# PENNSYLVANIA

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

 Public Meeting held August 31, 2017

Commissioners Present:

 Gladys M. Brown, Chairman, Statement

 Andrew G. Place, Vice Chairman

 David W. Sweet

 John F. Coleman, Jr.

Application of Wenger Works, Inc., t/a Tuktuk A-6419528

Lancaster, for the initial right to begin to transport, A-2017-2585784

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.

Petition for Declaratory Order of Wenger Works, Inc., P-2017-2615559

t/a Tuktuk Lancaster

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the following: (1) the Petition for Declaratory Order (Declaratory Order Petition), filed by Wenger Works, Inc. (Wenger Works), t/a Tuktuk Lancaster (Tuktuk) on July 21, 2017, at Docket No. P-2017-2615559, seeking a determination that Tuktuk’s proposed transportation service is not subject to Commission jurisdiction; and (2) the Petition for Rehearing and Reconsideration (Reconsideration Petition), filed by Tuktuk on July 27, 2017, at Docket No. A-2017-2585784, seeking reconsideration of the Order entered on July 12, 2017 (*July 2017 Order*).[[1]](#footnote-1) No Answers were filed to either the Declaratory Order Petition or the Reconsideration Petition. As set forth in more detail herein, we shall: (1) grant the Declaratory Order Petition, expressly conditioned on the specific factual averments in that Petition; and (2) grant the Reconsideration Petition to the limited extent necessary to clarify that Tuktuk’s proposed service is not subject to our jurisdiction.

**History of the Proceeding**

 On December 27, 2016, Tuktuk filed an Application for Motor Common Carrier of Persons in Paratransit Service at Docket No. A-2017-2585784 (Application). Timothy Wenger, the President of Wenger Works, filed the Application. In the Application, Tuktuk described its service as “[t]o transport sightseers in Lancaster City and adjoining municipalities.” Application ¶ 9. On January 27, 2017, the Commission’s Bureau of Technical Utility Services (TUS) sent a letter to Tuktuk informing Tuktuk that its Application could not be published in the *Pennsylvania Bulletin* because the service area description was vague. TUS advised Tuktuk to provide a defined area with firm and verifiable boundaries. In its response filed on February 6, 2017, Tuktuk revised its service area to read “[t]o transport sightseers from points in Lancaster County, to points in Pennsylvania, and return.” The Application was published in the *Pennsylvania Bulletin* on March 4, 2017, at 47 *Pa*. *B*. 1451. No protests to the Application were filed, and the Application was assigned to TUS for review without a hearing.

 On May 1, 2017, Tuktuk filed a Verified Statement and Verified Statements in Support of the Application. In the Verified Statement, Tuktuk indicated that a 2015 E-Tuk Limo (E-Tuk) would be used for its proposed service. Verified Statement at 3. Tuktuk also indicated that its geographic service area would be limited to Lancaster City. Tuktuk stated the following: “[A]lthough we have requested ‘persons in paratransit service, limited to sightseeing excursions, from points in Lancaster County to points in Pennsylvania, and return, our geographical area will be limited to Lancaster City.” *Id*. at 4. On June 1, 2017, in response to questions from TUS, Tuktuk filed a response addressing the safety of E-Tuk vehicles.

 In the *July 2017 Order*, we denied Tuktuk’s Application, citing safety concerns about the E-Tuk vehicle as the reason for denial. In a Statement issued by Chairman Gladys M. Brown at the July 12, 2017 Public Meeting, Chairman Brown indicated that sufficient information was not available to make a determination regarding the safety of Tuktuk’s proposed operations. Chairman Brown recommended that Tuktuk provide the following information should it file an application in the future:

1. Does the City of Lancaster have any safety concerns regarding Tuktuk vehicles operating on City streets alongside heavier 4-18 wheel vehicles?
2. Do City Police have any concerns about Tuktuk vehicles impeding the normal flow of traffic?
3. Has the City of Lancaster considered how it will notify the public that these vehicles would be sharing the road?
4. Are there bike lanes that would be more appropriate for Tuktuk vehicle operation?
5. It appears that Wenger Works is currently operating free of charge in the City of Lancaster. Have there been any moving violations or incidents, if so, please provide details?
6. How many drivers does Wenger Works currently have providing the service free of charge?
7. What is the current route or area of operation for Wenger Works’ free service?

