**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

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|  | Public Meeting held January 29, 2015 |
| Commissioners Present:Robert F. Powelson, ChairmanJohn F. Coleman, Jr., Vice ChairmanJames H. CawleyPamela A. WitmerGladys M. Brown |  |
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Application of Rasier-PA LLC, a limited liability A-2014-2416127

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

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Reconsideration (Petition) of Executive Transportation Company, Inc. (Executive) filed on December 22, 2014, seeking reconsideration of our Opinion and Order entered on December 5, 2014 (*December 2014 Order*), relative to the above-captioned proceeding. On January 2, 2015, Rasier-PA, LLC (Rasier-PA or Applicant) filed an Answer to the Petition (Answer). For the reasons stated below, we shall deny the Petition.

**History of the Proceeding**

On April 14, 2014, Rasier-PA filed an application for motor common carrier of persons in experimental service between points in Allegheny County, Pennsylvania (Application).[[1]](#footnote-1) In its Application, Rasier-PA stated as follows:

Applicant proposes to operate a ride-sharing network service for passenger trips between points within Allegheny County, Pennsylvania.

Applicant proposes to use a digital platform to connect passengers to independent ride-sharing operators (“Operators”) with whom 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. Applicant does not own vehicles, employ drivers or transport passengers.

Application at 2-3.

Notice of the Application was published in the Pennsylvania Bulletin on April 26, 2014, at 44 *Pa*. *B*. 2604. The notice provided that the deadline for filing protests was May 12, 2014. Various motor carriers, including Executive, filed protests to the Application.[[2]](#footnote-2)

 On July 31, 2014, Administrative Law Judges (ALJs) Mary D. Long and Jeffrey A. Watson issued an Interim Order directing the Applicant to provide certain trip data for the record in this proceeding. The ALJs based this directive on the Commission’s July 24, 2014, Order for Interim Emergency Relief in connection with enforcement proceedings initiated against the Applicant’s parent company, Uber Technologies, Inc. (Uber).[[3]](#footnote-3)

 Combined evidentiary hearings for this proceeding and the Statewide Application at Docket No. A-2014-2424608, were held on August 18-19, 2014, and September 9, 2014.

 During the hearing, the Applicant objected to the provision of the information required in the *Interim Order* arguing that the trip data was highly confidential and proprietary, was not relevant to the proceeding and invoked a Fifth Amendment right against self-incrimination. Counsel for the Applicant instructed her witness to not answer each question posed from the *Interim Order*. Subsequently, counsel for some Protestants in the Statewide Application made an oral Motion to Dismiss the Application for failure to comply with the ALJs’ Order. The ALJs held the ruling on the Motion in abeyance and provided the Parties an opportunity to brief their positions. The Applicant filed its Brief in opposition to dismissal on September 12, 2014; the Protestants filed their Reply Briefs on September 15, 2014.

 The Recommended Decision, issued on September 25, 2014, determined that the Applicant did not provide the trip data enumerated in the *Interim Order*. The ALJs also found that the Applicant did not seek redress from the *Interim Order* or seek a protective order. Concluding that the Applicant’s conduct obstructed the orderly conduct of the proceeding and was inimical to the public interest pursuant to 52 Pa. Code
§ 5.245(c),[[4]](#footnote-4) the ALJs dismissed the Application.

The Applicant filed Exceptions on October 10, 2014; and various Protestants filed Replies to Exceptions on October 20, 2014.

In our *December 2014 Order*, we granted, in part, Rasier-PA’s Exceptions, reversed the Recommended Decision, and granted the Application subject to compliance with certain terms and conditions before Experimental Service would be authorized. As previously stated, Executive filed the instant Petition on December 22, 2014.[[5]](#footnote-5) By Order entered January 2, 2015, we granted the Petition, pending further review of, and consideration on, the merits. Also on January 2, 2015, Rasier-PA filed an Answer to the Petition.

**Discussion**

**Legal Standards**

Before addressing the Petition, we note that any issue not specifically discussed shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pennsylvania Public Utility Commission,* 625 A.2d 741 (Pa. Cmwlth. 1993).

The Public Utility Code (Code) establishes a party’s right to seek relief following the issuance of our final decisions pursuant to Subsections 703(f) and (g), 66 Pa. C.S. § 703(f) and § 703(g), relating to rehearings, as well as the rescission and amendment of orders. Such requests for relief must be consistent with Section 5.572 of our Regulations, 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision.

The standards for granting a Petition for Reconsideration were set forth in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553 (1982):

A Petition for Reconsideration, under the provisions of

66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part.

