

**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.

R.12-12-011

(Filed December 20, 2012)

**TAXICAB PARATRANSIT ASSOCIATION OF CALIFORNIA'S
REPLY COMMENTS ON PROPOSED DECISION
MODIFYING D.13-09-045**

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Pursuant to Rule 14.3 of the Commission’s Rules of Practice and Procedure, the Taxicab Paratransit Association of California (“TPAC”) respectfully submits its Reply Comments on the Proposed Decision (the “PD”) Modifying Decision (“D.”) 13-09-045. TPAC provides these comments without admitting the lawfulness of D.13-09-045 or D.14-04-022, and without waiving any of TPAC’s arguments raised in its pending petitions for writ of review of D.13-09-045 and D.14-04-022.

I. TNCs ARE SITUATED SIMILARLY TO OTHER PASSENGER CARRIERS

Notwithstanding that the largest so-called Transportation Network Companies or “TNCs” advertise and provide exactly the same on-demand, non-prearranged passenger services that taxicabs provide, the Commission granted TNCs a special, less-rigorous regulatory category and regulations in D.13-09-045, as modified by D.14-04-022. Now, when the Commission proposes to modify D.13-09-045 to clarify the scope of TNC liability insurance obligations under the Public Utilities Code, General Orders (“G.O.”) 157-D and 115-F, and the Commission’s TNC regulations as promulgated in D.13-09-045, allegedly for the public’s safety and protection, the TNCs object to the proposed level of coverage by claiming that the Commission’s proposal is unduly burdensome in comparison to limousine and taxicab insurance requirements.¹ The TNCs now seek treatment equal to that which is afforded similarly-situated taxicab and limousine services.²

TPAC submits that if TNCs are truly providing services of a different nature from those offered by other passenger carriers, and if they impose a greater risk on their passengers and the public by the manner in which they provide those services, the Commission could well justify imposing different, more onerous, insurance requirements for TNCs. However, the TNCs’ assertion that the proposed requirements *exceed* all taxi and limousine insurance requirements does not withstand scrutiny. The terms and limits bear a rational relationship to typical taxicab and limousine policies in California.

While the TNCs may be technically correct that uninsured motorist and other coverages proposed in the PD are not *required* by statute for taxicab and limousine services,³ it is nonetheless true that in practice most commercial liability passenger carrier policies – like most personal and commercial auto insurance policies – include such additional coverage. Such policy terms, as offered by the insurance industry to passenger carriers in California, typically constitute a key aspect in the carrier’s compliance with the fundamental requirement to maintain sufficient liability coverage for the protection of their paying passengers, and to serve the public interest, in the minimum dollar amounts as set forth by the applicable regulatory authority.⁴

¹ Lyft, Inc. (“Lyft”) Opening Comments, pp. 7-10; Sidecar Technologies, Inc. and Side.cr, LLC (together, “Sidecar”) Opening Comments, pp. 9-10; Opening Comments of Uber Technologies, Inc. on behalf of Rasier-CA, LLC (together, “Uber”), pp. 4-9.

² *Ibid.*

³ *Brown v. All American Cab Co.* (1976) 57 Cal.App.3d 896, uninsured motorist coverage excluded from requirements under Ins. Code § 11580.2, subd. (b), taxicab operators “may voluntarily procure” coverage.

⁴ *See, e.g.* Pub. Util. Code §§ 5387, 5391 (requiring “adequate protection against liability”); G.O. 157-D § 1.05;

TPAC believes that the requirement in D.13-09-045 to maintain “not less than \$1,000,000 . . . per incident coverage” serves this purpose more readily than the proposed modifications to D.13-09-045.⁵ This minimum amount is commensurate with the \$750,000 to \$1.5 million minimum coverage requirement for most charter party carriers⁶ and the range of \$500,000 to \$2 million in coverage that is typically carried by taxicab services in California. The Commission should simply clarify that coverage must be primary (or “exclusive” as suggested by PIFC⁷) and not time-restricted according to app usage or secondary to any not-yet-extant, time-based hybrid coverage under a TNC driver’s personal policy.

Lyft’s suggestion that a more extensive evidentiary record and consideration of economic impacts are required to support the Commission’s determinations might be well-taken if it were not so late in coming.⁸ While TPAC believes it is beyond reasonable dispute on the existing record that TNCs do not provide exclusively prearranged services and in fact operate *de facto* taxicab services, evidentiary hearings and the formal submission of sworn testimony would have been of great assistance to the Commission prior to issuance of D.13-09-045. In addition, as TPAC noted in its Opening Comments on the PD, the TNCs uniformly resisted TPAC’s data requests concerning the nature of their operations, and the Commission denied TPAC’s motion to compel responses.⁹ TPAC stands ready to assist the Commission in making a more complete record in this proceeding.

II. COVERAGE MUST BE PRIMARY

Primary, or “exclusive,” coverage is favored by the Insurance Commissioner¹⁰ and the insurance industry,¹¹ as well as by TPAC and all other Parties who submitted Opening Comments on the PD, except for the TNCs.¹² The TNCs now ask to be treated similarly to other passenger carriers for purposes of insurance coverage. Such treatment would necessarily include primary liability insurance coverage, and TPAC urges the Commission, if it takes any action, to clarify D.13-09-045 to that extent.

