

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Eckert Seamans Cherin & Mellott, LLC
213 Market Street
8th Floor
Harrisburg, PA 17101

TEL 717 237 6000
FAX 717 237 6019
www.eckertseamans.com

Karen O. Moury
717.237.6036
kmoury@eckertseamans.com

July 21, 2017

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Petition for Declaratory Order of Wenger Works, Inc., t/a Tuktuk Lancaster, Docket No. P-2017-XXXXXXX

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Petition for Declaratory Order of Wenger Works, Inc. t/a Tuktuk Lancaster. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Karen O. Moury

KOM/jls
Enclosure

cc: Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the Petition for Declaratory Order of Wenger Works, Inc. t/a Tuktuk Lancaste upon the person listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

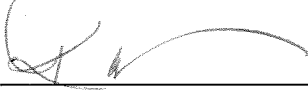
Via First Class Mail and Electronic Mail

Richard Kanaskie, Chief Prosecutor
Bureau of Investigation and Enforcement
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Tanya J. McCloskey, Acting Consumer Advocate
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Harrisburg, PA 17101

John Evans, Small Business Advocate
Office of Small Business Advocate
300 North Second St., Suite 202
Harrisburg, PA 17101

Date: July 21, 2017



Karen O. Moury

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition for Declaratory Order of Wenger : Docket No. P-2017-_____
Works, Inc., t/a Tuktuk Lancaster :

**PETITION FOR DECLARATORY ORDER
OF WENGER WORKS, INC., T/A TUKTUK LANCASTER**

Pursuant to Section 331(f) of the Public Utility Code¹ (“Code”) and Section 5.42 of the regulations of the Pennsylvania Public Utility Commission (“Commission”),² Wenger Works, Inc. t/a Tuktuk Lancaster (“Tuktuk”), through the undersigned counsel, files this Petition for Declaratory Order (“Petition”), seeking the issuance of a Declaratory Order by the Commission concluding that the transportation services provided to the public by Tuktuk are exempt from the jurisdiction of the Commission on the basis that their primary purpose is entertainment and they are incidental to Tuktuk’s primary business of offering sightseeing services. In support of this Petition, Tuktuk further aver as follows.

I. INTRODUCTION

1. By this Petition, Tuktuk seeks to resolve a controversy that has arisen as a result of Tuktuk’s plan to offer transportation services in an E-Tuk Limo to members of the public for compensation in connection with sightseeing tours within the City of Lancaster. The question

¹ 66 Pa.C.S. § 331(f).

² 52 Pa. Code § 5.42.

raised by this Petition is whether Tuktuk needs a certificate of public convenience from the Commission to offer the proposed transportation services.³

2. The controversy that Tuktuk requests the Commission to resolve is whether its proposed transportation services are beyond the jurisdiction of the Commission due to being incidental to and in furtherance of its primary business of offering sightseeing tours to the public and because the transportation services are primarily offered for their entertainment value.

3. Tuktuk submits that because its proposed transportation services are in the nature of an amusement ride, and are incidental to and in furtherance of its primary business of offering sightseeing tours to the public, they are outside the jurisdiction of the Commission and may lawfully be furnished without a certificate of public convenience being issued by the Commission.

4. Under well-established Pennsylvania precedent, transportation services that are incidental to and in furtherance of a primary business are exempt from the Commission's jurisdiction. It is also well-settled that transportation services that are circuitous, and not provided between points in Pennsylvania, and are in the nature of an amusement ride for the entertainment of the operator's patrons are not regulated by the Commission.

5. The Commission should resolve the controversy presented by this Petition by concluding that Tuktuk's transportation services are not subject to regulation by the Commission and that Tuktuk need not obtain a certificate of public convenience in order to lawfully provide transportation services to members of the public who purchase tickets for Tuktuk's sightseeing tours.

³ The controversy arises due to instructions from Commission staff to file an application for a certificate of public convenience.