 In this regard we agree with the court in the *Pennsyl­vania Railroad Company* case, wherein it was stated that:

 Parties . . . cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them . . . what we expect to see raised in such petitions are new and novel arguments, not previously heard, or considera­tions which appear to have been overlooked by the Commission.

*Duick,* 56 Pa. P.U.C. at 559 (quoting *Pennsylvania Railroad Co. v. Pennsylvania Public Service Commission*, 179 A. 850, 854 (Pa. Super. Ct. 1935)).

 Under the standards of *Duick*, a petition for reconsideration may properly raise any matter designed to convince this Commission that we should exercise our discretion to amend or rescind a prior Order, in whole or in part. Such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations which appear to have been overlooked or not addressed by the Commission. *Duick*, 56 Pa. P.U.C. at 559.

***December 2014 Order***

 In our *December 2014 Order*, we disagreed with the ALJs’ determination to dismiss the Application pursuant to Section 5.245(c) of our Regulations, 52 Pa. Code

§ 5.245(c). We concluded that the dismissal at such a late stage in the proceeding, and after the development of an extensive record, was not in the public interest. Based on our evaluation of the record, we determined that Rasier-PA’s failure to comply with the *Interim Order* did not materially prejudice the Parties. In addition, we found that the Commission was able to consider and reach a disposition on all the relevant issues pertaining to the Application and approve it, subject to terms and conditions outlined in the *December 2014 Order*. Nonetheless, we did not condone Rasier-PA’s failure to comply with the *Interim Order* and directed the Applicant to submit the outstanding trip information as part of the Compliance Plan and as a condition for the issuance of any Certificate of Public Convenience (Certificate). *December 2014 Order* at 24-27.

Next, in our *December 2014 Order*, we evaluated whether the Commission has the jurisdiction to a grant a Certificate to Rasier-PA as an experimental service provider. During the proceeding, various Protestants had argued that the Applicant is seeking authorization to operate a Transportation Network Company (TNC), a term that is undefined under the Code. *See e.g.,* Executive Brief at 2.[[6]](#footnote-6) The Protestants contended that the General Assembly has not empowered the Commission to grant Certificates to TNCs. Although the Commission may grant Certificates to certain classes of transportation, the Protestants claimed that the Application must be denied because Rasier-PA is not a “motor carrier” – as defined in Section 102 of the Code, 66 Pa. C.S. § 102. The Protestants submitted that the term “motor carrier” requires the Applicant to own or operate the motor vehicles involved in the proposed service. Here, the proposed service involves independent drivers owning and operating their own vehicles. Additionally, they argued that the “experimental service” regulation under 52 Pa. Code § 29.13 only applies to “motor carriers” as defined in the Code. *See e.g.,* Executive Brief at 7-11.

 The Protestants also contended that the Applicant is attempting to act as a broker and not as a motor carrier. *Id.* at 12-14. Pursuant to 66 Pa. C.S.

§ 2505(a), brokers of transportation in the Commonwealth must obtain a brokerage license issued by the Commission and the broker must utilize certificated motor carriers to provide transportation. However, the Protestants submitted that the Applicant does not hold a broker license nor does it intend to use certificated motor carriers to provide the transportation service. The Protestants averred that the Commission is prohibited from allowing the Applicant to provide such broker services. *See e.g.,* Executive Brief at 12-14.

 The Applicant argued that because its new and innovative service does not fit squarely within the types of transportation services delineated in the Code and the Commission’s Regulations, it should qualify as an “experimental service.” Rasier-PA Brief at 47.

In our *December 2014 Order*, we explained that in the Statewide Application proceeding, the ALJs disagreed with the Protestants’ identical contentions that the Applicant as a TNC cannot be considered a motor carrier and that Rasier-PA is ineligible for a Certificate. First, we noted the ALJs’ explanation that the Code does not require the Applicant to own vehicles in order to be a motor carrier.[[7]](#footnote-7)

 Next, we referenced the ALJs’ recognition that the Commission regulates various types of motor carrier service and that not all forms of common carrier transportation fit squarely within these categories. As such, the Commission promulgated a regulation for “experimental service” to accommodate a proposed transportation service not encompassed in the regulatory categories. The ALJs concluded that it is appropriate to consider the Applicant’s transportation service under the experimental service regulation as a motor carrier because it does not fit within any of the other regulatory categories including as a broker of transportation service. *Id.* at 30.

