BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

IN RE:		
APPLICATION OF		
Rasier-PA LLC, a limited liability company of the State of Delaware, for the right to begin to transport, by motor vehicle, persons in the experimental service of shared-ride network for passenger trips between points in Allegheny County	:	A-2014-2416127
and	:	
Raiser-PA, LLC, a limited liability company of the State of Delaware for the right to begin to transport, by motor vehicle, persons in the experimental service of share-ride network for passenger trips between points in Pennsylvania, excluding points in the counties of Beaver, Clinton, Columbia, Lawrence, Lycoming, Mercer, Northumberland and Union	:	A-2014-2424608

PROTESTANTS' JOINT BRIEF

Protestants, Concord Limousine, Inc., and Executive Transportation Company, Inc. ("Limousine Protestants" (both matters)), and Protestants, Aceone Trans Co., AF Taxi, Inc. AG Taxi, Inc. AGB Trans, Inc., Almar Taxi, Inc. ATS Cab, Inc, BAG Trans, Inc., BNG Cab Co., BNA Cab Co., BNJ Cab, Inc., Bond Taxi, Inc., BSP Trans, Inc., Double A Cab Co., FAD

Trans, Inc., GA Cab, Inc., GD Cab, Inc. GN Trans, Inc., God Bless America Trans, Inc., Grace Trans, Inc., IA Trans, Inc., Jarnail Taxi, Inc., Jaydan, Inc. LAN Trans, Inc., LMB Taxi, Inc. MAF Trans, Inc., MDS Cab, Inc., MG Trans Co., Noble Cab, Inc., Odessa Taxi, Inc., RAV Trans, Inc., Rosemont Taxicab Co., Inc., S&S Taxi Cab, Inc., SAJ Trans, Inc., Saba Trans, Inc., SF Taxi, Inc., Society Taxi, Inc., Steele Taxi, Inc., TGIF Trans, Inc., V&S Taxi, Inc., VAL Trans, Inc., VB Trans, Inc., and VSM Trans, Inc. ("Medallion Taxicab Protestants" (Pennsylvania application only)) and Protestants, BM Enterprises, Inc., t/a A.G. Taxi, Bucks County Services, Inc., Dee Dee Cab Company, Germantown Cab Company, Ronald Cab, Inc., t/a Community Cab, Shawn Cab, Inc., t/a Delaware County Cab and Sawink, Inc., t/a County Cab ("Non-medallion Taxicab Protestants" (Pennsylvania application only)), hereby submit their Joint Brief in the above matters.

I. INTRODUCTION

This matter involves two applications filed by a **transportation network company** ("TNC") for **motor carrier** authority to provide "**experimental** service through a **ridesharing** network." But the General Assembly has not empowered the Commission to grant certificates of public convenience to TNC's. With regard to transportation service, the General Assembly has empowered the Commission to grant certificates to motor

carriers to provide certain classes of transportation service subject to certain restrictions. But the Applicant is not a "motor carrier," the proposed service is not "experimental" and commercial "ridesharing" is illegal in Pennsylvania.

For each of these reasons, the Application must be denied because the Commission does not have the power to authorize an entity that is not a "motor carrier" to provide motor carrier service. The Commission does not have the power to authorize an entity to provide motor carrier service that does not fall within one of its designated classes of motor carrier service. Furthermore, authorization to provide "experimental" service must involve the provision of some form of transportation service **by the Applicant**. Finally, the Commission does not have the power to authorize service that is illegal in Pennsylvania and commercial ridesharing is illegal.

The same problem exists if the Applicant were to amend its Application to seek authorization to act as a broker of motor carrier service. The Commission does not have the power to authorize a broker to facilitate or arrange motor carrier service, as the Applicant proposes, with entities that are not authorized to provide motor carrier service to the public (i.e. illegal hacks or gypsy cabs). Furthermore, a broker may not facilitate commercial ridesharing, which is illegal in Pennsylvania.

Protestants recognize and appreciate the enormous influence and resources that multi-billion dollar corporations can bring to bear to exert pressure on public officials to grant them the benefits they seek. Intense public relations campaigns and political lobbying can create an almost irresistible temptation for officials to accommodate the desires of those who are in a position to wield such power. But the Commission must resist these temptations because it does not sit in the position of policy maker here and because the rule of law requires it. The Applicant's solution cannot be found in this forum, but in the hallways of the General Assembly.

The Commission's responsibility in this matter is to apply the law to the facts as they exist today, faithfully, in a fair and impartial manner, free from the influence of public relations campaigns and political pressures, and within the scope of Commission's delegated powers. If it does so, Protestants assert that the present Applications must be denied. Protestants mean no disrespect by recognizing the "elephant in the room" that has dictated the highly unusual expedited hearing and briefing schedule in these matters and imposed great burdens, inconvenience and expense on the Protestants in particular. Protestants are justifiably concerned that the extraneous factors that led the Commission to grant special treatment to the Applicants on a procedural basis will also influence the Commission's

substantive decision and trump the rule of law. Protestants have accepted the procedural irregularities in this case without objection and seek only fairness and impartiality on the substantive decision in return.

