BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transportation Services	Rulemaking 12-12-011

REPLY COMMENTS OF LYFT, INC. RE: PROPOSED DECISION OF COMMISSIONER PEEVEY MODIFYING DECISION 13-09-045

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In accordance with Rule 14.3 of the Commission's Rules of Practice and Procedure, Lyft, Inc. replies to the Opening Comments on the Proposed Decision of Commissioner Peevey Modifying Decision 13-09-045 (hereafter "Proposed Decision").

1. Because Defining TNC Services as "App On/App Off" is Unworkable and There is No Evidentiary Support for the Contemplated Insurance Limits, The PUC Should Refrain From Unilateral Action and Instead Await Completion of the Legislative Process

The Commission received Opening Comments on the Proposed Decision from numerous parties representing broadly divergent viewpoints, including TNCs (Lyft, Sidecar, Uber, Summons), personal lines insurance carrier representatives (PIFC, ACIC), local regulatory representatives (SFMTA, SF Airport), and representatives of the incumbent taxi and limousine industries (TPAC, UTW, SFCDA). Although the parties share the Commission's goal of ensuring adequate insurance coverage, there is a clear lack of consensus concerning how best to achieve that goal. Some parties seek to modify the proposal, some seek to supplement it, and others urge the Commission to address issues (if any) in the next phase of this proceeding. There simply is not sufficient evidence in the record before the Commission to settle on a rational, non-arbitrary and data-driven solution to the issues raised by the Proposed Decision.

Lyft and others have demonstrated that the Commission's proposal to define TNC services as "whenever the app is on" is inherently ambiguous, unworkable, and encourages fraudulent behavior. The proposal would detract from the Commission's goal by introducing additional uncertainty, freezing current TNC and insurance company efforts to develop new insurance products in their tracks and leading to more litigation aimed at interpreting and applying these new and untested concepts. For that reason, Lyft urges the Commission to refrain from taking action until the Legislature has had the opportunity to act and/or a more fulsome record has been developed.

Incumbent industry representatives TPAC, UTW and SFCDA also oppose defining TNC services as "app on," though for entirely different reasons. They argue that the definition is not broad enough and assert that PUC should simply order that TNC drivers obtain commercial livery insurance. The argument ignores the fact, confirmed by the California Department of Insurance, that commercial livery insurance cannot be obtained for personal vehicles,[1] and is premised on an assertion for which there is no evidence at all in the record.[2] But the fact that such diametrically opposed parties agree that the proposed definition of TNC services is unworkable provides further reason to defer action until the matter can be more carefully considered.

SFMTA and SF Airport (collectively, "SF") say they agree in principle with using "app on/app off" to define TNC services, but in virtually the same breath argue that the definition is unacceptably vague when a vehicle is located on airport property. In that case, they argue, coverage should apply at all times, "regardless of whether an app is on or off, or whether the TNC driver has a passenger." SF, p. 1. SF does not explain its rationale for concluding that a driver who does not have an app on, is not transporting a passenger, and is not even available to receive a ride request should be deemed to be providing TNC services, or by what criterion one would determine which of the various TNCs should be deemed responsible for this then-unaffiliated driver. Indeed, SF's proposed modification would lead to the absurd result that anyone who has ever driven for a TNC would be "providing TNC services" anytime she ventures onto airport property, even if for *wholly personal reasons* (e.g., picking up a relative at the airport, or leaving on a flight), and even if she hasn't driven for a TNC in a number of years. In all events, by arguing that "app on/app off" is unacceptably vague for vehicles on airport property SF tacitly confirms that the concept is simply unworkable ***on or off*** such property.

Indeed, even PIFC and ACIC, for whose benefit the "app on/app off" concept was devised in the first place, have trouble fully embracing or supporting it. The only justification they offer in support of the proposal is the improbable and unsupported assertion that the mere act of turning on an app instantly transforms an average driver into a reckless TNC driver. PIFC, at p. 1.

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[1] April 7, 2014 Letter from Dave Jones to Michael Peevey, at p. 2 ("CDI has been advised that . . . insurers will not sell commercial insurance for livery purposes to a driver unless his or her care is registered commercially and has a "Transportation – Charter Party (TCP) permit.").

[2] They claim without reference to any evidence that TNC drivers turn off the app to avoid paying a fee to TNCs, however, even if one assumes, for sake of argument, that there were at least one such instance, the argument fails because they fail to offer any rationale for holding TNCs responsible for drivers not even using their app, or any explanation as to how one would determine which TNC should be responsible for these unaffiliated drivers.

("Commercial coverage must come into play during this commercial period because as soon as the 'app' is turned on, the behavior of the driver changes, and his or her activities become commercial in nature." PIFC, p. 1; *see also* ACIC, p. 1 ("From that point, the TNC driver . . . drives a little faster to the destination of potential customers, increases the likelihood of distracted driving which includes constantly looking at the 'app' for potential customers, and travels to places that may be more risker (sic) like a 'beer fest.'"). Neither PIFC nor ACIC make any effort whatsoever to prove that this actually occurs, and neither cites to even a stitch of evidence in the record to support it. Instead, they simply assert it as a fact and ask the Commission to accept it. That the primary advocates for this proposal can muster only speculation exposes a disturbing lack of actual evidence in support of it and simply reinforces the fact that neither these stakeholders nor the Commission has adequately investigated the basis for or consequences of the proposal. Absent findings of fact, such an important ruling cannot be made on the bare record before the Commission.