The ALJs explained the following in support of their finding:

[Section 29.352] of the regulations permits the Commission to approve a type of motor carrier service not currently contemplated by the regulations on a short-term basis, which permits the Commission (or the General Assembly) the time to promulgate additional regulations [or laws] to accommodate the proposed service if it is appropriate to do so. It also provides the certificate holder with the time to concretely demonstrate that the service proposed is indeed a public benefit, that the service can be operated safely and that the certificate holder will maintain an appropriate relationship with the Commission as the regulatory body. Section 29.352 further provides the Commission with the flexibility to waive the application of certain regulations that are not appropriate to impose and to also impose additional requirements which are not explicitly provided for in the Code, particularly informational and reporting requirements.

Statewide Application R.D. at 31 (citing *Application of Yellow Cab Company of Pittsburgh, Inc. t/a Yellow X*, Docket No. A-2014-2410269 (Order entered May 22, 2014)).

Upon review, we agreed with the analysis of the ALJs in the Statewide Recommended Decision that the Commission has jurisdiction to grant a certificate of public convenience to a TNC offering transportation services to passengers for compensation. In contrast to the interpretations that were offered by the Protestants, we stated that the Code clearly does not require the Applicant to own vehicles in order to be a motor carrier. Rather, the definitions of “public utility,” “common carrier,” and “common carrier by motor vehicle” convey the opposite position that the provision of transportation service can be offered indirectly and independent of actual ownership of a vehicle. 66 Pa. C.S. § 102. Additionally, we explained that there is no legitimate question that Rasier-PA, utilizing the Uber software and back office functions, is offering and operating “on demand” motor carrier passenger service to the public.

Moreover, we explained that ourRegulations delineate various types of motor common carrier passenger service, which include scheduled route service, call or demand service, group and party service, limousine service, airport transfer service, and paratransit service. 52 Pa. Code §§ 29.301-29.356. Each of these types of passenger service has unique characteristics that define the particular transportation mode. However, not all types of common carrier transportation fit squarely within these specified categories, as we recognized when we promulgated these Regulations. Therefore, in order to accommodate a proposed transportation methodology not encompassed within the stated categories, our Regulations also provide for “experimental service” under 52 Pa. Code § 29.352.

We determined that in the Statewide Application proceeding, the ALJs correctly considered the proposed transportation to be experimental service rather than brokerage service under 66 Pa. C.S. § 2505(a), which precludes a broker from using uncertificated motor carriers.[[8]](#footnote-8) Clearly, the Applicant is proposing to use private individuals in their personal vehicles rather than certificated motor carriers. We agreed with the ALJs that the innovative nature of this proposed service – the use of so-called non-professional drivers in their private vehicles – required an evaluation under Section 29.352 of our Regulations and a determination of whether this service could be provided in a safe manner. This regulation gives the Commission the flexibility to consider a new type of motor carrier service on a trial basis to determine if the proposed service is beneficial to the public. Therefore, we concluded that the Application was properly before us as a request for experimental service and proceeded to an analysis of whether it met the evidentiary criteria under 52 Pa. Code § 41.14. *December 2014 Order* at 32-33.

 Based on our review of the record, and given the experimental nature of the service, we found that Rasier-PA sustained its burden of proving a public demand for the proposed service and that it possessed the requisite technical and financial fitness and propensity to operate safely and legally.[[9]](#footnote-9) However, we held that the authority shall not take effect until Rasier-PA has demonstrated full and complete compliance with the conditions set forth in the *December 2014 Order*. *Id.* at 71.

**Petition and Answer**

In its Petition, Executive argues that the Commission does not have jurisdiction over the Application because Rasier-PA does not propose to operate as a common carrier. Additionally, Executive contends that the Applicant has provided unauthorized service since the Commission approved the Application and since the Commission issued its Order in this matter. Petition at 4-7.

 Regarding its jurisdictional argument, Executive cites to the Code definitions of “common carrier,” “common carrier by motor vehicle,” and “broker.” Petition at 5-6 (citing 66 Pa. C.S. §§ 102 and 2501(b)). Executive states that a common carrier by motor vehicle is not required to own or operate a vehicle. However, Executive contends that as part of its obligations under the Code, a common carrier must assume custody, control and supervision of each vehicle it operates under its Certificate. Executive states that the definition of common carrier excludes brokers and cites to the definition of broker for further clarification.[[10]](#footnote-10) According to Executive, it is clear that the assumption of custody of a vehicle used to provide service as a common carrier by motor vehicle is necessary to distinguish it from a mere broker of motor carrier service. Executive claims that we erred in concluding the Commission has jurisdiction to grant the Application because Rasier-PA is proposing to act as a broker and not as a common carrier by motor vehicle within the meaning of the Code. Petition at 5-7.

