**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 |

# COMMENTS OF LYFT, INC. ON PROPOSED MODIFICATION TO DECISION 13-09-045

Kristin Sverchek
General Counsel
Lyft, Inc.
548 Market St #68514
San Francisco, CA 94104
Tel: (855) 946-7433
kristin@lyft.com

April 7, 2014

## Table of Contents

**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 |

**COMMENTS OF LYFT, INC. ON PROPOSED MODIFICATION TO DECISION 13-09-045**

In accordance with the Assigned Commissioner's Ruling Requesting Comment on Proposed Modification to Decision 13-09-045 Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry ("Assigned Commissioner's Ruling" or "ACR"), Lyft, Inc. ("Lyft") submits the following comments and recommendations. For the reasons discussed below, the Commission should not create a new definition of "providing TNC services" and should not alter the TNC insurance requirements very recently established in Decision 13-09-045. The Commission should address any issues related to TNC insurance coverage requirements cautiously and deliberately. Further, the Commission should only consider making changes to the existing TNC rules after the existing rules have been given a chance to work for at least 12 months as called for in Decision 13-09-045, and only upon the basis of a complete record. With the second phase of the proceeding scheduled to begin in the near future, the Commission already has a planned mechanism for addressing new issues.

## I. Introduction

Lyft appreciates this opportunity to provide comments in response to the Assigned Commissioner's Ruling. Lyft understands and shares the Commission's desire to ensure that both drivers and riders participating in ridesharing provided through a Transportation Network Company ("TNC") are adequately protected by insurance coverage. However, Lyft is concerned

that the ad hoc changes to Decision 13-09-045 ("Phase I Decision") proposed in the Assigned Commissioner's Ruling will actually *undermine* the Commission's stated purpose of resolving so-called insurance "uncertainties" by ambiguously expanding the definition of "TNC services" and mandating the purchase of unnecessary insurance coverage. Any vagueness or uncertainty in regulations may stop the insurance industry from expanding coverage options for consumers and businesses.

## II. The Commission need not and should not change the definition of "providing TNC services" in Decision 13-09-045.

### A. The meaning of "providing TNC services" is clear and unambiguous.

The Assigned Commissioner's Ruling proposes to modify the Phase I Decision to redefine the provision of TNC services as follows:

> 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.[1]

This proposal is apparently motivated by a perception that there is an "absence of a definition of "providing Transportation Network Company (TNC) services" and "uncertainty over the meaning of the phrase 'providing TNC services'" in the Phase I Decision.[2] Lyft does not agree that there is any ambiguity in the decision regarding when a TNC driver is engaged in providing TNC services, and Lyft strongly opposes creation of a definition that conflicts with other language in the Decision discussing the prerequisites for "providing TNC services."

The Phase I Decision's explanation and usage of the phrase "providing TNC services" is already clear and consistent:

> This Commission defines a TNC as an organization whether a corporation, partnership, sole proprietor, or other form, operating in California that provides prearranged transportation services for compensation using an online-enabled

[1] ACR at 2.
[2] ACR at 2, 5.

> application (app) or platform to connect passengers with drivers using their personal vehicles.[3]

Throughout the decision, the Commission uses the words "providing TNC services" to refer to the period of time during which a driver either has a TNC passenger in the car or is on the way to pick up a passenger who has requested a ride, and *not* to any period of time during which the TNC driver is using the vehicle for his or her own purposes.[4]

The Phase I Decision's definition of providing TNC services is also tied directly to the requirement for "prearrangement" of the ride, and unambiguous in its conclusion that prearrangement only occurs when a ride has been offered and accepted:

> TNC drivers may only transport passengers on a prearranged basis. For the purpose of TNC services, a ride is considered prearranged if the ride is *solicited and accepted* via a TNC digital platform before the ride commences.[5]

The Commission's intent and meaning could not be clearer. A TNC driver is not "providing TNC services" if there is no prearranged ride. Indeed, because the Commission has recognized that TNC drivers are not employees of the TNC, and are using private vehicles to provide TNC services, there is no jurisdictional activity by the driver in the absence of prearrangement. TNC services *require* solicitation by the passenger and acceptance by the driver of a ride using the TNC's digital platform. Lyft sees no ambiguity on this point in the Phase I Decision. However, if the Commission finds that there is ambiguity the solution is to add a sentence simply identifying as a formal "definition" the Decision's statement that TNC services require both an offer and acceptance of a ride arranged through a TNC's platform.