Even if we were to pretend, for the sake of argument, that the Commission has the power to grant the Applications in this matter, the Applicant has failed on every front to meet its burden of proof with regard to the criteria established by the Commission for approving motor carrier applications. The Applicant has not presented any evidence of public need in the form and manner required under Commission procedures to warrant the granting of statewide authority and hardly any evidence regarding public need in Allegheny County. The Applicant has not met its burden of proof with regard to financial fitness and, in fact, presented evidence that raises serious concerns about the financial viability of the proposed service. Finally, the Applicant has not demonstrated its technical and operational fitness, including its propensity for operating legally. In fact, the Applicant has openly and unapologetically defied the Commission's orders by continuing to operate in violation of a valid cease and desist order. For all of these reasons, if the Commission even reaches the merits of the Applications, they must be denied.

I. THE GENERAL ASSEMBLY HAS NOT EMPOWERED THE COMMISSION TO GRANT A

CERTIFICATE OF PUBLIC CONVENIENCE TO A TRANSPORTATION NETWORK COMPANY

It is a well-established principle of administrative law that the powers of an administrative agency are not boundless. *See West Penn Railways Company v. Pennsylvania Public Utility Commission*, 4 A.2d 545 (Pa. Super. 1939). As creatures of statute, administrative agencies may only exercise those powers that have been conferred upon them by the General Assembly in their enabling acts. *See Susquehanna Regional Airport Authority v. Pennsylvania Public Utility Commission*, 911 A.2d 612 (Pa. Cmnwlth. 2006). Administrative agencies have no inherent power and may do only those things that the legislature has expressly or by necessary implication placed within their power to do. *Naylor v. Township of Hellam*, 773 A.2d 770, 773-773 (Pa. 2001). An administrative agency "cannot, by mere usage, invest itself with authority or powers not fairly or properly within the legislative grant: *it is the law which is to govern rather than departmental opinions in regard to it.*" *Commonwealth v. American Ice Company*, 178 A.2d 768, 773 (Pa. 1962) (quoting *Federal Deposit Insurance Corp. v. Board of Finance & Revenue of Commonwealth*, 84 A.2d 495, 499 (Pa. 1951) (emphasis in the original).

Unlike the legislatures in other states, the Pennsylvania General Assembly has not empowered either of Pennsylvania's public utility

commissions to grant certificates of public convenience authorizing the operation of transportation network companies ("TNC's), nor has it empowered them to promulgate regulations to redefine or expand the term "public utility."[1] Neither the Public Utility Code, 66 Pa. C.S. §§101-3316, nor the Parking Authorities Law, 53 Pa. C.S. §§5501-5517 and §§5701-5745, contain any provisions granting such power. The scope of the Commission's regulatory power is limited to public utilities as defined by the General Assembly in Section 102 of the Public Utility Code, 66 Pa. C.S. §102. It defines the term "public utility" as follows:

> (1) Any person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for:
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> (i) Producing, generating, transmitting, distributing or furnishing natural or artificial gas, electricity, or steam for the production of light, heat, or power to or for the public for compensation.
>
> (ii) Diverting, developing, pumping, impounding, distributing, or furnishing water to or for the public for compensation.
>
> (iii) Transporting passengers or property as a common carrier.

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[1] The California Public Utilities Commission has promulgated a regulation defining a "transportation network company" ("TNC") as "a company that uses an online-enabled platform to connect passengers with drivers using their personal, non-commercial, vehicles." Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry, California Public Utilities Commission, Rulemaking 12-12-11 (Filed December 20, 2012) (copy attached). But the Commission does not have the power to expand its jurisdiction in this fashion.

(iv) Use as a canal, turnpike, tunnel, bridge, wharf, and the like for the public for compensation.

(v) Transporting or conveying natural or artificial gas, crude oil, gasoline, or petroleum products, materials for refrigeration, or oxygen or nitrogen, or other fluid substance, by pipeline or conduit, for the public for compensation.

(vi) Conveying or transmitting messages or communications, except as set forth in paragraph (2)(iv), by telephone or telegraph or domestic public land mobile radio service including, but not limited to, point-to- point microwave radio service for the public for compensation.

(vii) Sewage collection, treatment, or disposal for the public for compensation.

(viii) Providing limousine service in a county of the second class pursuant to Subchapter B of Chapter 11 (relating to limousine service in counties of the second class).

