#  PENNSYLVANIA

 **PUBLIC UTILITY COMMISSION**

 **Harrisburg, PA 17105-3265**

 Public Meeting held January 28, 2016

Commissioners Present:

Gladys M. Brown, Chairman

Andrew G. Place, Vice Chairman

Pamela A. Witmer

John F. Coleman, Jr.

 Robert F. Powelson

Application of East Coast Resources, LLC A-2014-2453533

a limited liability company of the

Commonwealth of Pennsylvania, for the right to

begin to transport, by motor vehicle, persons

in the experimental service of ride sharing

network for passenger trips, from points in

Cumberland, Dauphin, Lancaster, Lebanon and

York Counties, to points in Pennsylvania,

and return, excluding service under the

jurisdiction of the Philadelphia Parking Authority

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by EZ Taxi, LLC; United Cab, LLC; Good Cab, LLC; and Keystone Cab Service, Inc. (Joint Protestants), and Capital City Cab Service (Capital City) (collectively, Protestants) on July 9, 2015, to the Initial Decision Sustaining Preliminary Objections and Dismissing Protests of Good Cab, LLC, United Cab, LLC, Keystone Cab Service, Inc., EZ Taxi, LLC and Capital City Cab Service (I.D.) of Administrative Law Judge (ALJ) David A. Salapa, issued on June 19, 2015. East Coast Resources, LLC (Applicant or East Coast) filed Replies to Exceptions on July 20, 2015. For the reasons set forth below, we shall grant the Exceptions, reverse the Initial Decision and remand this case to the Office of Administrative Law Judge for such further proceedings as may be necessary.

**Procedural History**

 On October 7, 2014, East Coast filed the above-captioned Application to begin to provide Transportation Network Company (TNC) service for passenger trips, from points in Cumberland, Dauphin, Lancaster, Lebanon, and York Counties to points in Pennsylvania and return, excluding service under the jurisdiction of the Philadelphia Parking Authority (Application). The Application was published in the *Pennsylvania Bulletin* on March 21, 2015, at 45 *Pa*. *B*. 1474, and provided that the deadline for filing protests was April 6, 2015.

 East Coast is seeking authority to operate in experimental service under 52

Pa. Code § 29.352.[[1]](#footnote-1) In its Application, East Coast indicates that it will use an online enabled platform to connect passengers with qualified drivers, as defined in 52 Pa. Code §§ 29.501- 29.508, using the drivers’ personal vehicles. East Coast states that the drivers will own the vehicles and lease them to East Coast for specific time periods. East Coast proposes to provide an “alternative form of ground transportation service that will utilize the latest electronic and social media forms of communication, including ’Apps’ and internet platform reservation services.” Attachment to Application at 1. Drivers would be able to accept trips via internet dispatch and/or via “App” and not via street hail. Upon booking a TNC trip, the passenger will receive a confirmation by email or through the “App” along with a photograph of the driver and a description of the driver’s vehicle. East Coast explains that it plans to use an adjustable pricing method based on time and distance or a flat fee rate charge, and passengers would be advised of the charge before hiring the vehicle.

 On April 6, 2015, each of the Joint Protestants filed a nearly identical Protest, and Capital City also filed a Protest to East Coast’s Application. The Joint Protestants alleged that they provide call and demand service in portions of the counties where East Coast seeks authority to operate. The Joint Protestants contended that East Coast’s Application would not serve a useful public purpose, responsive to a public demand or need, but would duplicate already existing service to the detriment of existing carriers. The Joint Protestants also alleged that approval of East Coast’s Application would impair the Protestants’ operations to such an extent that it would be contrary to the public interest. Further, the Joint Protestants averred that East Coast is neither technically nor financially capable of providing the service it proposes in the Application. Accordingly, the Joint Protestants requested that the Commission deny East Coast’s Application. Capital City averred that there was no need for service in the areas Capital City serves and that the Applicant lacks the technical fitness to serve the proposed areas. Capital City also stated that it would be adversely affected if East Coast operated in the areas currently served by Capital City.