 As previously noted, on July 21, 2017, Tuktuk filed the Declaratory Order Petition. On July 27, 2017, Tuktuk filed the Reconsideration Petition. No Answers were filed to either Petition. By Order entered August 3, 2017, the Commission granted the Reconsideration Petition, pending further review of, and consideration on, the merits.

**Discussion**

 We note initially that we will consolidate the Declaratory Order Petition and the Reconsideration Petition for purposes of this Opinion and Order. Under 52 Pa. Code § 5.81(a), “[t]he Commission or presiding officer, with or without motion, may order proceedings involving a common question of law or fact to be consolidated. The Commission or presiding officer may make orders concerning the conduct of the proceeding as may avoid unnecessary costs or delay.” In its Reconsideration Petition, Tuktuk states that the Commission could consolidate the Declaratory Order Petition with the Reconsideration Petition and that Tuktuk is not opposed to such a procedure.

Reconsideration Petition at 1-2 n. 2. We find that consolidation is appropriate because both Petitions involve common questions of law or fact and because a consolidated procedure will avoid unnecessary costs or delay.

Any issue or argument that we do not specifically address herein 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 Corporation v. Pa. PUC,* 625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also see, generally,* [*University of Pennsyl­vania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

**Declaratory Order Petition**

**Legal Standards**

Tuktuk filed its Declaratory Order Petition pursuant to 66 Pa. C.S. § 331(f) and 52 Pa. Code § 5.42.  Under these provisions, the issuance of a declaratory order is subject to the Commission’s sound discretion and is employed to resolve actual controversies or remove uncertainty.  *Application of the City of Chester*, Docket No.

A-2012-2298192 (Order entered August 21, 2014).  Declaratory orders carry the same effect as other Commission Orders and are appealable to the Commonwealth Court as final adjudications.  *Professional Paramedical Services, Inc. v. Pa. PUC*, 525 A.2d 1274 (Pa. Cmwlth. 1987).

**Petition**

 In its Declaratory Order Petition, Tuktuk requests the Commission to determine that its proposed transportation services are exempt from Commission regulation and that a Certificate of Public Convenience (Certificate) is not necessary to lawfully provide the service in connection with its sightseeing business. Specifically, Tuktuk avers that, because its 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, its proposed service is outside of the Commission’s jurisdiction. Declaratory Order Petition at 2.

 Tuktuk describes its service as a sightseeing tour of the City of Lancaster conducted in a vehicle called an E-Tuk. Based on Tuktuk’s current averments, it will provide a circuitous ride and will not offer transportation services to and from intermediate points during the tour or make stops for the purpose of picking up or discharging passengers. *Id*. at 3. An E-Tuk is a three-wheeled, battery-operated vehicle that holds up to six passengers and can reach a maximum speed of 25 miles per hour. The United States Department of Transportation (USDOT) and the Pennsylvania Department of Transportation (PennDOT) consider the E-Tuk to be a motor vehicle. PennDOT licenses the E-Tuk as a motorcycle. *Id*. at 4.

 Tuktuk indicates that the E-Tuk tour will last forty-five minutes and include stops at four or five eateries. Tuktuk states that the tour will also stop at some tourist attractions, but most of the tour will be conducted with the tour guide narrating without stopping. According to Tuktuk, when the tour stops at eateries, the tour guide will bring food to the vehicle, which the passengers can eat between stops, or collect in a take-out box provided for the passengers to take at the end of the tour. Tuktuk explains that these stops are not intended as destinations and will not be for picking up or discharging customers; they will only be for picking up food. *Id*.