(2) The term does not include:

(i) Any person or corporation, not otherwise a public utility, who or which furnishes service only to himself or itself.

(ii) Any bona fide cooperative association which furnishes service only to its stockholders or members on a nonprofit basis.

(iii) Any producer of natural gas not engaged in distributing such gas directly to the public for compensation.

(iv) Any person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service.

(v) Any building or facility owner/operators who hold ownership over and manage the internal distribution system serving such building or facility and who supply electric power and other related electric power services to occupants of the building or facility.

(vi) Electric generation supplier companies, except for the limited purposes as described in sections 2809

(relating to requirements for electric generation suppliers) and 2810 (relating to revenue-neutral reconciliation).

(3) For the purposes of sections 2702 (relating to construction, relocation, suspension and abolition of crossings), 2703 (relating to ejectment in crossing cases) and 2704 (relating to compensation for damages occasioned by construction, relocation or abolition of crossings) and those portions of sections 1501 (relating to character of service and facilities), 1505 (relating to proper service and facilities established on complaint) and 1508 (relating to reports of accidents), as those sections or portions thereof relate to safety only, a municipal authority or transportation authority organized under the laws of this Commonwealth shall be considered a public utility when it owns or operates, for the carriage of passengers or goods by rail, a line of railroad composed of lines formerly owned or operated by the Pennsylvania Railroad, the Penn-Central Transportation Company, the Reading Company or the Consolidated Rail Corporation.

Accordingly, since TNC's are not within the scope of the definition of "public utility", TNC's are not within the regulatory jurisdiction of the Commission. The Commission is therefore not empowered to entertain an application for authorization to operate a TNC, which is not what has been submitted to the Commission for consideration in the present proceeding.

Obviously, the Applicant realizes that the Commission is not empowered to grant a TNC certificate and has, therefore, styled its Applications as applications for authorization to provide **motor carrier service**. But the Applicant is, in reality a TNC, not a motor carrier, and its

attempt to overcome the Commission's lack of statutory authority to give it what it wants by styling its Applications as something they are not is like trying to fit a square peg in a round hole. It does not fit.

II. THE COMMISSION DOES NOT HAVE THE POWER TO GRANT THE APPLICATIONS BECAUSE THE APPLICANT, BY ITS OWN ADMISSION, IS NOT A MOTOR CARRER.

The transportation of passengers or property as a common carrier is clearly within the General Assembly's definition of the term "public utility" and therefore the Commission has the power to entertain an application for authorization to operate as a "common carrier", including authorization to operate as a "motor carrier" as these terms are defined by the General Assembly. But the Commission is not empowered to grant an application filed by an entity that does not meet the General Assembly's definition of "common carrier." And by the Applicant's own admission it is not a transportation company and does not provide any transportation service. Accordingly, the Commission may not grant the Applications.

The Public Utility Code defines the term "motor carrier" as "[a] common carrier by motor vehicle, and a contract carrier by motor vehicle." 66 Pa. C.S. §102. The Public Utility Code defines the term "common carrier" as follows:

> Any and all persons or corporations holding out, offering, or undertaking, directly or indirectly, service for compensation to the public for the transportation of passengers or property, or both, or any class of passengers or property, between points within this Commonwealth by, through, over, above, or under land, water, or air, and shall include forwarders, ***but shall not include*** contract carriers by motor vehicles, or ***brokers***, or any bona fide cooperative association transporting property exclusively for the members of such association on a nonprofit basis.
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> 66 Pa. C.S. §102 (emphasis added).

In order to determine whether the Applicant meets the Public Utility Code's definition of "motor carrier," the Commission should rely on the Applicant's own words. In paragraph 13 of its Application, the Applicant describes itself as the operator of a "ridesharing network service for passenger trips." Application ¶13. In paragraph 14 of its Application, the Applicant states:

> Applicant proposes to use a digital platform to connect passengers to independent ridesharing operators with whom the Applicant intends to contract. Operators will use their personal, noncommercially licensed vehicles for the purpose of providing transportation services. The Applicant plans to license the Uber technology to generate leads from riders who need transportation services. ***The Applicant does not own vehicles, employ drivers or transport passengers.***
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> (emphasis added)

Furthermore, in its own licensing agreement, the Applicant states:

> **THE COMPANY DOES NOT PROVIDE TRANSPORTATION SERVICES, AND THE COMPANY**

IS NOT A TRANSPORTATION CARRIER. IT IS UP TO THE THIRD PARTY TRANSPORTATION PROVIDER, DRIVER OR VEHICLE OPERATOR TO OFFER TRANSPORTATION SERVICES WHICH MAY BE SCHEDULED THROUGH USE OF THE APPLICATION OR SERVICE. THE COMPANY OFFERS INFORMATION AND A METHOD TO OBTAIN SUCH THIRD PARTY TRANSPORTATION SERVICES, BUT DOES NOT AND DOES NOT INTEND TO PROVIDE TRANSPORTATION SERVICES OR ACT IN ANY WAY AS A TRANSPORTATION CARRIER, AND HAS NO RESPONSIBILITY OR LIABILITY FOR ANY TRANSPORTATION SERVICES PROVIDED TO YOU BY SUCH THIRD PARTIES.