II. PARTIES

6. Tuktuk is a company that provides sightseeing tours to the public within the City of Lancaster. Its offices are at 823 North Duke Street, Lancaster, Pennsylvania.⁴

7. Tuktuk has served a copy of this Petition on the Office of Consumer Advocate, the Office of Small Business Advocate and the Commission's Bureau of Investigation and Enforcement, pursuant to the Commission's regulations.⁵

III. FACTS

8. Since 2009, Tuktuk's affiliate – Wenger Works, Inc., d/b/a Taste The World – has been offering walking tours around the City of Lancaster.

9. As an expansion of that business, Tuktuk recently began offering sightseeing tours in an E-Tuk Limo in the City of Lancaster, which start at The Hotel Lancaster on the corner of North Queen and East Chestnut Streets, two blocks north of Penn Square and the Lancaster City Visitor Center. This is also where the tours end. Although Tuktuk is currently offering these tours free of charge, it proposes to begin charging a fee for the tours.

10. Tuktuk provides a circuitous ride and does not offer transportation services to and from intermediate points during the tour and makes no stops for the purpose of picking up or discharging passengers. The only stops during the tour are for the purpose of observing and experiencing the sightseeing attractions.

⁴ Tuktuk filed an application with the Commission for authority to operate as a common carrier in Pennsylvania on December 27, 2016. As there were no protests filed to the application, Tuktuk does not believe that any other parties would be affected by this Petition. The Commission denied the application, citing safety concerns related to the E-Tuk Limo. *Application of Wenger Works, Inc., t/a/ TukTuk Lancaster, for the initial right to begin to transport, as a common carrier, by motor vehicle, persons in paratransit service, limited to sightseeing excursions, from points in Lancaster County, to points in Pennsylvania, and return*, Docket No. A-2017-2585784 (Order entered July 12, 2017) (“*Tuktuk Order*”). Tuktuk plans to file a Petition for Reconsideration with the Commission by July 27, 2017 in the event that the Commission does not grant this Petition for Declaratory Order.

⁵ 52 Pa. Code § 5.41.

11. Tuktuk uses an E-Tuk Limo to provide the transportation services for the sightseeing tours. An E-Tuk Limo is a three-wheeled, battery-operated vehicle, which holds six passengers and is capable of reaching a speed of 25 miles per hour. Both the U.S. Department of Transportation (“USDOT”) and the Pennsylvania Department of Transportation (“PennDOT”) consider the E-Tuk Limo as a motor vehicle. PennDOT licenses it as motorcycle.⁶

12. The sightseeing tours last approximately thirty minutes. The tours feature a bit about the history, architecture, things to do and the people of Lancaster City. During the tour, Tuktuk highlights the following sites of interest: the Homes of Lydia Hamilton Smith and Thaddeus Stevens, the Mary Reynolds Mansion, Neighborhoods of Old Town, Lancaster Central Market, Lancaster City Visitor Center, Fulton Theatre, Clipper Stadium, Champion Forge and Foundry, Andrew Ellicott House, Shreiner Concord Cemetery, and Gallery Row. Although the tour stops at some of these tourist attractions, most of the tour is done in motion with the tour guide narrating without stopping.

13. Tuktuk plans in the future to offer a tour that lasts approximately forty-five minutes and also includes stops at four or five of Tuktuk’s favorite eateries. The tour guide will bring food to the vehicle, which the tourist can eat between stops, or collect the food in a take-out box that is provided for the tourist to take at the end of the tour. Again, these stops are not intended as destinations and will not be for the purpose of picking up or discharging customers; rather, they will only be for the purpose of picking up food.

14. Although Tuktuk does not offers tours during severe weather conditions, it operates regardless of temperature or rain. The vehicle has rain covers and heated seats. Tourists are advised to dress appropriately for an outdoor experience.

⁶ *Tuktuk Order* at 3.

15. Tuktuk permits tourists who are four years of age and older to ride the E-Tuk Limo and provides booster seats for children between the ages of four and eight.