G.O. 115-F § (1).

⁵ Indeed, the PD’s proposal to limit coverage to specific time periods will provide the public with *less* protection than currently exists under D.13-09-045.

⁶ G.O. 115-F § (1). D.13-09-045 explicitly permits TNCs who elect to carry \$1.5 million in coverage to carry up to ten passengers. (D.13-09-045, p. 28 fn. 40.)

⁷ Personal Insurance Federation of California (“PIFC”) Opening Comments, p. 2.

⁸ Lyft Opening Comments, pp. 6-7, 9.

⁹ See TPAC’s Opening Comments, pp. 5 at fn. 10; 8 at fn. 25.

¹⁰ See Ins. Com’r Jones’ June 16, 2014 letter to President Peevey, TPAC’s June 30, 2014 Request for Official Notice, Att. I at p. 2 (Ins. Comm. applauds the “decision to make the TNCs’ insurance primary” rather than shifting the burden to drivers; final decision “should include the ‘primary’ requirement”).

¹¹ PIFC Opening Comments, p. 2; Association of California Insurance Companies (“ACIC”) April 7, 2014 comments in response to Assigned Commissioner’s Ruling, pp. 2-3.

¹² Opening Comments of San Francisco Mun. Trans. Agency (“SFMTA”) and San Francisco Int’l Airport (“SFIA”), Appendix A at revised Ordering ¶ 5 (“TNC policies are exclusive and primary, and shall assume all liability. Such policies shall have the sole duty to defend.”); Opening Comments of United Taxicab Workers (“UTW”), p. 5 (“TNCs shall maintain full-time primary commercial (livery) liability insurance policies”); Opening Comments of San Francisco Cab Drivers Association (“SFCDA”), p. 1 (supporting “full time commercial ‘livery’ insurance”).

III. COVERAGE SHOULD NOT BE TIME-CONSTRAINED

Insurance coverage should not be confined to “app on/app off” time criteria, because the TNC drivers appear to routinely manipulate their app usage, whether to serve private clients off-line or to create a price “surge,” and the TNCs themselves appear to do so in order to weed out insufficiently eager driver “partners.”¹³ A driver who is involuntarily logged off for missing a ride request is still very much “available for hire,” just like the taxicab driver who fails to respond first to a street hail.

The unworkability of imposing app-based time restrictions on insurance coverage is also clearly illustrated by the comments of the TNCs.¹⁴ They emphasize the argument that the period of time when a driver is logged in but is not yet committed to a specific passenger is particularly problematic due to many drivers’ use of multiple TNC apps.¹⁵ This difficulty arises in part from TNC drivers’ status as non-employee “partners.” If TNCs were required to employ their drivers, as those charter party carriers who are not owner-drivers must,¹⁶ simultaneous multiple app use by one driver could be eliminated.

Only insurance companies stand to profit from the imposition of an unworkable and confusingly time-constrained coverage requirement on TNCs, or from suggesting that TNC drivers should obtain some sort of hybrid personal/commercial policy that does not presently exist. As SFMTA and SFIA correctly point out, risk and liability still exist any time a TNC vehicle and driver are on airport property.¹⁷ TPAC respectfully suggests that such reasoning extends the risk and liability of TNC operations to a myriad of other times and locations as well. TPAC supports a requirement for the same full-time coverage for TNCs as the coverage that is maintained by similarly-situated carriers. No other approach will eliminate the risk of inadequate coverage, contrary to Public Utilities Code section 5391 and the public interest, or the very real danger of rampant insurance fraud.

IV. UBER SHOULD PROVIDE COVERAGE

Uber states that permitted charter party carriers other than TNCs “that receive trip requests from the Uber App carry insurance that complies with the Commission’s requirements.”¹⁸ But Uber does not identify these charter party carriers. Unless Uber discloses the identities of its already-permitted charter party carriers, verifies that their permit and insurance are in order, and confirms that such permitted charter party carriers are in compliance with their permits by providing only prearranged services, it is nonetheless creating risk and incurring liability through operation of its app. Therefore, it must be

¹³ SFCDA Opening Comments, pp. 1-2, Attachments A and B; UTW Opening Comments, pp. 2-3.

¹⁴ Uber’s Opening Comments, pp. 9-11, 12-15 (suggesting its partial coverage in Period One (as defined in the PD) is comparable to requirements for non-commercial “car sharing” coverage (fn. 17) and citing multiple app use as a barrier to time-based coverage); Lyft’s Opening Comments, pp. 4-6 (noting users’ uncertainty in app use and closure; potential for fraud if coverage time-based); SideCar’s Opening Comments, p. 5 (time-based coverage is potentially inconsistent with display of trade dress and other requirements of D.13-09-045); Summon Opening Comments, pp. 2-3.

¹⁵ Uber Opening Comments, p. 14; Lyft Opening Comments, p. 4; Summon Opening Comments, p. 3.

¹⁶ G.O. 157-D, § 5.03.