By its own admission, then, the Applicant is not a "motor carrier" within the meaning of the Public Utility Code because it does not transport passengers. Accordingly, the Commission may not approve the Applications.

III. NOTWITHSTANDING THE APPLICANT'S OWN ADMISSION, THE COMMISSION DOES NOT HAVE THE POWER TO GRANT THE APPLICATIONS SEEKING AUTHORIZATION TO PROVIDE MOTOR CARRIER SERVICE BECAUSE THE APPLICANT PROPOSES TO FUNCTION AS A BROKER, WHICH IS EXCLUDED FROM THE DEFINTION OF COMMON CARRIER.

Even if the Applicant were not denying that it is a transportation company and that it does not provide transportation service, it still would not meet the definition of "motor carrier" within the meaning of the Public Utility Code because it meets the definition of "broker" within the meaning

of Section 2501 of the Public Utility Code, 66 Pa. C.S. §2501, which is explicitly excluded from the definition of "motor carrier." Section 2501 defines the term "broker" as follows:

> Any person or corporation not included in the term "motor carrier" and not a bona fide employee or agent of any such carrier, or group of such carriers, who or which, as principal or agent, sells or offers for sale any transportation by a motor carrier, or the furnishing, providing, or procuring of facilities therefor, or negotiates for, or holds out by solicitation, advertisement, or otherwise, as one who sells, provides, furnishes, contracts, or arranges for such transportation, or the furnishing, providing, or procuring of facilities therefor, other than as a motor carrier directly or jointly, or by arrangement with another motor carrier, and who does not assume custody as a carrier.
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> 66 Pa. C.S. §2501

In its application, the Applicant indicates that it will use its mobile software application to facilitate ridesharing arrangements between prospective passengers and private individuals using their own vehicles, who will provide the actual transportation service; the Applicant does not propose to provide transportation service itself. Based on the foregoing, Applicant proposes to function as a "broker" within the meaning of 66 Pa. C.S. §2502 and not as a "motor carrier" within the meaning of 66 Pa. C.S. §102. Accordingly, the application should be denied because the Commission may not authorize a person or corporation to provide motor carrier service where the person or corporation only proposes to procure such service on behalf of

third parties, but does not propose to provide such service itself, either directly or indirectly.

IV. EVEN IF THE APPLICANT AMENDS ITS APPLICATION TO SEEK AUTHORIZATION TO ACT AS A BROKER OF MOTOR CARRIER SERVICE, THE COMMISSION DOES NOT HAVE THE POWER TO GRANT AUTHORIZATION TO A MOTOR CARRIER OR A BROKER THAT PROPOSES TO FACILITATE THE PROVISION OF TRANSPORTATION SERVICE BY UNCERTIFIED CARRIERS OR TO FACILITATE ILLEGAL COMMERCIAL RIDESHARING

Commission regulations prohibit a broker to "employ or engage a carrier who or which is unable to lawfully provide the transportation under his contracts, agreements, or arrangements therefor." 52 Pa. Code §39.5 (pertaining to carrier's operating authority). In other words, a broker cannot procure transportation services from an individual or entity that does not have a certificate of public convenience authorizing the type of transportation that is being requested. This makes sense because a motor carriers must first obtain a certificate of public convenience before beginning service. 66 Pa. C.S. §1101. Accordingly, a broker should not be able to procure a service that an individual or entity may not provide directly.

Furthermore, the Application proposes to facilitate commercial ridesharing, which is illegal in Pennsylvania. The Ridesharing Arrangement

Act, 55 P.S. §§ 695.1 through 695.9, defines the term “ridesharing arrangement” as follows:

> As used in this act, "RIDESHARING ARRANGEMENT" shall mean any one of the following forms of transportation:
>
> (1) The transportation of not more than 15 passengers where such transportation is incidental to another purpose of the driver ***who is not engaged in transportation as a business.*** The term shall include ridesharing arrangements commonly known as carpools and vanpools, used in the transportation of employees to or from their place of employment.
> (2) The transportation of employees to or from their place of employment in a motor vehicle owned or operated by their employer.
> (3) The transportation of persons in a vehicle designed to hold no more than 15 people and owned or operated by a public agency or nonprofit organization for that agency's clientele or for a program sponsored by the agency.