Synthesizing these various comments, there is consensus on one thing – that attempting to define TNC services using a new, untested, and inherently limited "app on/app off" concept represents bad policy and would create many more issues than it resolves. There is a similar lack of consensus on appropriate levels and types of insurance, and a similar absence of evidence justifying the proposed requirements. One thing is clear, however – the proposed levels are beyond that required of any existing or similarly situated transportation provider. Nowhere is this more evident than with respect to the $1M limit required for Period One, which is over *thirty times* that required for private passenger vehicles by state statute. The only reasonable suggestion provided in initial comments was Uber's footnote regarding the $45k/$90k/$15k standard set by then-Assemblyman David Jones in AB 1871. Lyft therefore reiterates its request that the Commission defer taking any action on insurance issues in the Proposed Decision while the Legislative process concludes, and re-examine the need for any subsequent further refinements in the Phase II proceedings or a further joint study based on a fulsome evidentiary record.

2. The PUC Should Not Attempt To Dictate The Terms Of Yet-To-Be-Created Insurance Policies Or Circumscribe (to Consumers' Detriment) The Legal Obligations Flowing From Such Policies

In Ordering Paragraphs 5 and 6, the Proposed Decision declares that the new TNC insurance policies the Commission assumes will be developed in response to the decision "shall

have the sole duty to defend" and "shall provide primary and exclusive coverage, and assume all liability and the sole duty to defend at dollar one." Proposed Decision, OP 5, OP 6. In Ordering Paragraph 7, the Proposed Decision goes even further by purporting to circumscribe the legal obligations flowing from ***personal lines policies***, ordering that "[u]nless coverage for Transportation Network Company (TNC) services is separately and specifically stated in the policy and priced pursuant to approval by the California Department of Insurance, a driver's personal automobile policy is in no way required to provide coverage or the duty to defend for TNC services." *Id.* at OP 7. Not surprisingly, PIFC and ACIC eagerly embrace these proposals, and in fact urge the Commission to go still further and "clarify that the duty to defend rests with the commercial policy…" PIFC, pp. 2-3; *see also* ACIC, p. 5 ("The duty to indemnify or the promise to reimburse for a loss must also be specified in proposed decision six and seven."). In other words, PIFC and ACIC want the PUC to effectively rewrite their respective members' policies and absolve such companies of any obligations therein. These are self-serving requests benefitting *only* the member insurance companies, with absolutely no benefit to consumers.

It is perhaps understandable that PIFC and ACIC would like to shift responsibility for as much activity as possible onto TNCs and their carriers. What these proposals overlook, however, is that the scope of coverage under a policy is a question of law, to be determined based upon the language of the particular policy at issue and if necessary by the courts, in reliance on decades of existing legal precedent interpreting and applying that language. *See, e.g., Vons Companies, Inc. v. United States Fire Ins. Co*., 78 Cal. App. 4th 52, 58 (Cal. App. 2000) ("While insurance contracts have special features, they are still contracts subject to the ordinary rules of contract interpretation. The fundamental goal of contract interpretation is to give effect to the parties' mutual intentions, which, if possible, should be inferred solely from the written terms of the policy."); *Forecast Homes, Inc. v. Steadfast Ins. Co.*, 181 Cal. App. 4th 1466, 1475 (Cal. App. 2010) (interpretation of insurance policy is a question of law for the courts to resolve).

The Commission should not declare the scope of coverage under a given policy or the duties to defend or indemnify thereunder; rather, the policy should speak for itself. Courts will determine the scope of coverage and duties under existing and any future policies based upon the language of the policy at issue and consistent with legal precedent. If PIFC's and ACIC's members are concerned that certain activity should be excluded from coverage under their policies, their remedy is to ***modify their policy language to clearly exclude it***. Whether or not the PUC

expresses a view as to which parties should bear what responsibilities under these as-of-yet unwritten policies, the duties and obligations will ultimately be determined not by the Commission but by the courts based on the terms of the policy. Lyft strongly urges the Commission to focus its efforts on areas within its jurisdiction and to not attempt to predetermine the contractual terms of new insurance policies.[3]

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Respectfully submitted,

/s/

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[3] PIFC's and ACIC's argument that PUC should attempt to limit in advance the scope of coverage under personal lines policies is problematic for yet another reason. Some number of individuals have undoubtedly purchased existing personal lines policies in the expectation that coverage would not lapse simply because they happen to turn on an app. In the absence of any actuarial data demonstrating that turning on a TNC app significantly increases the risk of an incident, denying coverage would deprive these individuals of the benefit of their bargain and would actually result in an undeserved windfall for carriers.