

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held March 12, 2026

Commissioners Present:

Stephen M. DeFrank, Chairman
Kimberly Barrow, Vice Chair
Kathryn L. Zerfuss
John F. Coleman, Jr.
Ralph V. Yanora

Application of SMOKER PAVING, INC.

A-2025-3059150

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Reconsideration from Staff Action (Petition),¹ filed on December 15, 2025, by SMOKER PAVING, INC. (SMOKER PAVING or Petitioner),² in the above-captioned proceeding. No response to

¹ Because the instant Petition challenges the action taken in the Secretarial Letter issued on December 12, 2025 (*December 2025 Secretarial Letter*) relative to this proceeding and was filed within twenty (20) days of the issuance of the *December 2025 Secretarial Letter*, we shall regard the filing as a Petition for Reconsideration from Staff Action pursuant to Commission Regulations at 52 Pa. Code § 5.44(a).

² We note, at the outset, that Smoker Paving is a registered entity with the Pennsylvania Department of State. Application at 1. We also note that the Petitioner has a United States Department of Transportation (USDOT) Number of 2118706 as stated on the Application. Application at 1-2.

the Petition has been filed. In its Petition, SMOKER PAVING seeks reconsideration of the *December 2025 Secretarial Letter*, which was issued by the Commission's Bureau of Technical Utility Services (TUS) denying SMOKER PAVING's Application requesting authority to transport stone, asphalt, and millings as a motor common carrier of property (Application). More specifically, SMOKER PAVING seeks reconsideration of the denial of its Application based upon the clarifications of its response to TUS' data request served upon SMOKER PAVING on December 10, 2025 (*December 2025 Data Request*). For the reasons set forth herein, we shall deny the Petition, consistent with the discussion in this Opinion and Order.

I. Procedural History

On December 9, 2025, SMOKER PAVING filed its Application with the Commission, requesting authority to transport stone, asphalt, and millings as a motor common carrier of property. Application at 1-3.

On December 10, 2025, the Commission issued the *December 2025 Data Request* informing the Applicant that additional information was needed in order to proceed with the Application. Specifically, TUS sought information regarding the type of service being proposed and the entities that hire the Applicant for transport of the commodities listed in the Application. Attachment to the *December 2025 Data Request* at 3. The *December 2025 Data Request* indicated that the additional information was required within ten (10) working days of the date on the letter and further instructed that the Applicant's response should include a signed verification with an original signature, pursuant to 52 Pa. Code § 1.36. A sample Verification was also supplied. *See December 2025 Data Request.*

Additionally, the Attachment to the *December 2025 Data Request* stated, in pertinent part, as follows:

Per your answer to Question #10 on your Application for Common Carrier of Property, regarding the commodities you intend to transport, please answer the following questions in detail:

- 1.) Will the commodities you listed (stone, asphalt, millings) be transported by SMOKER PAVING Inc. to purchasers directly from SMOKER PAVING Inc.?
YES NO
- 2.) Are the commodities being transported used solely for work performed by SMOKER PAVING Inc.?
YES NO
- 3.) Please explain in detail who hires you for the transport of the commodities you listed.

See Attachment to the December 2025 Data Request at 3.

On December 10, 2025, SMOKER PAVING filed a timely response to the *December 2025 Data Request (December 10 Data Response)* and indicated that the commodities listed in the Application are transported by SMOKER PAVING to purchasers directly from the Petitioner. Also, SMOKER PAVING indicated that the commodities being transported are used solely for work performed by the Petitioner. The Applicant further provided that SMOKER PAVING is contracted by general contractors to perform asphalt paving operations which include the hauling of the materials listed. *December 10 Data Response at 3.*

On December 12, 2025, upon review of the submitted information, the Commission issued its *December 2025 Secretarial Letter* denying and dismissing the Application on the basis that SMOKER PAVING was proposing to provide a

non-jurisdictional service, *i.e.*, service considered private transportation of property. *December 2025 Secretarial Letter* at 1. The Commission determined that the requested transportation services remain outside of the Commission's jurisdiction and are exempt from Commission regulation and oversight. *Id.*

Additionally, the *December 2025 Secretarial Letter* informed SMOKER PAVING that, if it disagreed with the Commission's determination, then it could submit a Petition for Reconsideration from Staff Action with the Commission's Secretary within twenty (20) days of the date of the *December 2025 Secretarial Letter*. Further, TUS outlined instructions regarding the form and content of such a Petition for Reconsideration from Staff Action, including references to the inclusion of relevant documentation and a signed verification statement, as set forth in 52 Pa. Code §§ 1.31 and 5.44. *December 2025 Secretarial Letter* at 1-2.