Individuals or entities that provide transportation services under a ridesharing arrangement are not subject to motor carrier laws and are not considered commercial vehicles. 66 P.S. §695.2 and §695.99. But a transportation provider that receives compensation for its services is no longer doing so pursuant to a “ridesharing arrangement” and must first obtain a certificate of public convenience prior to beginning service. 66 Pa. C.S.. §1101 and 53 Pa. C.S. §§ 5714 and 5741.

Accordingly, the application should be denied, whether it amended or not, because it is illegal to provide directly, or to facilitate, commercial

transportation services pursuant to ridesharing arrangements that will be provided by individuals or entities that do not possess certificates of public convenience. Individuals who provide transportation service are subject to the provisions of the Public Utility Code and must first obtain a certificate of public convenience before beginning to provide the proposed service. 66 Pa. C.S. §1101. Based on the foregoing, the Commission may not approve the Application as it seeks to facilitate the provision of illegal transportation service with uncertified carriers.

V. THE COMMISSION DOES NOT HAVE THE POWER TO GRANT THE PRESENT APPLICATION FOR EXPERIMENTAL SERVICE BECAUSE THE PROPOSED SERVICE DOES NOT DIFFER IN ANY MEANINGFUL WAY FROM CALL OR DEMAND AND LIMOUSINE SERVICE

Commission has adopted a scheme of classification for service provided by common carriers of passengers, including "experimental service", under 52 Pa. Code §29.13, which states:

> The following standard classification of types of service furnished by common carriers of passengers is adopted, and the following is hereby recognized as a standard class of common carrier service. The rights and conditions pertaining to a standard class of service are specified in Subchapter D (relating to supplemental regulations). A certificated service which does not completely correspond to a standard class may be governed, where practicable, by the regulations for the standard class to which it most nearly corresponds:

(1) *Scheduled route service.* Common carrier service for passengers, rendered on either an exclusive or a nonexclusive basis, wherein the vehicles delivering the service operate according to schedules along designated routes.

(2) *Call or demand service.* Local common carrier service for passengers, rendered on either an exclusive or a nonexclusive basis, where the service is characterized by the fact that passengers normally hire the vehicle and its driver either by telephone call or by hail, or both.

(3) *Group and party service.* Common carrier service for passengers, rendered on an exclusive basis as charter service for groups or rendered on a nonexclusive basis for tour or sightseeing service and special excursion service.

(4) *Limousine service.* Local, nonscheduled common carrier service for passengers rendered in luxury-type vehicles on an exclusive basis which is arranged for in advance.

(5) *Airport transfer service.* Common carrier service for passengers rendered on a nonexclusive basis which originates or terminates at an airport.

(6) *Other services: paratransit, experimental.* Common carrier service for passengers which differs from service as described in any one of the five classes set forth in paragraphs (1)—(5) and is provided in a manner described in the certificate of public convenience of the carrier and is subject to restrictions and regulations are stated in the certificate of the carrier or in this chapter.

In order to advance and promote the public necessity, safety and convenience, the Commission may, upon application, grant a new certificate or an amendment to an existing certificate in order to allow to be provided a

new, innovative or experimental type or class of common carrier service. 52 Pa. Code §29.352.

Notwithstanding the fact that the application is, for all intents and purposes, requesting authorization to act as a "broker", so that the Applicant may facilitate illegal ridesharing arrangements between prospective passengers and private individuals, without certificates, using their own vehicles, the actual service that will be provided by these individuals in not "experimental" within the meaning of 52 Pa. Code §29.13 because it does not differ, in any significant way, from "call or demand service" or "limousine service", as defined under the Commission's classification scheme for motor carriers.

As noted above, "experimental service" is defined negatively, as a service that *differs* from "scheduled route service", "call or demand service", "group and party service", "limousine service" and "airport transfer service." But nothing about the proposed service distinguishes it, in any meaningful way, from the service provided by other motor carriers under the Commission's scheme of classification for such services. As described in the application, the proposed service appears to offer on-demand transportation service, despite the use of mobile electronic devices to communicate such requests. Such service is "call or demand" service within

the meaning of the Commission's classification scheme for motor carrier service.

Clearly, the use of a smartphone application does not render the proposed service "experimental." In fact, as Protestants' witnesses testified, the use of mobile electronic devices and smart phone applications in call or demand service is neither new nor experimental and is currently in use in taxicab service in Philadelphia. N.T. 366-388 (Direct Examination of Khalid Alvi); N.T. 431-433 (Direct Examination of Alex Friedman) Moreover, the mobile phone application the Applicant proposes to use appears to be less innovative and less user friendly than smartphone applications already in use, as Applicant's smartphone application does not permit advance reservations and discriminates against patrons who prefer to use cash, which includes many visually impaired individuals. Id.