 On April 24, 2015, East Coast filed a Motion to Dismiss the Protests of the Joint Protestants and Capital City. In its Motion to Dismiss, East Coast argued that the Protests should be dismissed for lack of standing, because none of the Protestants have Commission authority to provide experimental service in Pennsylvania, the service for which the Applicant is applying. East Coast averred that the Commission previously determined that TNC service, the type of service proposed by the Applicant, is different from call or demand service, the type of service the Protestants are authorized to provide. Motion to Dismiss at 3 (citing *Application of Rasier-PA, LLC*, Docket No. A-2014-2424608 (Order entered December 5, 2014) (*Rasier-PA*)).

 On May 4, 2015, the Joint Protestants filed a “Response” to East Coast’s Motion to Dismiss. The Joint Protestants stated that the Commission determined in the *Rasier-PA* proceeding that traditional taxi companies have the authority to protest experimental service applications. Joint Protestants’ Response at 1, 2.

 On May 4, 2015, Capital City filed an Answer to East Coast’s Motion to Dismiss. Capital City averred that East Coast’s Application presents a potential conflict with Capital City’s authority. Capital City also argued that the Commission determined in the *Rasier-PA* proceeding that call and demand operators have standing to protest an experimental service application. Capital City Cab’s Answer at 1, 2(citing *Rasier-PA, Interim Order Denying Preliminary Objections to the Protest of Executive Transportation, Inc., T/A Luxury Sedan* (issued August 11, 2014) (*Rasier-PA Interim Order*), at 7-8).

In the Initial Decision, issued June 19, 2015, ALJ Salapa sustained East Coast’s Preliminary Objections,[[2]](#footnote-2) dismissed the Protests for lack of standing, and referred the Application to the Commission’s Bureau of Technical Utility Services for review under modified procedure pursuant to 52 Pa. Code § 3.381(c)(1)(iii). Exceptions and Replies to Exceptions were filed as above noted.

**Discussion**

The ALJ made six Findings of Fact and reached six Conclusions of Law. I.D. at 3-4, 10-11. We shall adopt and incorporate herein by reference the ALJ’s Findings of Fact and Conclusions of Law, unless they are reversed or modified by this Opinion and Order, either expressly or by necessary implication.

We note that any issue or Exception that we do not specifically delineate has been duly considered and will be denied without further discussion. It is well settled that we are 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).

**Legal Standards**

Section 5.101 of the Commission’s Regulations, 52 Pa. Code § 5.101, sets forth the grounds for filing preliminary objections. In pertinent part, that section provides as follows:

**§ 5.101. Preliminary objections.**

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

  (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.

    (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.

    (3) Insufficient specificity of a pleading.

    (4) Legal insufficiency of a pleading.

    (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.

 (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.

 (7) Standing of a party to participate in the proceeding.

52 Pa. Code § 5.101(a).

Commission procedure regarding the disposition of preliminary objections is similar to the procedure utilized in Pennsylvania civil practice. A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Dep’t of Environmental Resources*, 486 Pa. 536, 406 A.2d 1020 (1979). The moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the preliminary objection all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts. *County of Allegheny v. Commonwealth* *of Pa.*, 507 Pa. 360, 490 A.2d 402 (1985). The preliminary objection may be granted only if the moving party prevails as a matter of law. *Rok v. Flaherty*, 527 A.2d 211 (Pa. Cmwlth. 1987). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Dep’t of Auditor General, et al. v. State Employees’ Retirement System, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003) (citing *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002)).

In this case, the Applicant sought dismissal of the Protests on the basis that the Protestants lacked standing. Standing to participate in proceedings before an administrative agency is primarily within the discretion of the agency. *Pennsylvania National Gas Association v. T.W. Phillips Gas and Oil Co.*, 75 Pa. P.U.C. 598 (1991). Generally, Pennsylvania courts and the Commission have held that a person or entity has standing when the person or entity has a direct, immediate, and substantial interest in the subject matter of a proceeding. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 195-197, 346 A.2d 269, 282-284 (1975); *Waddington v. Pa. PUC*, 670 A.2d 199, 202 (Pa. Cmwlth. 1995); *Landlord Service Bureau, Inc. v. Equitable Gas Co.*, 79 Pa. P.U.C. 342 (1993); *Re Equitable Gas Co.*, 76 Pa. P.U.C. 23 (1992). An interest in the subject matter of the proceeding is direct if such interest is adversely affected by the actions challenged in the protest, is immediate if there is a close causal nexus between the asserted injury and the actions challenged in the protest, and is substantial if there is a discernible interest other than the general interest of all citizens in seeking compliance with the law. *Ken R. ex rel. C.R. v. Arthur Z.*, 546 Pa. 49, 53-54, 682 A.2d 1267, 1270 (1996); *William Penn Parking Garage, supra*.

