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April 7, 2014

Via Email

Commissioner Michael Peevey
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: Decision 13-09-045

Enclosed please find comments re: Phase II from Christopher Dolan, Esq.

Regards,

Christopher B. Dolan, M.S.M., J.D.

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF
CALIFORNIA**

Christopher B. Dolan's Comments on
Assigned Commissioner's Ruling
Modifying Decision 13-09-045 Adopting
Rules and Regulations to Protect Public
Safety While Allowing New Entrants to
the Transportation Industry

Rulemaking 12-12-0011
Decision 13-09-045

Comments on Proposed Modifications to Decision (D) 13-09-045
Christopher B. Dolan

Pursuant to the Assigned Commissioner's ruling requesting comments on proposed modification to Decision 13-09-045 Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry I hereby submit the following comments.

PROLOGUE

I am an attorney in San Francisco that deals extensively in the areas of personal injury and the application of liability insurance. I represent those injured by the fault of others including the Liu family for the death of Sophia Liu and the severe injuries suffered by her mother and brother. Sophia was killed by an Uber X driver on New Year's Eve while logged on to the Uber X app, driving around, and waiting for a rider to connect with him through the app. Uber has declared that it is not responsible for Sophia's death, or the injuries sustained by her family, because they have interpreted the PUC's wording "while providing transportation services" to mean either when a prospective TNC passenger has connected with a driver and the driver is en-route, or when a passenger is onboard. The death of Sophia Liu has placed pressure on TNC's to be more responsible as corporate citizens, and has fostered this debate on insurance, including "gap insurance." After raising the important issue regarding preemption, I address, respond to, and make several suggestions concerning the Assigned Commissioner's requests for comment.

PREEMPTION

Before addressing the Assigned Commissioner's specific questions, the issue of preemption should be addressed. Various local governments and municipalities, including the City and County of San Francisco, have struggled with the question of whether the PUC has preempted the regulation of TNC's with its rules that were created as part of Phase I of Rulemaking 12-12-011. In the absence of intervention and regulation the PUC promptly, and appropriately, conducted hearings and created certain *minimum* standards to provide a measurement of safety to the general public. The PUC should clearly state that the rules set forth in Phase 1 are not exhaustive but, instead, constitute a minimum set of requirements which the TNC industry must meet.

Regulation of local transportation services, including taxi's, has been left, generally, to the various municipalities throughout California. This is appropriate because those municipalities are in the best position to regulate the local market for transportation services including fare regulation, driver training, size of the transportation fleet, passenger safety, trade dress, etc. As part of a vital economy a reliable supply of transportation is essential. While government generally organizes, subsidizes, and regulates intra city and regional transportation along established transportation routes (trains, busses, ferries, etc.), individualized transpiration has traditional been provided, en masse, by a healthy taxi industry. Local regulation of this form of common carrier is essential so as to create a market in which the stock of transportation can be readily maintained and available. Local control provides area specific pricing (different from city to city) that provides sufficient profit to encourage investment in and maintenance of a reliable transportation network while simultaneously protecting the public from price gouging or manipulation. A consistent rate structure provides citizens with the ability to budget their transportation needs. The municipalities, who subsidize the transportation of the elderly and/or disabled, rely on consistent, predictable, rates so as to budget for transportation support. Likewise local regulation has provided for the Ramp Taxi program designed to insure that members of the disabled community would have access to transportation.

Local regulation is also important as the entry of TNC's, and their vehicles, into the marketplace has occurred at an unprecedented, and unrestricted, rate. The TNC's brag that they are "cheaper than a taxi." This is true only because they face none of the barriers to entry of other transportation providers such as a medallion, permit, fee, insurance, etc., faced by other transportation providers who wish to enter into the established transportation system. These TNC's have the goal of putting taxi's out of business. If this occurs, and the PUC is seemed to have "occupied the field" and pre-empted rate regulation by the localities, then TNC's will be able to manipulate the

market, price gouge, redline, surge price, and local governments will be precluded from acting to protect its citizens and remedy these ills. We already have seen Uber engage in "surge pricing" where they double or triple their rates. If allowed to go unchecked by local governments, citizens will be at the mercy of the TNC's and their whimsical rate structures

The PUC should expressly declare that the regulations that were issued in Phase I are *minimum requirements* and that the PUC has not intended to "occupy the field" and preempt the State Legislature or local authorities from regulating, or taxing, the local transportation infrastructure.

THE DEFINITION OF "PROVIDING TRANSPORTATION SERVICES"

1.) Q: Should "providing TNC services" be defined as; Whenever the TNC driver is using their vehicle as a public or livery conveyance including when the TNC app is open and available to accept rides from a subscribing TNC passenger until that app has been closed?