In the alternative, to the extent requests for the proposed service are deemed to be on an "advance reservation" basis (i.e. the immediate demand for service is in advance of the actual response to the demand), the service is "limousine" service within the meaning of the Commission's classification scheme for motor carrier service. And the use of smartphone applications in limousine service is also neither new nor experimental as it is currently in

use by one of the Applicant's affiliated companies, Gegen, LLC, which has limousine authority from the Philadelphia Parking Authority.

Accordingly, the use of smartphone applications in the provision of motor carrier service does not render the service experimental, as they are actively employed in both call or demand and limousine service in Pennsylvania. The Applicant's proposed use of its smartphone application does not distinguish it in any way from other classes of motor carrier service.

The only thing new or experimental about Applicant's proposed service that distinguishes its service from other motor carrier services is the proposal to use uncertified drivers to facilitate illegal ridesharing. But this is not new, innovative or experimental, it is just illegal. The Commission did not adopt a classification for experimental service as an exception capable of swallowing the rest of its regulatory scheme governing motor carrier service. The Commission intended that experimental service would be governed by the same rules and regulations that govern other motor carrier service, at least with respect to vehicle safety and equipment standards, driver eligibility standards, and insurance requirements. Experimentation does not permit the Commission to exceed the bounds of its statutory authority or to grant authorization to provide service that is otherwise illegal.

What the Applicant proposes here is not a new, experimental service, but the resurrection of an old problem: illegal hack service provided by gypsy cabs. One of the primary aims of taxicab regulation in this Commonwealth has been the elimination of such unauthorized service, which, until recently, was uniformly viewed as a threat to public safety. The only thing new or innovative about the proposed service in this case is the fact that a multi-billion dollar corporation is facilitating the provision of illegal gypsy cab service by making them harder to detect and easier for them to break the law.

Based on the foregoing, the application should be denied because the proposed service does not differ, in any meaningful way, from other motor carrier services and, therefore, does not fall within the definition of "experimental service" under 52 Pa. Code §29.13.

VI. ASSUMING FOR THE SAKE OF ARGUMENT THAT THE COMMISSION IS EMPOWERED TO GRANT THE APPLICATIONS, THE APPLICANT HAS FAILED TO MEET ITS BURDEN OF PROOF WITH REGARD TO STATEWIDE PUBLIC NEED

Section 1103(a) of the Public Utility Code, 66 Pa. C.S. §1103(a), provides that an application for a certificate of public convenience should be granted only if the Commission finds that "the granting of such certificate is necessary or proper for the service, accommodation, convenience or safety

of the public." The applicant must also satisfy the specific requirements the PUC has promulgated in its regulations under 52 Pa.Code §41.14, which provides:

> (a) An applicant seeking motor common carrier authority has a burden of demonstrating that approval of the application will serve a useful public purpose, responsive to a public demand or need.
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> (b) An applicant seeking motor common carrier authority has the burden of demonstrating that it possesses the technical and financial ability to provide the proposed service. In addition, authority may be withheld if the record demonstrates that the applicant lacks a propensity to operate safely and legally. In evaluating whether a motor carrier applicant can satisfy these fitness standards, the Commission will ordinarily examine the following factors, when applicable:
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> (1) Whether an applicant has sufficient capital, equipment, facilities and other resources necessary to serve the territory requested.
>
> (2) Whether an applicant and its employees have sufficient technical expertise and experience to serve the territory requested.
>
> (3) Whether an applicant has or is able to secure sufficient and continuous insurance coverage for all vehicles to be used or useful in the provision of service to the public.
>
> (4) Whether the applicant has an appropriate plan to comply with the Commission's driver and vehicle safety regulations and service standards contained in Chapter 29 (relating to motor carriers of passengers).
>
> (5) An applicant's record, if any, of compliance with 66 Pa.C.S. (relating to the Public Utility Code), this title and the Commission's orders.
>
> (6) Whether an applicant or its drivers have been convicted of a felony or crime of moral turpitude

and remains subject to supervision by a court or correctional institution.

(c) The Commission will grant motor common carrier authority commensurate with the demonstrated public need unless it is established that the entry of a new carrier into the field would endanger or impair the operations of existing common carriers to an extent that, on balance, the granting of authority would be contrary to the public interest.

(d) Subsections (a) and (c) do not apply to an applicant seeking authority to provide motor carrier of passenger service under § § 29.331—29.335 (relating to limousine service).

The applicant must prove by a preponderance of the evidence that the requirements of Section 1103(a) and Section 41.14 are met. *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602-03 (Pa. Cmwlth. 1990). "[A] public demand/need for an applicant's proposed transportation service may be proven through witnesses comprising a representative sampling of the public that will use the applicant's proposed service within the territory encompassed by the application.'" *Ace Moving & Storage v. Pennsylvania Public Utility Commission*, 935 A.2d 75, 78 (Cmnwlth. Ct. 2007). In proving a public need for the services, the "witnesses must be legally competent and credible; their testimony must be probative and relevant to the application, and they must articulate a demand/need for the type of service embodied in the

application." *Yellow Cab Company of Pittsburgh v. Pennsylvania Public Utility Commission*, 673 A.2d 1015, 1018 (Pa. Cmwlth. 1996).