 In support of its Declaratory Order Petition, Tuktuk avers that the Commission and the Court have long-recognized that transportation services that are incidental to an entity’s primary business are exempt from the Commission’s jurisdiction. *Id*. at 6 (citing *Aronimink Transportation Co. v. Public Service Commission*, 170 A. 375 (Pa. Super. 1934); *Protective Motor Service Co. v. Pa. PUC*, 286 A.2d 30 (Pa. Cmwlth. 1972). Tuktuk also avers that 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 the entities to be exempt from regulation. *Id*. at 7 (citing *Petition for Declaratory Order*; *Northampton Area Community College*, 1985 Pa. PUC Lexis 20). Tuktuk states that the Commission has also determined that transportation services are exempt from Commission jurisdiction when they are provided as an amusement or tourist attraction and are designed for the entertainment of the patrons. *Id*. at 8 (citing *Abe’s Buggy Rides, Inc.; Letter/Petition for Declaratory Order* (*Abe’s Buggy Rides*), 1988 Pa. PUC Lexis 483. Tuktuk argues that its proposed services are similar to those provided in *Abe’s Buggy Rides*, because, like the operator in that case, Tuktuk will offer “a circuitous ride around a defined area,” rather than a service between points in Pennsylvania, and is therefore not a common carrier. *Id*. at 8. According to Tuktuk, the Commonwealth Court has also endorsed an exemption for transportation services that are primarily for entertainment value, even when the transportation is offered between points in Pennsylvania. *Id*. at 9 (citing *Society Hill Carriage Co. v. Pa. PUC*, 581 A.2d 702 (Pa. Cmwlth. 1990) (*Society Hill Carriage*). Tuktuk submits that, while its patrons may use the services in part to help them navigate around the City of Lancaster, it is clear that their primary purpose is for sightseeing and the experience of the ride in a Tuktuk vehicle. *Id*. at 10.

 Tuktuk continues that, since the *Society Hill Carriage* decision, the Commission has made it clear that the exemption is not limited to horse-drawn carriages. Tuktuk states that, in *Application of Kevin Michael Walker, t/d/b/a Walker Trolley and Transit Company*, 1998 Pa. PUC Lexis 26 (*Walker Trolley*), the Commission found that a proposed service consisting of a round trip sightseeing tour through the Hershey, Pennsylvania area on a trackless trolley was incidental to the primary business of the transportation service. *Id*. at 11. Tuktuk also cites to *Petition of Millersburg Ferry Boat Association for a Declaratory Order (Millersburg Ferry)*, 1998 Pa. PUC Lexis 25, noting that the Commission applied a similar exemption to a ferry ride across the Susquehanna River, finding that the operators of the boat did not provide common carrier service but, instead, offered a source of historic interest, amusement, and education for those interested in its unique method and place of crossing. *Id*. at 11-12.

**Disposition**

 Tuktuk asks this Commission to declare that the description of service provided in its Petition is beyond our jurisdiction. We are authorized to enter declaratory orders to terminate a controversy or remove uncertainty. 66 Pa. C.S. § 331(f). Due to the unique nature of the E-Tuk vehicle being used in Tuktuk’s service and the proposed use of the vehicle, uncertainty exists as to whether Tuktuk is a “common carrier” as defined in Section 102 of the Code and, therefore, subject to our jurisdiction.[[2]](#footnote-2)

 The Courts and the Commission have consistently held that transportation service that is incidental to the service provider’s primary business is beyond this Commission’s jurisdiction. While we have not previously addressed whether an E-Tuk used to provide a tour for entertainment purposes in a circuitous route constitutes common carrier service under Section 102 of the Code, we find informative the various cases dealing with other novel vehicles providing transportation service. In *Abe’s Buggy Rides*, we entered a declaratory order finding that a tour using a horse and carriage for transportation was outside of our jurisdiction, because the transportation provided by horse-drawn carriages was purely incidental to the primary business of furnishing carriage rides for entertainment. *Abe’s Buggy Rides* at \*5. We reasoned that the horse-drawn carriage was intended as an amusement or tourist attraction and was designed solely for entertainment, as opposed to transportation of its patrons. We noted that the ride originated and terminated in the same location with no service to intermediate points for picking up or discharging passengers. We found that, while customers received transportation from Abe’s Buggy Rides, that was a secondary benefit of the service, and the carriage rides were not held out or used as a means of transportation. *Abe’s Buggy Rides* at \*4.

 The Commonwealth Court has affirmed our determination that horse-drawn carriages fall outside of our jurisdiction. In *Society Hill Carriage,[[3]](#footnote-3)* the Court adopted our rationale that:

If a patron’s primary goal is to reach a destination, he is unlikely to opt for a carriage, in lieu of a bus, taxi or limousine, to transport him to that destination. The fact that a horse and carriage 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].

*Society Hill Carriage* at 704. Although Society Hill Carriage Company made intermediate stops where passengers disembarked and other passengers were picked up, the Court determined that “the transportation involved in [Society Hill Carriage Company’s] enterprise [was] merely incidental to the primary function which [was] to entertain passengers.” *Id*.