16. Tuktuk has sponsoring partnerships with numerous local businesses, including Building Character, Escape Room, Lancaster City Visitor Center, Hotel Lancaster, and Lancity Connect.⁷

IV. LEGAL STANDARDS APPLICABLE TO DECLARATORY ORDER

17. Code Section 331(f) authorizes the Commission to “issue a declaratory order to terminate a controversy or remove uncertainty.”⁸

18. The Commission’s regulations require petitions for the issuance of a declaratory order to terminate a controversy or remove uncertainty to state clearly and concisely the controversy or uncertainty which is the subject of the petition; cite the statutory provision or other authority involved; include a complete statement of the facts and grounds prompting the petition; and include a full disclosure of the interest of the petitioner.⁹

V. CONTROVERSY TO BE DECIDED

19. The controversy to be decided is whether the transportation services proposed by Tuktuk in an E-Tuk Limo are exempt from Commission regulation on the basis that the transportation is incidental to and in furtherance of its primary business of offering sightseeing tours and is in the nature of an amusement ride for the entertainment of its patrons, rather than as a means of transportation.

⁷ A complete list of sponsors and contributors is available at <http://www.tuktuklanaster.com/tours.html>.

⁸ 66 Pa.C.S. § 331(f). *See also Borough of Olyphant v. Pa. PUC*, 861 A.2d 377 (2004).

⁹ 52 Pa. Code § 5.42.

20. Tuktuk respectfully urges the Commission to conclude that its proposed transportation services are exempt from Commission regulations and that a certificate of public convenience is not needed to lawfully provide these services in connection with its sightseeing business.

VI. ARGUMENT

21. Under Section 1102 of the Public Utility Code (“Code”), and the definitions of “public utility” and “common carrier” in Section 102 of the Code, an entity is required to obtain a certificate of public convenience if it offers or undertakes service to the public for the transportation of passengers or property between points in Pennsylvania.¹⁰

22. The Commission and the Courts, however, have long recognized that transportation services that are incidental to an entity’s primary business are exempt from the Commission’s jurisdiction.

23. In the landmark decision of *Aronimink Transportation Co. v. Public Service Commission*,¹¹ the Superior Court of Pennsylvania found that a corporation owning two large apartment buildings and operating a passenger bus between the buildings and a railway terminal was exempt from the Commission’s jurisdiction. Because the transportation service was rendered for the exclusive use and convenience of its tenants and was incidental to the main business of maintaining the apartment buildings, the Superior Court explained that the corporation was not a common carrier.

¹⁰ 66 Pa.C.S. §§ 102 (relating to definitions) and 1102 (relating to enumeration of acts requiring certificate).

¹¹ 111 Pa. Superior Ct., 414, 170 A. 375 (1934).

24. In another landmark decision, *Protective Motor Service Company v. Pa. Pub. Util. Comm'n.*,¹² the Commonwealth Court of Pennsylvania considered whether a detective agency that transported money from banks to vessels required authority from the Commission. Finding that the detective agency was exempt from Commission regulation, the Commonwealth Court concluded that the transportation of money was incidental to the agency's principal business of providing security services.

25. Similar to the circumstances in *Aronimink* and *Protective Motor Service*, Tuktuk would not be available for hire by members of the public who want to be transported from one location in the City of Lancaster to another location; rather Tuktuk's transportation services would be offered only to members of the public who purchase tickets for their sightseeing tours within the City of Lancaster. As such, the transportation services would be incidental to and in furtherance of the primary business of offering sightseeing tours.

26. In reviewing similar factual scenarios, the Commission has focused on the need for a nexus between the entity's primary business and any transportation services that are provided. Specifically, the Commission has emphasized the importance of those transportation services being both incidental to and in furtherance of the entity's primary business for them to be exempt from regulation. For example, in *In Re: Northampton Area Community College*,¹³ the Commission exempted a college from obtaining a certificate of public convenience when it planned to transport students between campus and an area in the city of Bethlehem, Pennsylvania. Finding that the college was in the business of providing education and was providing transportation services to

¹² 4 Pa. Cmwlth. Ct. 75, 286 A.2d 30 (1972).

¹³ Docket No. 850054; 1985 Pa. PUC LEXIS 20.

students in furtherance of that business, the Commission determined that the transportation was incidental to the college's primary business.