**ALJ’s Recommendation**

 The ALJ stated that, viewing the factual allegations in the Protests as true for purposes of disposing of East Coast’s preliminary objections, none of the Protestants holds a Certificate of Public Convenience authorizing the provision of experimental or TNC service. The ALJ noted that the Protestants did not allege that they operate any experimental or TNC service or are seeking Commission authority to provide such service. Therefore, the ALJ concluded that the Protestants lacked standing to protest the Application. I.D. at 7. In support of his conclusion, the ALJ indicated that prior Commission decisions controlled the outcome in this case. For example, the ALJ stated that the Commission has held that protestants with call or demand authority lacked standing to protest an application for limousine authority or for paratransit authority. I.D. at 8 (citing *Application of Kutztown Area Transport*, Docket No. A-2009-2140250 (Order entered October 18, 2010); *Application of Select Ambulance, Inc*., Docket No. A-2014-2441095 (Order entered April 3, 2015)).

 The ALJ observed that, in this case, the Protestants have authority to provide call or demand service and, therefore, do not hold any authority that is in conflict or potential conflict with the authority sought by East Coast. The ALJ determined that, consequently, the Protestants could not be adversely affected by the granting of the Application. The ALJ also found that the Protestants possessed no greater interest in East Coast’s Application than any other member of the general public in having the Applicant comply with the law and that this general interest was insufficient to confer standing on the Protestants. The ALJ disagreed with the Protestants that standing to protest an application for experimental or TNC service should be subject to a standard that is different from the standards to protest applications for other types of motor carrier passenger authority. I.D. at 9.

**Exceptions and Replies**

 In their Exceptions, the Joint Protestants contest Conclusions of Law Numbers 4, 5, and 6 on the basis that the conclusions fail to address the potential conflict between the authority held by the Joint Protestants and the authority sought by

the Applicant.[[3]](#footnote-3) The Joint Protestants rely on the decision in the *Rasier-PA Interim Order* in support of their position that, where an application does not expressly state that there is any particular restriction on the transportation and the applicant could use the service to meet nearly any kind of transportation need sought, then the application presents at least a potential conflict with authority that provides similar transportation services, such as traditional call or demand, paratransit, airport transfer, or limousine authority. Joint Protestants’ Exc. at 4. The Joint Protestants aver that, although the restrictions on call or demand service are set forth in 52 Pa. Code § 29.13(2), the Regulation does not rule out “internet hails” or “hail by app.” The Joint Protestants state that there is an apparent potential conflict between call or demand service and TNC service, because the restrictions on experimental authority in 52 Pa. Code §§ 29.13(6) and 29.352 are not well-defined. Joint Protestants’ Exc. at 5. Therefore, the Joint Protestants contend that it is impossible to determine at the preliminary objections stage whether or not an experimental service provider will possess actual or potential conflicting authority with a call or demand service provider since the Commission has yet to stipulate the additional requirements that will apply to the experimental service Applicant. *Id*. at 5-6.

 The Joint Protestants indicate that the Application in this case does not provide for any restrictions, other than the type of vehicles and the absence of street hails, that would distinguish the proposed service from call or demand service. The Joint Protestants state that they provide local common carrier service for passengers on an exclusive basis, and the passengers normally hire the vehicle and its driver by using their phones’ cellular capabilities. *Id*. at 6. They contend that, because the Applicant seeks authority in the same counties to provide local common carrier service on an exclusive basis and passengers will hire the vehicle and driver using their phones’ internet capabilities, the Joint Protestants have authority that is in potential conflict with the authority sought by the Applicant. *Id*. at 6-7. On this basis, the Joint Protestants aver that they have a direct, immediate, and substantial interest in the subject matter of the Application. *Id*. at 7.