What may constitute "need" for service depends on the locality involved and the particular circumstances of each case. *Warminster Township Municipal Authority v. Pennsylvania Public Utility Commission*, 138 A.2d 240 (Pa. Super. 1958). An applicant need not establish a present demand for service in every square mile of the territory to be certificated; proof of necessity within the general area is sufficient. *Morgan Drive Away, Inc. v. Pennsylvania Public Utility Commission*, 512 A.2d 1359 (Cmnwlth. Ct. 1986).

The Commission has established certain evidentiary guidelines for the establishment of public need under 52 Pa. Code §3.382, which provides:

> (a) *Service request evidence.* Evidence of requests received by an applicant for passenger or household goods in use service may be offered by the applicant in a transportation application proceeding relevant to the existence of public necessity for the proposed service. The credibility and demeanor of a witness offering evidence will be considered in evaluating the evidence. The weight which will be attributed to the evidence will depend upon the extent to which the alleged requests are substantiated by evidence such as the following:
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> (1) The date of each request.
> (2) The name, address and phone number of the person or company requesting service.
> (3) The nature of the service requested on each occasion, including the commodities or persons to be

transported, and the origin and destination of the requested transportation.

(4) The disposition of the request, that is, whether the applicant provided the service or, if not, whether the requesting shipper was referred to another carrier and, if there was a referral, to which carrier was the shipper referred.

In the present case, the Applicant did not present any request evidence and relied solely on the testimony of public witnesses. The evidence of public need in this matter is thin to non-existent and limited to users in Allegheny County only, which was provided illegally. Certainly, there is no evidence of public need that supports the granting of statewide authority or any authority outside of Allegheny County.

The absence of sufficient public need testimony is puzzling given the grandiose claims from the Applicant's vast public relations campaign regarding the need for its services. If these claims were true, one would have expected the hearing room to be flooded with potential users of the proposed service eager to extol its virtues. The actual turnout is not reflective of a broad based statewide demand for the proposed service.

VII. ASSUMING FOR THE SAKE OF ARGUMENT THAT THE COMMISSION IS EMPOWERED TO GRANT THE APPLICATIONS, THE APPLICANT HAS FAILED TO MEET ITS BURDEN OF PROOF WITH REGARD TO FINANCIAL FITNESS

Evidence of financial fitness in the record is virtually non-existent. The Applicant's sole operation witness testified regarding a projected profit and loss statement, but was unable to provide any information about the details of any of the line items on the statement or how projected revenues were derived. In addition, the projected profit and loss statement projected an operating loss of $1.3 million dollars, or an operating ratio of approximately 40%, which is not sustainable from a financial perspective and suggests that the Applicant may be willing to subsidize its losses in order to engage in illegal predatory price cutting to drive its competitors out of business.

The Applicant's sole operation witness testified that the Applicant has no employees and calls the Pittsburgh offices of its parent company its operational base, even though these offices are not manned on a full-time basis by any employees. These facts raise significant questions about the credibility of the Applicant's financial evidence, which projects office expenses of more than $2,000,000. In any event, Applicant failed to offer sufficient evidence of financial fitness.

VIII. ASSUMING FOR THE SAKE OF ARGUMENT THAT THE COMMISSION IS EMPOWERED TO GRANT THE APPLICATIONS, THE APPLICANT HAS FAILED TO MEET ITS BURDEN OF PROOF WITH REGARD TO TECHNICAL FITNESS

There was no testimony presented regarding the experience or qualifications of any of the Applicant's employees concerning their technical fitness. In fact, the testimony indicated that the Applicant does not have any employees and shares space in Pittsburgh with its parent company, whose employees only use the office on a part-time basis.

IX. ASSUMING FOR THE SAKE OF ARGUMENT THAT THE COMMISSION IS EMPOWERED TO GRANT THE APPLICATIONS, THE APPLICANT HAS FAILED TO MEET ITS BURDEN OF PROOF WITH REGARD TO ITS PROPENSITY TO OPERATE LEGALLY

Perhaps the most disturbing aspect of the Applicant's case concerns its operational fitness from the perspective of its propensity to operate legally. The Commission issued a direct order to the Applicants to provide testimony regarding its continued operations in light of a Commission-issued cease and desist order. Some of the Protestants moved to dismiss the Applications on the basis of the Applicant's failure to comply with this order. The above Protestants join in this motion. The Applicant has been directed to address the motion in its Main Brief and the Protestants have been given an opportunity to respond in their Briefs due September 12, 2014.