27. Here, Tuktuk operates a sightseeing business, to which the transportation services would be incidental to and in furtherance of that business. Tuktuk's sightseeing business model, of offering approximately thirty-minute tours highlighting various places of interest within the City of Lancaster would not be feasible absent the ability of E-Tuk Limos to transport patrons from one sightseeing attraction to another. Importantly, Tuktuk is not offering a stand-alone transportation service to the public but is only providing such services in connection with its sightseeing tours.

28. The Commission has also found that when transportation services are provided as an amusement or tourist attraction and are designed for the entertainment of its patrons, they are exempt from the Commission's jurisdiction. In *Abe's Buggy Rides, Inc. Letter/Petition for Declaratory Order ("Abe's Buggy Rides")*,¹⁴ the Commission exempted horse-drawn carriage rides from its jurisdiction on that basis, noting that patrons used that means of transportation for the experience and enjoyment of the ride, while also viewing the Pennsylvania Dutch countryside during the ride. Notably, the Commission's decision had nothing to do with the fact that the vehicles were powered by animals but was solely based on the incidental nature of the transportation to the primary business of providing entertainment to the public.

29. As with Tuktuk, the operator in *Abe's Buggy Rides* provided a roundtrip ride without offering service to intermediate points or making stops for the purpose of picking up or discharging passengers. In other words, Tuktuk similarly does not propose to provide service between points in Pennsylvania, but rather to offer "a circuitous ride around a defined area" and is

¹⁴ Docket No. P-880307, 1998 Pa. PUC LEXIS 483, 68 Pa. PUC 65.

therefore not a common carrier.¹⁵ See also *Commonwealth v. Cerra*,¹⁶ (the court held that the operation of an amphibious vehicle known as a “duck” around the shores of a lake did not constitute common carriage).

30. The Commission’s conclusion in *Abe’s Buggy Rides* was consistent with court decisions “which have held that when ‘transportation’ has recreation or amusement as its primary or only purpose, it does not amount to common carriage.”¹⁷ The Commission analogized its declaration to the “well-established principle that transportation which is incidental to a primary non-transportation business is exempt from Commission regulation” and concluded that “any transportation provided by the horse-drawn carriage companies is purely incidental to their primary business of furnishing carriage rides for entertainment.”¹⁸

31. The Commonwealth Court has also endorsed the exemption of transportation services on the basis that they are provided primarily for their entertainment value – even when the transportation is offered between points in Pennsylvania. In *Society Hill Carriage Co. v. Pa. Pub. Util. Comm’n.* (“*Society Hill*”),¹⁹ the Commonwealth Court affirmed the Commission’s conclusion horse-drawn carriage operators were not in the business of transportation but rather in the business of entertainment in which transportation is merely incidental. It was undisputed that these businesses operated primarily out of the Independence Hall area in Pennsylvania from which they offered long or short trips throughout the City and that some passengers embark at

¹⁵ *Abe’s Buggy Rides* *5.

¹⁶ 66 D&C 96 (1948).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 135 Pa. Commw. 538, 581 A.2d 702, 1990 Pa. Commw. LEXIS 569.

Independence Hall and others are picked up along the way. In finding that these intermittent pickups and discharges throughout the course of the trip did not make the operators common carriers, the Court agreed that merely because the ride may also happen to provide the patron with an alternate means of transportation does not convert an amusement ride into transportation under the Code.²⁰

32. So, while Tuktuk's patrons may utilize the services in part to help them navigate around the city of Lancaster, it is undeniable that their primary purpose is for sightseeing and the experience of the ride in the Tuktuk vehicle. Indeed, Tuktuk's marketing underscores both the sightseeing nature of its business and the entertainment nature of the transportation services.