¹⁷ SFMTA/SFIA Opening Comments, p. 1.

¹⁸ Uber Opening Comments, p. 15.

prepared to assume responsibility for any uncovered incident arising from those services. Unless the Commission verifies and enforces the compliance of Uber's charter party carrier users, the Commission must apply its TNC insurance requirements to Uber as well as any TNC subsidiary of Uber.

V. PUBLIC UTILITIES MUST ACCEPT REASONABLE REGULATION

Finally, the TNCs' argument to this Commission that the added expense of adequate liability insurance would unfairly impair their ability to compete in the transportation industry rings exceptionally hollow.¹⁹ Insurance is a large part of any taxicab or limousine company's budget. TNCs have, so far, been able to offer the public inexpensive rides because – unlike taxicab services – they are not burdened with the same operating expenses. Such inequities form the basis of TPAC's equal protection challenge to D.13-09-045 in the Court of Appeal.²⁰

TPAC maintains that if TNCs wish to be treated just like taxicab or limousine services, and if TNC services are just like taxicab or limousine services, there is simply no justification for maintaining the TNC category. As TPAC argues in its petition to the Court of Appeal and in its Opening Comments here,²¹ the wholesale restructuring of the paid passenger transportation industry which D.13-09-045 engendered is beyond the Commission's powers in any event. The Commission should simply apply and enforce its charter party carrier rules, which might well include opening an investigatory proceeding to determine whether or not the TNCs are providing exclusively prearranged transportation. If TNCs wish to lawfully provide on-demand services, they must seek appropriate local authority to do so.

Unfortunately, profit-driven companies are seeking here to disrupt a highly regulated industry, which operates under a longstanding, legislatively-imposed dual regulatory scheme enacted for the public safety. That scheme imposes statewide Commission jurisdiction over exclusively prearranged transportation, and it imposes local jurisdiction over non-prearranged transportation, *i.e.*, taxicab services. Under the guise of promoting a technology-fueled, purported "sharing" economy, the TNCs have persuaded the Commission to afford them favorable, specialized regulatory treatment at the expense of public safety, lawfully competing carriers, and the public interest. Now, when the Commission proposes what TPAC views as a very minor clarification of TNC insurance rules, the TNCs object, on the ground that they will be unfairly burdened.

The TNCs utterly fail to take into account their obligation, as public utilities, to serve the public good. Safety, and the public convenience and necessity, must take precedence over uncontrolled free-

¹⁹ *Id.*, pp. 4-9; Summon Opening Comments, pp. 3-4; Sidecar Opening Comments, pp. 9-10; Lyft Opening Comments, pp. 7-10.

²⁰ Uber's comparatively inexpensive service, at least for the time being, also comes by dint of a price war funded by its "\$1.2 billion war chest." (Rogowsky, M., *As Uber Steps Up Its Assault, Lyft And The Taxi Industry May Get Overrun*, Forbes, July 1, 2014, available at <http://www.forbes.com/sites/markrogowsky/2014/07/01/as-uber-steps-up-its-assault-lyft-and-the-taxi-industry-may-get-overrun/>.)

²¹ TPAC's Opening Comments, pp. 3-6.

market-based profits where public utilities, including charter party carriers, are concerned.²² History dating from the era of the California Railroad Commission has shown that billion-dollar profit-making schemes and the public interest are rarely aligned. Today, passengers and other members of the public deserve no less care, protection and enforcement than the Commission has afforded in the past.

VI. EX PARTE REPORTING SHOULD BE REQUIRED

Uber states that public disclosure of communications with the Policy and Planning Division is inappropriate, because such staff are not “decisionmakers.”²³ But any staff member whose role may encompass both advocacy and advice before the Commission (or any state agency) runs the danger of improperly influencing decisionmakers.²⁴ Requiring disclosure of *ex parte* communications with such staff will help to avoid improper influence, as well as the *appearance* of improper influence. TPAC respectfully maintains that *ex parte* reporting in this important proceeding, which arises from multiple enforcement actions, should also be made retroactive. TPAC respectfully requests that upon any Commission decision on the matter, all *ex parte* notices be due within thirty days of the date of decision.

VII. THE COMMISSION SHOULD PROCEED WITH CARE AND DELIBERATION

TPAC urges the Commission to proceed with caution at this juncture and to once again bring the public interest to the forefront of its proceedings. Unless the Commission is willing to revisit its determination to create the TNC sub-category and special TNC regulations, TPAC respectfully suggests that at this time the Commission should take only those immediate actions which are necessary to protect public safety. In TPAC’s view, the Commission need do no more than clarify that (1) the TNCs’ insurance policies should provide primary (or “exclusive” as PFIC suggests) coverage and (2) no time constraints should apply to the coverage provided under those policies. In addition, the Commission should require Uber to maintain adequate liability insurance. Further action may be deferred until the resolution of TPAC’s petitions for writ of review to the Courts, pending legislative actions, and with a more fully developed record in Phase II of this proceeding.

Dated: July 7, 2014

Respectfully submitted,

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²² Pub. Util. Code §§ 5352, 5360.

²³ Uber Opening Comments, p. 16.

²⁴ *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731, 741.