The above Protestants hereby reserve the right to address the motion and the issue of the Applicant's propensity to operate legally in their Reply

Brief, but note that the Applicant has failed to establish its propensity to operate legally.

X. ASSUMING FOR THE SAKE OF ARGUMENT THAT THE COMMISSION IS EMPOWERED TO GRANT THE APPLICATIONS, THE APPLICATIONS SHOULD BE DENIED BECAUSE THEY ARE NOT IN THE PUBLIC INTEREST

Commission has adopted certain regulations regarding direct control and supervision by motor carrier certificates that apply to all classes of motor carrier service, including experimental service. These regulations require a certificate holder to own or lease any vehicle used to provide authorized service and to exercise direct control and supervision over the vehicle. 52 Pa. Code §29.101(a)(5) and (f)(2)(i). The Applicant does not propose to own or lease any of the vehicles that will be used to provide the proposed service.

Direct control and supervision by a certificate holder also includes the duty to inspect the vehicle and equipment that will be used to provide the authorized service prior to taking possession of it and to certify that it is in a safe condition for operation on the highway. The Applicant proposes to rely on the annual inspection conducted by the Pennsylvania Department of Transportation and does not propose to conduct any vehicle inspections itself.

Direct control and supervision by a certificate holder also includes the duty to ensure that the vehicles are operated by drivers qualified under Subchapter F of Chapter 29 of the Commission's regulations. 52 Pa. Code §29.101(a)(2). The Applicant proposes to conduct criminal background checks, at least on an initial basis, but did not provide testimony regarding follow-up checks.

Direct control and supervision by a certificate holder also includes the duty to furnish and maintain adequate service to the public which shall be reasonably continuous and without unreasonable interruptions and delays. 52 Pa. Code §29.101(f)(2)(iii). Direct control and supervision by the certificate holder also includes the duty to enter into a proper lease agreement with the driver of any vehicle that will be used to provide authorized service. 52 Pa. Code §29.101(a)(5) and (f). Certificate holders are prohibited from leasing, contracting with, or making an arrangement with an employee-driver under which the certificate holder is given custody or possession or use of a vehicle owned or leased by the employee-driver or his nominee. 52 Pa. Code §29.101(f)(1).

Although it did not provide any testimony regarding its proposed leasing arrangement with drivers, the application proposes that private vehicle owners will provide the authorized service by driving their own

vehicles, which will be leased to the applicant on a temporary basis only during the time when service is being provided. Under the proposed leasing arrangement, the owner-driver is the lessor and the Applicant is the lessee, but possession will never pass from the owner-driver to the Applicant.

Presumably, under the proposed leasing arrangement, the vehicle owners are under no obligation to use Applicant's mobile application to provide authorized service and are free to use their own vehicles wherever and whenever they want for their own purposes. The application does not propose that the Applicant will lease back the vehicles to the owner-drivers who will be providing the authorized service. The proposed temporary leasing arrangement is not in the public interest for several reasons.

First, the proposed temporary leasing arrangement is not in the public interest because the Applicant will not be able to exercise direct control and supervision over the vehicles. Under the proposed leasing arrangement, the Applicant never takes possession and control of the vehicle when the owner-driver engages the Applicant's mobile telephone application. Accordingly, it is not possible for the Applicant to conduct safety inspections in compliance with the Authority's regulations because it never takes possession of the leased vehicle.

Furthermore, the proposed leasing arrangement is not in the public interest because it violates Commission regulations that prohibit a certificate holder from leasing a vehicle from a driver or his nominee. The proposed leasing arrangement is not in the public interest because the Applicant will not be the lessor of the vehicle. Moreover, the proposed leasing arrangement is not in the public interest because the Applicant has no way of ensuring that it provides continuous service without unreasonable interruption or delay. Applicant does not control or supervise the operation of the leased vehicle by the owner-drivers who are under no obligation to provide any service at all.

Furthermore, the proposed leasing arrangement is not in the public interest with respect to insurance and registration of the leased vehicles. Presumably, the leased vehicles title, registration and possession of the leased vehicles would remain with the owner-driver. Registration of the leased vehicle as a private passenger vehicle by the owner-driver violates Commission regulations and the Vehicle Code because the vehicle is being used as a commercial vehicle for hire.

CONCLUSION

For all of the foregoing reasons, the Applications should be denied.

Respectfully submitted,

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Date: August 29, 2014

CERTIFICATE OF SERVICE

I, Michael Henry, hereby certify that I mailed by first class mail, postage prepaid, a copy of the foregoing Brief to all parties on the Commission Service list.

Michael S. Henry

Michael S. Henry

Date: August 29, 2014