 In its Exceptions, Capital City argues that the Initial Decision ignores the Commission’s precedent by denying standing status to Capital City in this proceeding. Capital City’s Exc. at 1. Capital City points to the *Rasier-PA* proceeding in support of its position and states that call or demand carriers were granted standing in that case to protest an application for experimental service. *Id*. at 2-3. Capital City states that, while many of the details of the Applicant’s proposed service are unclear at this stage, the Application is similar, in function and effect, to the application and proposed service considered in the *Rasier-PA* proceeding. *Id*. at 5. Capital City additionally contends that the Applicant’s proposed service is nearly identical to call or demand service in all but two respects; the use of the app to schedule the trip and the plan that drivers will use their own vehicles. *Id*. at 5-6. For these reasons, Capital City avers that it clearly has standing to challenge a potential competitor offering the same service in its coverage area. *Id*. at 6.

 In its Replies to Exceptions, East Coast avers that the *Rasier-PA* *Interim Order* is not binding Commission precedent, because it was not excepted to and the Commission did not rule on the standing issues. East Coast also avers that the *Rasier-PA* proceeding was the first proceeding in which the Commission evaluated an experimental service application, and the standing determination was made without any Commission guidance. East Coast states that, after extensive hearings were held and evidence was provided, the Commission determined that there were many differences between TNCs and the traditional taxicab industry. R. Exc. at 2. East Coast argues that, based on the statement in *Rasier-PA* that traditional call or demand service is different from experimental service, the ALJ correctly held that standing to protest an application for experimental or TNC service should not be subject to a different standard than the standard applied to protest applications for other types of motor carrier authority. *Id*. at 3 (citing *Rasier-PA* at 11).

 Further, East Coast contends that the Protestants’ argument that their authority is in potential conflict with the Applicant’s proposed service is speculative and cannot form the basis for standing in this matter. *Id*. at 3. East Coast avers that the Commission is capable of fully vetting East Coast’s fitness to provide the proposed service without the Protestants’ involvement, as the Commission has the statutory authority and obligation to ensure that the Applicant complies with all of the relevant statutory and regulatory requirements before approving the Application. *Id*. at 3-4.

**Disposition**

 Based on our review of the various filings and the applicable law, we shall grant the Protestants’ Exceptions. Initially, we note the procedural posture of this case: the Applicant has filed Preliminary Objections to the Protests on the grounds of standing. As stated above, preliminary objections should only be granted where relief is clearly warranted and free from doubt. Therefore, in this case, the Preliminary Objections should only be granted if it is clear that the Protestants lack standing.

At this early stage in the proceeding, East Coast’s Application, on its face, appears to be substantially similar to the applications in the *Rasier-PA* proceeding and in *Application of Lyft, Inc*., Docket No. A-2014-2415047 (Order entered December 18, 2014) (*Lyft*). We find that the broader standard of Pennsylvania jurisprudence governing standing, which was applied in the *Rasier-PA* and *Lyft* proceedings, should also be applied in this case, as TNC service is still relatively new and is a unique form of experimental service. Under this broader standard, we conclude that East Coast’s Preliminary Objections should be denied because it is not clear that the Protestants lack a direct, immediate, and substantial interest in the subject matter of this proceeding.

Various call or demand carriers participated as parties in the *Rasier-PA* and *Lyft* proceedings and presented evidence and testimony during the hearings. In assessing the standing of call or demand carriers, the ALJs in those proceedings rejected the applicants’ positions that only carriers holding experimental authority using “App-based” technology were able to challenge the applications. The ALJs noted that the purpose of experimental authority is to provide the Commission with flexibility to consider innovative transportation forms that do not fit within the other types of service set forth in the Commission’s Regulations. The ALJs found that, “[t]o adopt the narrow view of standing espoused by the Applicant would be so limiting, that virtually no carriers would be in a position to protest.” *Rasier-PA Interim Order* at 7-8; *Lyft*, *supra*, Interim Order on Preliminary Objections, dated June 26, 2014, at 6-7. We examined this standing issue with respect to a call or demand carrier, JB Taxi LLC (JB Taxi), in the *Raiser-PA* proceeding and determined that it would not be appropriate to exclude JB Taxi from participation in that proceeding based on a narrow view of standing. We stated that it was critical to base our disposition of the application in that proceeding on a fully developed record and that JB Taxi, as an existing common carrier, was in a position to provide information regarding the impact Rasier-PA’s proposed service may have on certificated carriers in the context of an application for experimental service. *Application of Rasier-PA LLC*, Docket No. A-2014-2416127 (Order entered August 15, 2014), at 21-22.