A. Yes, with modification.

I) The vehicle should not be defined as the TNC driver's own vehicle ("their vehicle").

"Whenever the TNC driver is using their vehicle" should be changed to "Whenever the TNC driver is using a vehicle." In San Francisco, a startup company, Breeze is renting cars to TNC drivers for the express purpose of providing those, without cars, the ability to offer TNC services. (<https://www.zephyrcar.com>) According to published reports, they are in constant demand. This dispels the "ridesharing" myth once and for all. Likewise some TNC operators are borrowing vehicles from others. The app doesn't check which car is being driven or who owns it. Therefore, making *ownership* of the involved vehicle an element to prompt coverage will lead to continued confusion and create an incentive for TNC providers to find a way around the definition.

ii) The use limitation should be clarified to avoid confusion and unnecessary litigation

The current proposal will spurn litigation and confusion because of the use of the terms of art "public or livery conveyance." Rather than describing a particular type of conveyance the rule should focus on the manner and purpose of use. Therefore the

following modification is suggested;

“. . . as a public or livery conveyance” should be changed to read, “for the purpose of facilitating the actual or prospective transportation of the public, including but not limited to the time that they initially log onto, open, or otherwise indicate their availability as open and available to accept passengers through, a TNC app, until the driver has logged off, closed the application or otherwise indicated they are no longer available to provide TNC services.”

This coverage is similar to that which is afforded the public by other transportation providers, such as taxis, which provide coverage “gate-to-gate,” meaning from when the taxi leaves the yard to when it returns.

iii) The TNC’s arguments against such a definition are unpersuasive and easily remedied.

THC providers such as Uber X, Lift, Sidecar, etc., state that there is a hazard with such a definition or requirement claiming that drivers, not actively engaged in the provision of TNC services, may log on for the purpose of providing themselves the benefit of the TNC sponsored commercial insurance while using their vehicle for non TNC services. TNC providers are in the best position to monitor and control use of the app. They can determine if a driver has refused a request, remains immobile, or is traveling in areas which are unpopulated and in which there are little or no requests for service. TNC providers can, in an instant, log off any TNC driver. In Marin, Uber X is offering its service and, at times, provides drivers a guaranty of \$20.00 per hour just to be logged on to the app and be shown as available. This, in an effort to demonstrate that Uber X serves the Marin area. Therefore, such a driver may be running errands for themselves, while receiving payment from Uber X or another TNC for appearing as an available driver. This provides a direct benefit to each of the TNC operators and they should be “on the risk.”

a.) TNC’s fears re drivers using TNC insurance while not providing TNC services are easily allayed.

Uber and other TNC’s also claim that drivers, not engaged in TNC services, will log on immediately after being involved in a collision in an effort to obtain the benefit of TNC insurance. There is an easy remedy for this hazzard; the driver can be compelled to immediately notify the TNC of an accident, take photographs and e-mail them to the TNC. If a TNC driver calls in and then, suspiciously, reports an accident, without their vehicle having moved from where the TNC logged in, then the provider can argue they

are not on the risk. Again, they are the technological innovators, let them innovate a solution.

b.) TNC's issues with drivers having multiple open apps can be dealt with by self-regulation or by PUC mandated controls.

TNC providers state that TNC drivers are often logged on to more than one platform or app at a time having as many as 3 or 4 apps open at any one time. Therefore, they claim that such a definition would lead to difficulty in determining which TNC provider's insurance would apply. The fact that TNC providers are aware of drivers having multiple apps open simultaneously provides further evidence of the need for insurance as the danger of distracted driving is multiplied, exponentially, as a TNC driver monitors more than one app. A remedy for this dilemma is easily supplied if the driver is going to a passenger accepted over the app or is actively transporting such a passenger. In such a situation identification of the TNC provider is not a problem so long as the TNC carrier maintains adequate records. In that regard, the PUC should require the TNC to create, and maintain, a digital waybill available at the request of the PUC, police, the TNC insurance carrier and/or an injured party. In the situation where there is an open and available car logged on to more than one service then each of those services is deriving a benefit from the appearance of the vehicle on their app (demonstrating the abundance of vehicles available on their service), each is creating and multiplying the risk of an open app, and each should be on the risk. Should they not wish to expose themselves to this shared liability the TNC app providers should make and enforce rules prohibiting such multiple engagements. With the collective brain power and computer programming abilities they could create a central driver's database containing the names of registered drivers for all TNC's. As a TNC operator logs on, the database can determine if they are already logged on to another TNC provider's app and prevent the logging on to a second, or third, app. This is an industry created problem for which there is an industry solution. Indeed, the PUC should consider ordering the creation of such a database so those injured by a TNC driver, as well as the police, could obtain information regarding any driver's status and affiliation as a TNC driver.