 In addition to horse-drawn carriage transportation, we have also found that other forms of non-traditional transportation are outside of our jurisdiction. One case that is particularly relevant to the instant proceeding is *Walker Trolley*, in whichwe addressed whether a trackless trolley was outside of our jurisdiction. In that case, the trolley was a motor vehicle that had the appearance of an early to mid-century trolley car with bench seats. All transportation in the trolley included live, dramatized or musical entertainment and all pickups and drop-offs were at the same point with no intermediate stops for boarding or offloading passengers. Based upon this description, we reasoned that, since the service consisted of a roundtrip sightseeing tour with tour guides dressed in costume to give riders a historic presentation about the area, transportation was merely incidental to the service’s primary purpose which was entertainment. We concluded that, “[i]n our view, the crucial consideration is whether the proposed transportation is the primary purpose of the service or merely ancillary or incidental to the proposed service.” *Walker Trolley* at \*7. *See also* *Millersburg Ferry* at \*6 (finding that the provision of transportation by ferry was merely incidental to the primary purpose of providing amusement and a unique historical experience to the passengers but should not be viewed as an alternative means of transportation under the Code in modern society).

 Based upon our review of the applicable law, we conclude that Tuktuk’s proposed service, as specifically described in its Declaratory Order Petition, is outside of our jurisdiction. The vehicle Tuktuk proposes to use in its service is unique. The E-Tuk is an open, three-wheeled vehicle that is battery-operated and is licensed by PennDOT as a motorcycle. The E-Tuk is only capable of a maximum speed of twenty-five miles per hour. Given the limited speed capability of the E-Tuk and the fact that passengers will be exposed to the elements when riding in the vehicle, this is not a method of transportation individuals in modern society would consider when their primary purpose is to move efficiently between two points. Like the horse-drawn carriage cases, consumers would primarily be seeking Tuktuk’s services for entertainment, given the novelty and limited transport capability of the E-Tuk.

 Additionally, we find it significant that Tuktuk’s proposed service follows a circuitous route. Tuktuk’s route picks up passengers 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 tour terminates and where passengers disembark. Tuktuk explained in its Petition that its proposed service includes intermediary stops at four to five eateries. At these stops, the tour guide on the E-Tuk goes into these eateries and brings food to the vehicle, which the passengers can eat between stops, or collect the food in a take-out box. We also find it significant to our determination that passengers on the E-Tuk do not disembark and no other passengers are picked up at these stops. This is analogous to the circuitous route described in *Abe’s Buggy Rides* and *Walker Trolley* where the pick-up and drop-off points were the same with no intermediate points for pick-up and drop-off.

 Moreover, the primary purpose of Tuktuk’s service is relevant. Tuktuk explained in its Petition that the purpose of the service is to provide a tour of the City of Lancaster with four to five stops at eateries within Lancaster City. The use of the E-Tuk in Tuktuk’s business model is intended to expand the walking tour offered by Tuktuk’s affiliate – Wenger Works, Inc., d/b/a Taste the World. Petition at 3. The service described in the Petition is akin to the horse-drawn carriage ride in *Abe’s Buggy Rides* and the trolley tour in *Walker Trolley and Transit Company*. The primary purpose for which consumers will choose to use Tuktuk’s service will be for a tour of the City of Lancaster in a novel, open vehicle. The transportation aspect of Tuktuk’s service described in the Petition is incidental to the primary purpose of Tuktuk’s business, which is entertainment.

 Based on our analysis of the service described in Tuktuk’s Petition, we find that Tuktuk’s proposed service is beyond the Commission’s jurisdiction, and we will grant the Petition for Declaratory Order. Our decision herein is based upon the specific factual averments in Tuktuk’s Petition, including the novel method of transportation in an E-Tuk, the fact that the transportation service will follow a circuitous route with no intermediate stops for picking up or dropping off passengers, and the fact that the primary purpose of the service is entertainment. In reaching a determination that Tuktuk’s proposed service does not constitute public utility service under Section 102 of the Code, we emphasize that this is a declaratory order proceeding. Our determination herein is expressly conditioned on the factual averments in Tuktuk’s Petition and, in particular, the averments that Tuktuk will not be offering transportation services to and from intermediate points during the tour or making stops for the purpose of picking up or discharging passengers. *We are placing Tuktuk on notice that, if any of these factual circumstances change in the future, we have the authority to make a new determination regarding whether Tuktuk’s provision of service constitutes public utility service and to take any other action as may be warranted under applicable statutes and regulations.*

**Petition for Reconsideration**

**Legal Standards**

Tuktuk filed its Reconsideration Petition pursuant to Subsections 703(f) and (g) of the Public Utility Code (Code), 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*, 1982 Pa. PUC Lexis 4, \*12-13:

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 considered and 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.