33. On its home page, Tuktuk offers "sightseeing tours" and encourages the public to "experience Lancaster City on a tuktuk!" The home page also describes Tuktuk tours "to show sights, sounds AND tastes of Lancaster in a whole new way." It adds: "Join us on a city tour in Lancaster City" and offers a link to "learn more about our tours."²¹ On the "Tours" page, Tuktuk describes everything as a "tour" and advises to "dress appropriately for an outdoor experience."²² In its frequently-asked questions ("FAQs"), Tuktuk describes its services as "a super fun way to get around with your friends and see the town" and offers its preferred pronunciation of "took-took" as in "I took a ride on a tuktuk." The FAQs also seek input as Tuktuk puts "together this fun, safe, educational, tasty, and memorable experience."²³

²⁰ The Commission has expressly recognized that merely because a patron receives the secondary benefit of reaching his destination by horse-drawn carriage, the prevailing reason for using the carriage is for the experience or enjoyment of the carriage ride. The Commission has also found that if transportation is a secondary motive of the person utilizing the transportation, that motive does not render the transportation jurisdictional. *Abe's Buggy Rides* *8.

²¹ <http://www.tuktuklanaster.com/>

²² <http://www.tuktuklanaster.com/tours.html>

²³ <http://www.tuktuklanaster.com/faqs.html>

34. Affirming the Commission in *Society Hill*, the Commonwealth Court analogized the case to its holding in *Protective Motor Services*. Because the transportation aspect of the security company was incidental to the company's security activities, the Commission did not have jurisdiction to regulate the transportation. Similarly, the Court found that transportation involved in the horse-drawn carriage business is merely incidental to the primary function which is to entertain passengers and that it did not constitute common carriage.²⁴

35. Since the *Society Hill* decision, the Commission has made it clear that the exemption is not limited to horse-drawn carriages. In *Application of Keven Michael Walker, t/d/b/a Walker Trolley and Transit Company ("Walker Trolley")*,²⁵ the proposed service consisted of a round trip sightseeing tour through the Hershey area on a trackless trolley constructed to resemble an old street car. Finding that any transportation provided by the applicant was incidental to the primary business and emphasizing that the type of transportation, motor car versus horse-drawn carriage, does not distinguish the case from *Society Hill*, the Commission rejected the application for lack of subject matter jurisdiction. In so ruling the Commission stressed that "the crucial consideration is whether the proposed transportation is the primary purpose of the service or merely ancillary or incidental to the proposed service."²⁶

36. Similarly, in *Petition of Millersburg Ferry Boat Association for a Declaratory Order ("Millerburg Ferry")*,²⁷ the Commission applied this exemption to a ferry ride across the

²⁴ *Society Hill* ***6-7. It should be noted that in no way were the Commission or Commonwealth Court decisions based on the fact that the vehicles were powered by horses. Also, horse-drawn carriages are subject to all applicable provisions of the Pennsylvania Vehicle Code. See 75 Pa.C.S. § 3102.

²⁵ 1998 Pa. PUC LEXIS 26.

²⁶ *Walker Trolley* *7.

²⁷ 1998 Pa. PUC LEXIS 25.

Susquehanna River, finding that the operators of boat in *Millersburg Ferry* did not provide common carrier service but instead offer a source of historic interest, amusement and education for those interested in its unique method and place of crossing. The Commission noted that the public has other methods of crossing the Susquehanna River and the provision of transportation is incidental to the primary purpose of providing amusement and a historical experience to the its passengers.

37. Similarly, in the case of Tuktuk’s sightseeing tours, the public has other means of viewing the history and attractions of the City of Lancaster, and Tuktuk would simply provide a unique experience of doing so in an E-Tuk Limo. The proposed transportation services provided by Tuktuk would offer tourists the opportunity to enjoy the history, sights and people of the City Lancaster with the added amusement of riding in an E-Tuk Limo.