The PUC's clarification of the terms "providing transportation services" should be applied retroactively as it is a clarification of a previous order.

MODIFICATION OF THE COMMERCIAL LIABILITY MANDATE

Q. Should the requirement that TNC's maintain commercial liability insurance policies be modified as follows:

TNCs shall maintain commercial liability insurance policies providing a minimum of \$1,000,000 (one million dollars) per-incident coverage involving TNC vehicles used as a public or livery conveyance. In the event of a vehicle-related incident, this commercial liability insurance must provide coverage of up to \$1,000,000 per incident, whether against the driver or the TNC. In addition, these insurance policies must be issued by a company licensed to write insurance in this state, or by non-admitted insurers subject to Insurance Code § 1673.

A. Yes, with modification.

The sentence reading; "TNCs shall maintain commercial liability insurance policies providing a minimum of \$1,000,000 (one million dollars) per-incident coverage involving TNC vehicles used as a public or livery conveyance" should be reworded for consistency as "TNCs shall maintain commercial liability insurance policies providing a minimum of \$1,000,000 (one million dollars) per-incident coverage involving TNC vehicles providing TNC services."

This change provides consistency in definition throughout the modified rules by using the clarified definition of "providing TNC services."

This requirement best accomplishes the goal of meeting a TNC's obligations as a common carrier. Rather than shifting the burden of injury or loss to the injured, private insurers, or the general public, this requirement shifts the burden to the TNC provider who can best minimize the risks of injury or death through driver education, drug testing, safety programs, maintaining adequate insurance and/or monitoring of driver behavior. Currently the damages associated with operation of the enterprise are being shifted on to the driver's private insurance provider, or in the case of a declination of coverage, on to the driver, injured party, or the state and/or local governments. This is the case in collision which caused the death of Sophia Liu and the physical and emotional injuries suffered by her mother, brother, and father. Because of Uber's denial of responsibility, (claiming that have no involvement, because, although the driver was logged on to the app, he was not traveling to an engaged subscriber/passenger, was not a passenger in the driver's vehicle) the costs of their operations, and driver, have been shifted to the driver, his personal assets and/or his insurance, the Liu's who have suffered catastrophic loss, and the City and County which has paid for the substantial medical bills.

Applying established principals of law and economics, the risks and damages associated with the use of a product or service are best covered by the manufacturer or provider who can spread the costs of insuring against the risk among its many users.

By incorporating the cost into the good or service, this helps the market reach equilibrium where the marginal costs of a good or service is lesser than or equal to its marginal utility.

This commercial liability coverage should be primary and the duty to defend should also rest with the commercial carrier. For the benefit of the injured parties, and the public in general, there should be a prohibition against any such policy being a "wasting policy" which would allow the costs of defense to be subtracted from the \$1,000,000.00 in indemnity coverage. The TNC driver's policy should be secondary and available in addition to the \$1,000,000.00 primary coverage. This decision should be deemed to be retroactive to the date of the original order and decision.

MAINTENANCE OF MEDICAL PAYMENTS COVERAGE, COMPREHENSIVE & COLLISION AND UNINSURED/UNDERINSURED MOTORIST COVERAGES.

Q. In addition to the requirement that TNC's must maintain commercial liability insurance, should the TNC's be required to maintain the following coverage that, if adopted, will apply on a per-incident basis for incidents involving vehicles and drivers while they are providing TNC services: medical payments coverage in the amount of \$5,000.00, comprehensive and collision coverage in the amount of \$50,000.00 , and uninsured/underinsured motorist coverage in the amount of \$1,000,000.00?

A. Yes.

Currently the costs associated with TNC activities such as property damage, bodily injury, medical expenses, wage loss, property and casualty insurance, etc., have been externalized to the drivers, passengers, local hospitals, private vehicle and medical insurers, and local, state and federal benefit programs such as (Healthy San Francisco, MediCal and/or Medicare.) Applying established principals of law and economics, the risks and damages associated with the use of a product or service are best covered by the manufacturer or provider who can spread the costs of insuring against the risk among its many users. By incorporating the cost into the good or service this helps the market reach equilibrium where the marginal costs of a good or service is lesser than or equal to its marginal utility.

This commercial liability coverage should be primary and the duty to defend should also rest with the commercial carrier. For the benefit of the injured parties, and the public in general, there should be a prohibition against any such policy being a "wasting policy" which would allow the costs of defense to be subtracted from the \$1,000,000.00 in indemnity coverage. The TNC driver's policy should be secondary and

available in addition to the \$1,000,000.00 primary coverage.