 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. *Id*. at \*13.

 Additionally, the standards for granting a petition for rehearing were set forth in *Duick*:

A petition for rehearing, under the provisions of 66 Pa. C.S.

§ 703(f), properly must seek the reopening of the record for the introduction of additional evidence of some sort. As grounds thereof it must allege newly discovered evidence, not discoverable through the exercise of due diligence prior to the close of the record.

*Duick,* 56 Pa. P.U.C. at 558.

Commission Regulations allow a party to petition to reopen the proceeding any time after the record is closed but before a final decision is issued for the purpose of taking additional evidence. 52 Pa. Code § 5.571(a); *see, e.g., Application of Kris Eckerl t/d/b/a Michael’s Moving and Storage*, Docket No. A-2014-2429336 (Order entered November 19, 2015). The burden is on the petitioner to show grounds for reopening the proceeding, including changes of fact or law that have occurred since the conclusion of the hearing. 52 Pa. Code § 5.571(b). The Commission may reopen the record after the presiding officer has issued a decision if there is reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, the reopening of the proceeding. 52 Pa. Code § 5.571(d).

 ***July 2017 Order***

In denying Tuktuk’s Application, we found that the record demonstrated that the E-Tuk was less safe than the standard four-wheeled vehicles used in public service. In this case, the record consists of the Application and supporting documentation, which includes the Applicant’s responses and information supplied in response to data requests and inquiries from TUS. We addressed various safety concerns throughout the Order, noting that, consistent with 52 Pa. Code § 41.14(b), an applicant must demonstrate that it will use equipment that will safely render service in compliance with the Commission’s vehicle safety regulations and service standards. *July 2017 Order* at 3.

 We stated that, because the E-Tuk is not an enclosed vehicle, passengers have much less protection in the event of a collision. Additionally, since the vehicle has only three wheels, we observed that it lacks the stability of a four-wheel vehicle and would be more susceptible to rolling over than conventional vehicles. *Id*. at 3-4. We concluded that in the event of a collision with another vehicle, while the maximum speed of the E-Tuk is 25 miles per hour, the other vehicle may be travelling at a greater speed and may be heavier and therefore pose a greater risk of injury to the E-Tuk passengers. Regarding the possibility of a rollover, the Applicant submitted information from the National Highway Traffic Safety Administration (NHTSA), which determines a vehicle’s resistance to rollover based on its static stability factor (SSF). The Applicant indicated that the E-Tuk manufacturer stated that the SSF for the E-Tuk is 1.4. *Id*. at 4. We noted that, after consulting with the Applicant and the E-Tuk’s manufacturer, Commission staff determined that the source for the SSF rating of 1.4 was the manufacturer’s own computations using the NHSTA’s formula. We reasoned that no independent testing was performed by the NHTSA or the Insurance Institute for Highway Safety (IIHS); that the static rollover measurement performed by the manufacturer was limited to the E-Tuk’s rear axle, which has two wheels, and excluded the single-wheel front axle; and that no dynamic rollover test was performed. We also reasoned that E-Tuks are not equipped with antilock brakes or electronic stability control, a valuable safety feature to prevent rollovers, and that E-Tuks are not tested for roof strength by the NHSTA or IIHS. We also cited to various serious accidents in countries that permit E-Tuks to operate on public highways. *Id*. at 5. In light of the above-information, we determined that Tuktuk lacked the equipment to safely render the proposed service. *Id*. at 7.

