make this noticed tariff a hearing exhibit.

JUDGE DUNDERDALE: Well, you're not complying with the rules for gaining judicial notice if that's what you're requesting?

MR. POVILAITIS: In what respect, Your Honor?

JUDGE DUNDERDALE: Well, you can't just walk in and not allow the other side to know that you're going to be requesting judicial notice. I can note for the record that you have presented your witness with a document and that document is allegedly the tariff that your client filed with the Commission.

(N.T. 67:10-25, 68:1-9). Counsel had not asked the ALJ to take judicial notice of a document as provided by 52 Pa. Code § 5.408. Counsel *specifically* referenced 52 Pa. Code § 5.406(a)(1), which provides, "A report, decision, opinion or other document or part thereof, need not be produced or marked for identification, but may be offered in evidence as a public document by specifying the document or part thereof and where it may be found, if the document is one of the following: (1) A report or other document on file with the Commission." The ALJ's refusal to admit the Company's tariff, a public document on file with the Commission, was an abuse of discretion. The ALJ clarified her error later at hearing by explaining, "I am not going to be admitting a tariff into the evidentiary record unless you had provided me with the tariff, and then

I could admit it as an exhibit.” (N.T. 101:1-4). Again, the uncontroverted facts established in the record show that Rasier-PA did provide the ALJ and the Complainant with a copy of Rasier-PA’s tariff. The ALJ erred in refusing to allow admission of the Company’s tariff as a hearing exhibit. The Commission’s evidentiary rules regarding admissibility of public documents on file with the Commission authorize the Company’s submission.

III. CONCLUSION

As explained above, the Commission by statute may not review the amount of Rasier-PA’s charges and the Complaint must be denied on that basis. Moreover, there is no basis in law or fact supporting a finding that the rides provided on February 24, 2017, March 10, 2017 and March 13, 2017 constituted unreasonable service or violated any provision of the Code including Section 2604.3. The Initial Decision is internally contradictory and the conclusions reached therein are not based on substantial evidence. The Initial Decision ignores credible evidence supporting the Company’s position, and that evidence is sufficient to rebut any *prima facie* case that the Complainant may have established. Finally, the ALJ erroneously barred the Company from introducing its tariff and Answer to the Complaint into evidence.

Therefore, the Initial Decision must be reversed.

Respectfully submitted,



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Dated: April 3, 2018

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

FRIEDMAN WAGNER-DOBLER

v.

RASIER-PA LLC

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Docket No. C-2017-2593690

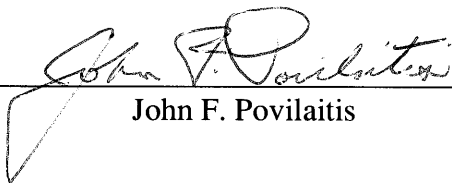
CERTIFICATE OF SERVICE

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

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

Dated this 3rd day of April, 2018.



John F. Povilaitis