APPLICATION OF MODIFICATIONS TO UBER TECHNOLOGIES INC.

Q. Should the proposed modification in TNC coverage be extended to Uber Technologies, Inc. as it is enjoying the privilege of conducting a business in California subject to the Commissions's jurisdiction?

A. Yes, with modification.

Uber has sought to rapidly occupy the point to point transportation market and, unabashedly, stated that it wants to not only replace taxi's as a means of public transportation but, also, has indicated it wants to extend its services to package deliver and other consumer services. There are believed to be thousands of Uber vehicles operating in California. (Uber has refused to disclose the number of vehicles which it has released on to the roadways.) The greater number of vehicles which Uber places into operation on the roadways in California, the greater the risk of injury and/or death. This generates the greater need for protection of the consumer through the provision of insurance by the TNC.

The requested modifications are three fold;

1) The modification should apply not only to Uber but Raiser-Ca. LLC, the shell company created by Uber to hold the TNC permit and insurance, as well as other transportation providers who operate similarly to Uber. Raiser-Ca. LLC is believed to have been created so as to shield Uber Technologies Inc. from liability for harms caused by TNC vehicles and other vehicles traveling under the Uber brand. Making the requirement applicable to Uber Technologies Inc., only, rather than to the class of transportation services/ vehicle provided by any company providing services of the same type will only foster the creation of new shell companies for the various transportation services provided by Uber and others.

2) The PUC should clarify the provisions issued in Decision 13-09-045 (Rulemaking 12-12-011). On pages 13-14 the PUC requires Uber to provide evidence of insurance stating; "We require Uber to demonstrate to the Commission within 30 days of the issuance of this decision that it maintains commercial liability insurance policies providing not less than \$1,000,000 (one million dollars) per-incident coverage **for incidents involving vehicles and drivers in transit to or during trips arranged through the Uber app**, the Commission reserves the right to require Uber to obtain a TCP permit through Commission resolution while they are providing Uber services. The insurance coverage shall be available to cover claims regardless of whether an Uber driver

maintains insurance adequate to cover any portion of the claim. The wording of this paragraph has led to Uber's declaration that they only have an obligation to provide insurance **for incidents involving vehicles and drivers in transit to or during trips arranged through the Uber app**. This paragraph should be reworked to reflect the PUC mandate that Uber and other TCP carriers should be required to have not less than \$1,000,000.00 for situations "whenever a driver is using a vehicle for the purpose of facilitating the actual or prospective transportation of the public, including but not limited to the time that they initially log onto, open, or otherwise indicate their availability as open and available to accept passengers through, an app, until the driver has logged off, closed the application or otherwise indicated they are no longer available to provide transportation services."

The findings of fact need to be modified/corrected to reach this end.

The findings of fact in Decision 13-09-045, **Pgh. 26**, state;

Uber should be required to demonstrate to the Commission within 30 days of the issuance of this decision that it maintains commercial liability insurance policies providing not less than \$1,000,000 (one million dollars) per-incident coverage for incidents involving vehicles and drivers **while they are providing Uber services**.

The terms "while providing Uber services" are vague and should be further defined in accordance with the definitions articulated in the TNC insurance discussion *supra* . Specifically said paragraph should be clarified by stating;

"Whenever a driver is using a vehicle for the purpose of facilitating the actual or prospective transportation of the public, including but not limited to the time that they initially log onto, open, or otherwise indicate their availability as open and available to accept passengers through, an app, until the driver has logged off, closed the application or otherwise indicated they are no longer available to provide transportation services."

Likewise, **Paragraph 13 of the Findings of fact** contained within Decision 13-09-45 states that \$1,000,000.00 in coverage must be provided by Uber "**while they are providing Uber services**." This should be changed to state . . . must be provided by Uber "whenever a driver is using a vehicle for the purpose of facilitating the actual or prospective transportation of the public, including but not limited to the time that they initially log onto, open, or otherwise indicate their availability as open and available to accept passengers through, an app, until the driver has logged off, closed the application or otherwise indicated they are no longer available to provide

transportation services.”

3) The PUC should order that this commercial liability coverage should be primary and the duty to defend should also rest with the commercial carrier. For the benefit of the injured parties, and the public in general, there should be a prohibition against any such policy being a “wasting policy” which would allow the costs of defense to be subtracted from the \$1,000,000.00 in indemnity coverage. The TNC driver’s policy should be secondary and available in addition to the \$1,000,000.00 primary coverage. This order by the PUC re primary and secondary coverage should be considered retroactive to the date of the issuance of the Decision in Phase I.

Dated April 7, 2014 at San Francisco, CA

Respectfully Submitted;

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