 **Petition**

In its Reconsideration Petition, Tuktuk requests that the Commission do the following: (1) reopen the record to receive evidence responding to the inquiries posed by Chairman Brown in her Statement accompanying the *July 2017 Order*, and other information that is relevant to the discussion of the testing, safety, and use of the vehicles in the *July 2017 Order*; (2) reconsider and vacate the *July 2017 Order*; and (3) adopt an Order granting Tuktuk experimental authority to provide transportation services in connection with sightseeing tours within the City of Lancaster, except during severe weather conditions. Reconsideration Petition at 1. Tuktuk references the Declaratory Order Petition and suggests that the Commission could consolidate the Petition for Declaratory Order with the Reconsideration Petition and determine as part of the Application proceeding that it lacks jurisdiction over Tuktuk’s proposed services. *Id*. at 1-2 n. 2.

In support of its Reconsideration Petition, Tuktuk avers that it is providing answers that are responsive to Chairman Brown’s inquiries, correcting “misinformation” the Commission relied on in denying its Application, and offering additional details that were not available to the Commission when its decision was made. *Id*. at 6. In response to Chairman Brown’s inquiries, Tuktuk states that the City of Lancaster does not have any safety concerns regarding Tuktuk vehicles operating on City streets, because the vehicles meet the standards established by the USDOT, and PennDOT already has licensed the vehicles. *Id*. at 7-8. Tuktuk also states that the Lancaster City Police Bureau does not have any concerns about Tuktuk vehicles impeding the normal traffic flow, since the vehicles are licensed by PennDOT and are legally permitted to operate on the City streets. Tuktuk explains that the City will notify the public that E-Tuks are on the road through normal forms of communication, such as social media and email blasts. Tuktuk indicates that no moving violations or incidents have occurred since it began providing its current free of charge service. *Id*. at 8. A Statement of the City of Lancaster is attached to the Petition as Appendix A.

 Tuktuk next addresses the safety issues surrounding its proposed service. First, Tuktuk avers that its vehicles meet or exceed the applicable federal standards, including the Federal Motor Vehicle Safety Standards (FMVSS) set forth by the USDOT and the NHTSA. *Id*. at 9. Next, Tuktuk discusses the SSF rating of the E-Tuk. Tuktuk argues that, by failing to give credit to the satisfactory rating determined by the manufacturer, the Commission overlooked the fact that vehicle manufacturers were the source of all ratings in the report that was prepared by the NHTSA and that the USDOT relies on manufacturers to determine these ratings. *Id*. at 11. Tuktuk states that, due to the concerns the Commission expressed, e-Tuk USA has performed additional roller and side calculations, which Tuktuk attached to the Petition as Appendix B. *Id*. at 12.

 Tuktuk also addresses the collision protection features. Tuktuk avers that the Commission did not consider information it provided, including diagrams regarding the safety aspects of the vehicle and Tuktuk’s explanation that the vehicle is equipped with numerous safety features, such as its top speed of 25 miles per hour, safety belts, rear roll bar, and hydraulic disc brakes. *Id*. Tuktuk further discusses the incidents in other countries and indicates that the Commission had incomplete information on these incidents. *Id*. at 13-14. Tuktuk asserts that the Commission likewise discounted the value of its statement regarding the absence of E-Tuk accidents in the United States involving any serious injury or fatality. *Id*. at 14-15. Tuktuk similarly asserts that the three-wheeled vehicles that have been used in third world countries are not E-Tuk vehicles, but are high-speed gas powered three-wheeled vehicles that would not meet the applicable federal standards in the United States. *Id*. at 15.

  **Disposition**

We will grant Tuktuk’s Reconsideration Petition pertaining to our *July 2017 Order* to the limited extent necessary to clarify that Tuktuk’s proposed service is not subject to our jurisdiction and, therefore, that Tuktuk is not required to obtain a Certificate prior to rendering its proposed service. We find that this clarification is appropriate given our determination herein regarding Tuktuk’s Declaratory Order Petition. Upon review of both Petitions, we conclude that Tuktuk has provided additional information to the Commission since it filed its Application that more clearly explains the type of service Tuktuk will be providing and its specific service area. Some of this newly provided information, such as the fact that Tuktuk’s proposed transportation service will follow a circuitous route with no intermediate stops for picking up or dropping off passengers, has been significant in reaching a determination that Tuktuk’s proposed service falls outside of our jurisdiction.