In view of our decisions and the process followed in the *Rasier-PA* and *Lyft* proceedings, we similarly determine that it is appropriate to allow the Protestants to participate in the instant proceeding concerning East Coast’s Application. Each of the Protestants has submitted that they possess authority in one or more of the counties in which the Applicant is proposing service. They also aver that the Applicant’s proposed service is unnecessary, would be harmful to competition, and would adversely affect them by resulting in a loss of their revenue in the proposed service territories. The Protestants observe that the Application does not contain any restrictions, other than the use of the drivers’ personal vehicles and the absence of street hails, that would distinguish the proposed service from call or demand service. Further, the Joint Protestants state that their passengers normally hire their vehicles and drivers, on an exclusive basis, through the use of their phones’ cellular capabilities. The Joint Protestants assert that, because the Applicant seeks authority in the same counties to provide service on an exclusive basis and passengers will hire the vehicle and driver using their phones’ internet capabilities, they have authority that is in potential conflict with the authority the Applicant is seeking. The Protestants have alleged facts which suggest that they could be adversely affected by the service East Coast proposes to provide in its Application and that the Application may present a potential conflict with the Protestants’ authority.

**Conclusion**

Based upon our review of the pleadings, the Parties’ positions, and the applicable law, we shall grant the Exceptions filed by the Joint Protestants and Capital City and reverse the ALJ’s Initial Decision, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by EZ Taxi, LLC, United Cab, LLC, Good Cab, LLC, and Keystone Cab Service, Inc. on July 9, 2015, are granted.

2. That the Exceptions filed by Capital City Cab Service on July 9, 2015, are granted.

3. That the Initial Decision of Administrative Law Judge David A. Salapa, issued on June 19, 2015, is reversed, consistent with this Opinion and Order.

4. That the Preliminary Objections of East Coast Resources, LLC to dismiss the Protests of EZ Taxi, LLC, United Cab, LLC, Good Cab, LLC, Keystone Cab Service, Inc., and Capital City Cab Service are denied.

5. That the Application of East Coast Resources, LLC, at Docket No. A-2014-2453533, is remanded to the Office of Administrative Law Judge for such further proceedings as may be necessary, consistent with this Opinion and Order.

 **BY THE COMMISSION,**

 Rosemary Chiavetta

 Secretary

(SEAL)

ORDER ADOPTED: January 28, 2016

ORDER ENTERED: January 28, 2016

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 [sic] 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. ALJ Salapa properly treated East Coast’s Motion to Dismiss, filed pursuant to 52 Pa. Code § 3.381(c)(1)(i)(C), as Preliminary Objections seeking dismissal of the Protests for lack of standing under 52 Pa. Code § 5.101(a)(7). Section 3.381(c)(1)(i)(C) provides that “[a] protest shall be treated as a pleading and the applicant may, within 20 days after the closing date for the filing of protests, file motions to strike, to dismiss, or for amplification as provided in § 5.101 (relating to preliminary objections).” [↑](#footnote-ref-2)
3. These Conclusions of Law state the following:

4. The Protestants have failed to demonstrate that they possess any interest in the subject matter of this proceeding which is direct, immediate, and substantial. *Application of Kutztown Area Transport*, Docket No. A-2009-2140250 (Order entered October 18, 2010).

 5. The Protestants lack standing to litigate their protests in this proceeding. *Application of Select Ambulance, Inc.*, Docket No. A-2014-2441095 (Order entered April 3, 2015).

6. No genuine issue of material fact exists for trial regarding the Protestants’ lack of standing*. Lehigh Valley Power Committee v. Pa. Pub. Util. Comm’n*, 563 A.2d 557 (Pa. Cmwlth. 1989). [↑](#footnote-ref-3)