As noted above, on December 15, 2025, SMOKER PAVING timely filed its Petition with an attachment.³ SMOKER PAVING requests the *December 2025 Secretarial Letter*, which denied its Application, and clarifies that the materials listed in its Application are picked up by the Petitioner at quarries and asphalt plants and then transported to jobs sites where SMOKER PAVING is working. Petition at 1. No response to the Petition has been filed.

³ Smoker Paving's attachment to its Petition is a copy of its responses to TUS' *December 2025 Data Request*.

II. Discussion

A. Legal Standards

Before us is a Petition for Reconsideration from Staff Action, pursuant to 52 Pa. Code § 5.44(a). Petitions for Reconsideration from Staff Action are governed by Section 5.44(a) of the Commission's Rules of Administrative Practice and Procedure, 52 Pa. Code § 5.44(a), which provides the following:

Actions taken by staff, other than a presiding officer, under authority delegated by the Commission, will be deemed to be the final action of the Commission unless reconsideration is sought from the Commission within 20 days after service of notice of the action, unless a different time period is specified in this chapter or in the act.

52 Pa. Code § 5.44(a).

In considering the appeal from Staff Action, the Application, and the Commission's regulatory authority, Section 332(a) of the Public Utility Code (Code), 66 Pa.C.S. § 332(a), provides that the party seeking affirmative relief from the Commission has the burden of proof. In this proceeding, the Petitioner is the party seeking affirmative relief from the Commission. Therefore, the Petitioner is the party with the burden of proof. *See, Application of 610 Hauling, LLC, t/a College Hunks Hauling Junk, for the right to begin to transport, as a common carrier, by motor vehicle, household goods in use, from points in the counties of Chester, Delaware, Montgomery, Philadelphia, and Bucks, to points in Pennsylvania*, Docket Nos. A-2012-2334103 and A-8915269 (Opinion and Order entered November 5, 2015), citing *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950).

Additionally, the Commission must ensure that the decision is supported by substantial evidence in the record. The Pennsylvania appellate courts have defined substantial evidence to mean such relevant evidence that a reasonable mind may accept as adequate to support a conclusion; more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Application of 610 Hauling, LLC, t/a College Hunks Hauling Junk, supra*, citing *Norfolk & Western Railway Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980); *Murphy v. Pa. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

In the instant proceeding, pursuant to Section 1103(a) of the Code, 66 Pa.C.S. § 1103(a), an application for a certificate of public convenience (Certificate) 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.” To make these determinations, the Commission’s Regulations, at 52 Pa. Code §§ 3.381-85, and the Commission’s Policy Statement, at 52 Pa. Code § 41.14, establish the evidentiary guidelines and criteria to be examined by the Commission when considering whether to grant or deny an application for authority. Pertinent here, the Commission’s enabling statute delineates a list of exemptions, which includes an exemption for transportation incidental to a primary business purpose. *See* 66 Pa.C.S. § 102 *et seq.*

The Commission will only grant a Certificate if the applicant is a “public utility” as defined in Section 102 of the Code, 66 Pa.C.S. § 102. Section 102 provides the following, in pertinent part:

“Public utility”

(1) Any person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for:

(iii) transporting passengers or property as a common carrier.

(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.

66 Pa.C.S. § 102 (emphasis added).

The Applicant also must provide proof that it proposes to provide service as defined in Section 102 of the Code, 66 Pa.C.S. § 102. Section 102 provides the following, in pertinent part:

“Common carrier by motor vehicle”

Any common carrier who or which holds out or undertakes the transportation of passengers or property, or both, or any class of passengers or property, between points within the Commonwealth, ...but does not include:

- (5) Transportation of property by the owner to himself, or to purchasers directly from him, in vehicles owned or operated by the owner of such property and not otherwise used in transportation of property for compensation for others.

66 Pa.C.S. § 102.

In every matter before the Commission, we must decide initially whether the Commission has jurisdiction over the Parties and subject matter at dispute. As a creature of legislation, the Commission possesses only the authority the state legislature has specifically granted to it in the Code. 66 Pa.C.S. §§ 101 *et seq.* Its jurisdiction must

arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1977); *Allegheny County Port Authority v. Pa. PUC*, 237 A.2d 602 (Pa. 1967); *Behrend v. Bell of Pa.*, 390 A.2d 233 (Pa. Super. 1978); *Pa. Department of Highways v. Pa. PUC*, 182 A.2d 267 (Pa. Super. 1962); and *City of Erie v. Pa. Electric Co.*, 383 A.2d 575 (Pa. Cmwlth. 1978). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348 (Pa. Super. 1945).