 While we do not have safety jurisdiction over Tuktuk’s operations under the specific factual circumstances delineated herein, the safety concerns regarding E-Tuk Limos, as discussed in detail in our *July 2017 Order*, remain valid and important considerations. We emphasize that other entities maintain sufficient safety authority over Tuktuk’s operations. *See Millersburg Ferry* at \*6-7 (noting that the applicable regulations of the United States Coast Guard, which required inspections of the Ferry and licensing requirements of the Ferry’s captain, were sufficient to ensure the safety of Ferry patrons). The E-Tuk Limo must comply with the applicable FMVSS set forth by the USDOT and the NHTSA, which are contained in Title 49, Part 571 of the U.S. Code of Federal Regulations. PennDOT has also licensed Tuktuk’s vehicle as a motorcycle, and, accordingly, Tuktuk is subject to the applicable PennDOT regulations set forth in Title 67, Part 1 of the Pennsylvania Code. Additionally, Tuktuk passengers may file a consumer complaint with the Office of Attorney General’s Bureau of Consumer Protection if they have an issue with the service provided by Tuktuk.[[4]](#footnote-4)

**Conclusion**

For the reasons set forth above, we shall grant Tuktuk’s Declaratory Order Petition, expressly conditioned on the specific factual averments in that Petition regarding the nature and scope of its service, particularly the averments that Tuktuk will not be offering transportation services to and from intermediate points during the tour or making stops for the purpose of picking up or discharging passengers. *We are placing Tuktuk on notice that, if any of these factual circumstances change in the future, we have the authority to make a new determination regarding whether Tuktuk’s provision of service constitutes public utility service and to take any other action as may be warranted under applicable statutes and regulations.*  Additionally, we shall grant Tuktuk’s Reconsideration Petition pertaining to our *July 2017 Order* to the limited extent necessary to clarify that Tuktuk’s proposed service, as described herein, is not subject to our regulation; **THEREFORE,**

**IT IS ORDERED:**

 1. That the Petition for Declaratory Order filed by Wenger Works, Inc., t/a Tuktuk Lancaster on July 21, 2017, at Docket No. P-2017-2615559, is granted, consistent with this Opinion and Order.

 2. That our determination in Paragraph No. 1, above, is expressly conditioned on the specific factual averments set forth in the Petition for Declaratory Order filed by Wenger Works, Inc., t/a Tuktuk Lancaster on July 21, 2017, at Docket No. P-2017-2615559, and as described in this Opinion and Order. If any of these factual circumstances change in the future, we have the authority to make a new determination regarding whether Wenger Works, Inc., t/aTuktuk Lancaster’s provision of service constitutes public utility service and to take any other action as may be warranted under applicable statutes and regulations.

 3. That the Petition for Rehearing and Reconsideration filed by Tuktuk on July 27, 2017, at Docket No. A-2017-2585784, is granted to the limited extent necessary to clarify that Wenger Works, Inc., t/a Tuktuk Lancaster’s proposed transportation service, as described herein, is not subject to our regulation, consistent with this Opinion and Order.

 4. That the proceedings at Docket Nos. A-2017-2585784 and

P-2017-2615559 be marked closed.

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 **BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: August 31, 2017

ORDER ENTERED: August 31, 2017

1. As explained in more detail herein, we will consolidate the Declaratory Order Petition and the Reconsideration Petition and consider both filings in this Opinion and Order. [↑](#footnote-ref-1)
2. Common carriers are a regulated utility under Section 102 of the Code, which provides as follows:

**“Common Carrier**.” Any and all persons or corporations holding out, offering, or undertaking, directly or indirectly, service for compensation to the public for the transportation of passengers or property, or both, or any class of passengers or property, between points within this Commonwealth by, through, over, above, or under land, water, or air, and shall include forwarders, but shall not include contract carriers by motor vehicles, or brokers, or any bona fide cooperative association transporting property exclusively for the members of such association on a nonprofit basis. The term does not include a transportation network company or a transportation network company driver.

66 Pa. C.S. § 102. [↑](#footnote-ref-2)
3. In *Society Hill Carriage*, we cancelled the Certificate of an operator of horse-drawn carriages after enacting a policy statement at 52 Pa. Code § 41.20, which states the following:

A provider of horse and carriage services is not a “common carrier” under [66 Pa. C.S. § 102](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000262&cite=PA66S102&originatingDoc=NA7E22A408E9211DE9819E4AEF12068F2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (relating to definitions), and is not subject to the Commission’s jurisdiction. [↑](#footnote-ref-3)
4. The Bureau of Consumer Protection is authorized to enforce the Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1, *et seq*. [↑](#footnote-ref-4)