 In its Answer, Rasier-PA argues that Executive simply reiterates prior arguments that have been expressly rejected in the *December 2014 Order* and that the standards for reconsideration have not been met. The Applicant contends that we engaged in a detailed analysis of the proposed service before correctly concluding that it was proper to view it as experimental service under 52 Pa. Code § 29.352. Further, Rasier-PA states that we correctly rejected the notion that the proposed service falls within the definition of broker. Answer at 3-4.

 As to Executive’s claims of unauthorized service, Rasier-PA argues that Executive can point to no evidence in the record to support the allegation. Also, the Applicant proffers that Executive’s claim fails to acknowledge that existing allegations have not yet been adjudicated and, even if Rasier-PA had been found to be operating unlawfully, that finding alone would be insufficient to preclude a grant of operating authority in a subsequent proceeding. *Id.* at 5 (citing *Brinks, Inc. v. Pa. PUC*, 500 Pa. 387, 456 A.2d 1342 (1983)).

**Disposition**

 With regard to the first argument that Rasier-PA is proposing to act as a broker and not as a common carrier by motor vehicle, we find that Executive has failed to satisfy the standards in *Duick, supra*, for reconsideration because Executive has not set forth new arguments that were not previously considered in our *December 2014 Order*.

 In its Brief, Executive argued that the Applicant does not propose to provide actual transportation service itself, but seeks to function as a broker within the meaning of 66 Pa. C.S. § 2502. Executive claimed that the Application should be denied because the Commission may not authorize a person or corporation to provide motor carrier service if the applicant is only proposing to procure services on behalf of third parties who will use their own vehicles to provide the actual transportation service. In other words, Executive argued that the Commission cannot permit Rasier-PA to provide motor carrier service because the Applicant wants to function as a broker, which is excluded from the definition of common carrier. Executive Brief at 12-14.

 In the *December 2014 Order*, we rejected Executive’s arguments, finding that the Code does not require the Applicant to own vehicles in order to be a motor carrier. Specifically, we determined that the definitions of transportation “public utility,” “common carrier,” and “common carrier by motor vehicle” convey the opposite position that transportation service can be offered indirectly or independent of actual ownership. Additionally, we explained that Rasier-PA, by utilizing the Uber software and back office functions, was unquestionably offering and operating “on demand” motor carrier passenger service to the public. *December 2014 Order* at 31.

 Furthermore, we addressed the issue of broker service and the preclusion of using uncertificated motor carriers. Because of the unique and innovative nature of the proposed service, we concluded that it was appropriate to consider the proposed transportation under the experimental service regulation rather than as a broker of transportation. We concluded that Section 29.352 of our Regulations permits flexibility to consider a new type of motor carrier service on a trial basis to determine if it is beneficial to the public. *Id.* at 32.

 In its Petition, Executive appears to concede that the Code does not require a common carrier by motor vehicle to actually own or operate a vehicle in the proposed transportation service. Instead, Executive claims that the Code requires a common carrier to assume custody, control and supervision of each vehicle used in the operation of service. In support, Executive again cites to the full definition of broker under 66 Pa. C.S. § 2501(b), but this time emphasizes the final exclusion clause “… and who does not assume custody as a carrier.” Executive argues that this definition makes clear that the assumption of custody of a vehicle used to provide service as a common carrier is necessary to distinguish it from being a broker of the service. Petition at 5-7.

Essentially, although there is a slight variation from the wording of its prior contentions, Executive is rearguing the claim that Rasier-PA is not proposing to act as a motor carrier but rather as a broker without using certificated motor carriers.

As discussed in our prior Order, we declined to consider the proposed service as a broker of transportation, recognizing the requirement that a broker must only employ certificated motor carriers. Instead, we agreed with the analysis of the ALJs in the Statewide Application that the innovative nature of the proposed service permits an analysis as an experimental service under Section 29.352 of our Regulations. Accordingly, we decline to reconsider our prior Order, finding that Executive has failed to raise new or novel arguments not previously heard or considered.[[11]](#footnote-11)

In its second argument, Executive alleges that Rasier-PA is providing unauthorized service. It simply states: “[i]n defiance of a long line of Commission orders directing the Applicant and its parent companies and affiliated entities to cease and desist providing unauthorized service, the Applicant continues to thumb its nose at the Commission by continuing to operate.” Petition at 7. However, Executive fails to elaborate or cite to any record evidence in support of these contentions.

We have previously held that “[b]ald assertions of error or inconsistency do not meet the standards established in Subsections 703(f) or 703(g), Section 5.572, or *Duick*, which form the predicate for a petition for reconsideration.” *Kisha Dorsey v. Philadelphia Gas* Works, Docket No. F-2012-2313679 (Order entered February 19, 2014) at 5. Here, Executive’s bald assertions lend no support to its Petition and are therefore rejected.