38. In Millersburg, despite concluding that the services were exempt from Commission regulation, the Commission referenced safety and relied on the applicability of regulations of the United States Coast Guard.²⁸ While Tuktuk does not address in detail the safety of the proposed services in this Petition, since the proposed services do not appear to fall within the purview of the Commission, it is noteworthy that the E-Tuk vehicles meet the safety standards of the United States Department of Transportation’s National Highway Traffic Safety Administration (“NHTSA”), which recognizes the E-Tuk Limo as a street-legal motor vehicle. Also, PennDOT has licensed the E-Tuk Limo as a motorcycle. Moreover, Tuktuk has presented significant information about

²⁸ *Millersburg Ferry* *6-7.

the safety of the vehicle in its application proceeding.²⁹ Clearly, this information is of the same nature as relied upon by the Commission in Millersburg Ferry.³⁰

39. In exempting horse-drawn carriage operations even when they were providing an alternate form of transportation, the Commission has ceded to any control that may be exercised by local authorities.³¹ Here, the Mayor of Lancaster, Richard Gray, has expressed strong support for Tuktuk activities and urged for approval of their operations by the Commission.³²

40. The Commission's recent issuance of a certificate of public convenience in *Application of Gettysburg Tours, Inc. ("Gettysburg Tours")*,³³ does not provide a basis for Tuktuk needing authority from the Commission to operate. In *Gettysburg Tours*, the applicant described the proposed service as involving the transportation of persons in group and party service. No issue was raised by the applicant about any transportation services being incidental to a primary sightseeing business. Moreover, the applicant did not suggest that the transportation was intended for entertainment or amusement purposes.

²⁹ See *Tuktuk Order* (and data requests provided during proceeding). In addition, Tuktuk will offer additional details and clarifications in its Petition for Rehearing and Reconsideration that is filed on or before July 26, 2017.

³⁰ Notably, the Commission has not considered the safety of horse-drawn carriages in exempting that transportation from its regulation, and it is common knowledge that numerous safety-related accidents have occurred over the years involving buggy rides. See, e.g., http://lancasteronline.com/news/local/injured-when-carriage-overturns-during-horse-and-buggy-tour-near/article_3f82ea58-42f2-11e7-85ad-87ca9edc49cc.html. Notably, in this particular example, the accident occurred during a sightseeing tour because the horses were "apparently spooked by a passing tractor-trailer," a risk that is not present with a battery-powered motor vehicle.

³¹ *Abe's Buggy Rides* *7.

³² http://lancasteronline.com/news/local/tuktuk-lancaster-raises-funds-for--pronged-legal-appeal-hopes/article_e8cf780e-6e37-11e7-8fbc-e35d6a4a9554.html.

http://lancasteronline.com/opinion/editorials/hard-to-understand-why-the-puc-pooh-poohed-lancaster-s/article_1f88153c-6c02-11e7-b37f-77d1e764da0f.htmlhttp://lancasteronline.com/opinion/editorials/hard-to-understand-why-the-puc-pooh-poohed-lancaster-s/article_1f88153c-6c02-11e7-b37f-77d1e764da0f.html

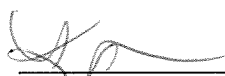
http://lancasteronline.com/news/local/tuktuk-tours-are-held-to-a-different-standard-than-buggy/article_4091dc20-67f9-11e7-9b20-0fd8ecbf64c6.html

³³ Docket No. A-2016-2537583 (Secretarial Letter issued September 27, 2016).

VII. CONCLUSION

WHEREFORE, based upon the foregoing, Wenger Works, Inc., t/a Tuktuk Lancaster respectfully requests that the Commission issue a Declaratory Order finding that its transportation services as described in this Petition are exempt from the Commission's jurisdiction and not subject to the Commission's regulatory requirements.

Respectfully submitted,



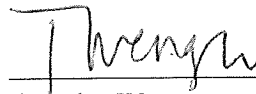
Karen O. Moury
Attorney I.D. No. 36879
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, Eighth Floor
Harrisburg, PA 17101
717.237.6036
kmoury@eckertseamans.com
*Counsel for Wenger Works, Inc.,
t/a Tuktuk Lancaster*

July 21, 2017

VERIFICATION

I, Timothy Wenger, hereby state that: (1) I am President and Treasurer of Wenger Works, Inc., t/a Tuktuk Lancaster; (2) I am authorized to verify the facts in this document on behalf of Tuktuk Lancaster; and, (3) the facts set forth in this document are true and correct to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Date: July 21, 2017



Timothy Wenger
President and Treasurer
Wenger Works, Inc. t/a Tuktuk Lancaster