In addition, Section 501 of the Code grants the Commission authority to supervise and regulate all public utilities doing business in the Commonwealth and requires all public utilities to comply with regulations and orders. *See* 66 Pa.C.S. § 501. In addition, Section 1101 of the Code provides that it shall be unlawful for a proposed public utility to begin to offer, render, furnish, or supply service within the Commonwealth prior to approval of its application. *See* 66 Pa.C.S. § 1101.

For purposes of this Application, SMOKER PAVING must prove that the transportation service it provides falls within the definition of “public utility” service as set forth in the Code and Commission Regulations.

B. Petition

The Petition consists of a single page response to the *December 2025 Data Request* and a Verification statement signed by Mr. John Smoker, President of SMOKER PAVING, requesting reconsideration of the *December 2025 Secretarial Letter*, wherein the Commission denied the Petitioner’s Application. Petition at 1.

The Petitioner avers, in pertinent part, as follows:

I believe that I may have misinterpreted question number 1 from the request for information that was sent to us. The

question was: “Will the commodities you listed (stone, asphalt, millings) be transported by Smoker Paving Inc. to purchasers directly from Smoker Paving Inc.?” The answer was yes. However, upon reading again, the materials don’t come from Smoker Paving, Inc. directly. They are picked up by Smoker Paving, Inc. at quarries and asphalt plants which are then delivered to the job site on which we are working.

Petition at 1.

Based upon this clarification, the Petitioner asks the Commission to reconsider the denial of its Application. Petition at 1.

C. Disposition

Any argument that we do not specifically delineate 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. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

Based on our review of SMOKER PAVING’s Petition, including the clarification of its response to the *December 2025 Data Request*, we shall deny the Petition. We find that the Petition, as well as the clarification, does not provide any additional information to refute the Commission’s initial conclusion that the transportation of goods in this case is for the Company’s own use and, therefore, nonjurisdictional service, as defined in the Code.

Based upon SMOKER PAVING’s *December 10 Data Response*, TUS determined that the proposed transportation services were exempt from Commission

regulation because the service is incidental to the Petitioner's primary business, given that the transported commodities are used solely for the work performed by the Petitioner. *December 10 Data Response* at 3. In its Petition, SMOKER PAVING attempts to clarify that it transports stone, asphalt, and millings from quarries and asphalt plants, which are then delivered by the Petitioner to the job site on which it is working. Petition at 1. Upon review of this information and our statutory authority, we find that TUS properly concluded that SMOKER PAVING is excluded from the Commission's jurisdiction. In accordance with Section 102(5) of the Code, we find that the evidence provided by SMOKER PAVING regarding its transportation service demonstrates that its operations meet the statutory exemption because the Petitioner is providing service to himself to have the requisite materials at its work sites. Petition at 1; *see* Section 102(5) of the Code, 66 Pa.C.S. § 102(5).

In addition, upon receiving an Application, it is common for TUS to examine the nature of the service contemplated by an applicant via the issuance of data requests, especially if such nature is not obvious from the detail provided on the application form. Here, the basic information sought in TUS's *December 2025 Data Request* was necessary to the Commission's threshold examination of both whether the service is jurisdictional, as defined in Section 102 of the Code, and whether its provision will be in accordance with Section 1103 of the Code. As noted above, we find that TUS properly concluded that the service provided by SMOKER PAVING falls outside of the definition of a public utility, as the Petitioner has documented that SMOKER PAVING furnishes transportation service only to itself. *See* 66 Pa.C.S. § 102 *et seq.* Accordingly, we find that SMOKER PAVING does not provide any additional evidence to reexamine the Commission's finding that the service in question does not fall under the Commission's jurisdiction. Accordingly, we shall deny the Petition.

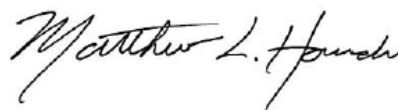
III. Conclusion

For the reasons discussed herein, we shall deny SMOKER PAVING, Inc.'s Petition for Reconsideration from Staff Action, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Petition for Reconsideration from Staff Action, filed by SMOKER PAVING, INC. on December 15, 2025, at Docket No. A-2025-3059150, is denied, consistent with this Opinion and Order.
2. That this proceeding, at Docket No. A-2025-3059150, be marked closed.

BY THE COMMISSION,



Matthew L. Homsher
Secretary

(SEAL)

ORDER ADOPTED: March 12, 2026

ORDER ENTERED: March 12, 2026