**Conclusion**

Consistent with the foregoing discussion, we shall deny Executive’s Petition; **THEREFORE,**

**IT IS ORDERED:**

That the Petition for Reconsideration of Executive Transportation Company, Inc., filed on December 22, 2014, is denied consistent with this Opinion and Order.

**BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: January 29, 2015

ORDER ENTERED: January 29, 2015

1. Section 29.352 of the Commission’s Regulations, 52 Pa. Code § 29.352, which pertains to certification for the provision of experimental service, provides the following:

§ 29.352. Experimental service

 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. An application for a certificate or amendment shall state that it is an application for an experimental service. Holders of experimental certificates shall abide by this chapter except those which the Commission shall explicitly state do not apply. Holders of experimental certificates shall abide by an additional regulations or requirements, including informational and reporting requirements, which the Commission shall stipulate upon granting the certificate. A certificate for experimental service shall be valid only until the service is abandoned, until 2 years have elapsed from the time the certificate was approved or until the Commission enacts amendments to this chapter pertaining to the new class of service represented by the experimental service, whichever event occurs first. [↑](#footnote-ref-1)
2. The procedural history pertaining to the Protestants is found on pages 3-4 of the *December 2014 Order*. [↑](#footnote-ref-2)
3. *Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility**Commission for an Interim Emergency Order requiring Uber Technologies, Inc. to immediately cease and desist from brokering transportation service for compensation between points within the Commonwealth of Pennsylvania*, Docket No.

P-2014-2426846 (Order entered July 24, 2014). [↑](#footnote-ref-3)
4. 52 Pa. Code § 5.245(c) provides:

If the Commission or the presiding officer finds, after notice and opportunity for hearing, that the actions of a party, including an intervenor, in a proceeding obstruct the orderly conduct of the proceeding and are inimical to the public interest, the Commission or the presiding officer may take appropriate action, including dismissal of the complaint, application, or petition, if the action is that of complainant, applicant, or petitioner. [↑](#footnote-ref-4)
5. We note that Rasier-PA filed its Compliance Plan on December 24, 2014, but we will not consider that Plan in this Opinion and Order. Rather, a separate Opinion and Order addressing the Compliance Plan will issue commensurate with this Opinion and Order. [↑](#footnote-ref-5)
6. In this proceeding, another Protestant, Concord Limousine, Inc. (Concord), joined with Executive in filing a brief opposing the Application. However, Concord did not join in the pending Petition. Accordingly, we will only refer to Executive when citing its Brief. [↑](#footnote-ref-6)
7. In support, the ALJs referenced the following definitions under Section 102 of the Code, 66 Pa. C.S. § 102: (1) a transportation public utility is: “Any person or corporation . . . owning or operating in this Commonwealth equipment or facilities for . . . transporting passengers or property as a common carrier;” (2) a “common carrier” is a person or corporation “holding out, offering, or undertaking, directly or indirectly, service for compensation to the public for the transportation of passengers . . . .;” and (3) a “common carrier by motor vehicle” is a common carrier which undertakes the transportation of passengers within the Commonwealth “by motor vehicle for compensation, whether or not the owner or operator of such motor vehicle, or who or which provides or furnishes the motor vehicle, with or without driver, for transportation for use in the transportation of persons . . . .” Statewide Application R.D. at 27-28. [↑](#footnote-ref-7)
8. However, we noted the pending Complaint proceeding against Uber, which involves the issue of whether the activities of Uber fall within the definition of “broker.” *Pa. PUC, Bureau of Investigation and Enforcement v. Uber Technologies, Inc.*, Docket No. C-2014-2422723 (*Uber Complaint Proceeding*). We stated that our decision does not impact the unanswered question of whether, under Pennsylvania law, Uber’s licensing of its App constituted the brokering of transportation service during the time periods alleged in the *Uber Complaint Proceeding*. [↑](#footnote-ref-8)
9. Our disposition of the evidentiary criteria under 52 Pa. Code § 41.14 is found on pages 33-70 of the *December 2014 Order*. [↑](#footnote-ref-9)
10. Executive cites to 66 Pa. C.S. § 2501(b) and emphasizes the final clause of the definition as follows:

“Broker.” 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*. [↑](#footnote-ref-10)
11. Furthermore, we considered all of the relevant Code and Regulation provisions discussed in Executive’s Petition in reaching our *December 2014 Order*, including 66 Pa. C.S. § 2501(b). [↑](#footnote-ref-11)