---

[3] Phase I Decision at 1.
[4] For example, a TNC driver is only required to use required "trade dress" identifying the vehicle as a TNC when "providing TNC services." Phase I Decision at 31. TNC record-keeping requirements focus on "trips made by its TNC drivers." Id. at 34.
[5] Phase I Decision at 30 (emphasis added).

### B. Adding reference to use of "public or livery conveyance" in defining TNC services will *create* uncertainty and confusion.

The proposal to define provision of TNC services as including "whenever the TNC driver is using their vehicle as a public or livery conveyance" would create significant ambiguity in what is currently a clearly bounded definition of TNC services. Attaching these terms to every form of ridesharing contemplated in Decision 13-09-045 creates significant ambiguity and confusion in an otherwise clear regulation.

The proposed definition of TNC services by reference to "public" or "livery" conveyance lacks any legal foundation or internal consistency with the balance of the Phase I Decision. There is no discussion in the Ruling or in the record to support defining TNC services by reference to the terms "public or livery conveyance." The terms as proposed apparently come from the unexamined context of insurance policies, although that is not clarified in the Ruling. The terms are not defined or discussed anywhere in the Phase I Decision (or, for that matter, the Ruling itself) and notably appear nowhere in the Public Utilities Code. For this reason alone, the introduction of these new terms will undoubtedly create uncertainty, confusion and risk.

This problem will be exacerbated by the complete lack of connection with the Decision's existing provisions defining TNC services by reference to a prearranged ride, which is the existing regulatory trigger initiating the provision of jurisdictional TNC services.

### C. Expanding the definition of TNC services to include any time that a TNC app is "on" will *create* uncertainty and confusion.

The Ruling's proposal to define TNC services as "including when the TNC app is open and available to accept rides from a subscribing TNC passenger until that app has been closed" is even more problematic. Adopting this language would throw the entire regulatory framework created by the Phase I decision into chaos by suggesting that merely having an "open" TNC

application on a mobile phone, even when no transportation ever takes place, could constitute the provision of jurisdictional TNC transportation services. The problems with this part of the proposed definition are significant and obvious.

First, using the driver's act of opening a TNC app and/or the driver's communication that he or she is "available to accept rides" as defining when a driver is "providing TNC services" is facially inconsistent with the meaning of TNC services as discussed throughout the balance of the decision. As discussed above, the Phase I Decision currently defines the act of "providing TNC services" as having a clear nexus with the provision of transportation for compensation facilitated through the TNC Platform to an identifiable rider. By contrast, under the proposed decision a TNC driver could open a TNC application and never receive a single communication from a single potential rider and yet be considered to have provided TNC services. Or a TNC driver could forget to close the app and be considered to be "providing TNC services" in the middle of the night when the car is parked on the street and the driver is sleeping, or when the vehicle is being driven by another household member, or when it is being used to transport a driver's child to soccer practice.

In addition, the proposed definition's language is inherently ambiguous and unclear. The proposed definition's use of "open," "closed" or "available to accept rides" is apparently based on a presumption that these terms have universally accepted meanings and that all TNC applications are the same, but there is no factual basis for making such a presumption. As the record to date in this proceeding suggests, different TNC companies use differing proprietary software and the companies' platforms and interface with customers may differ significantly. The Commission has not yet created a record regarding the workings of various TNCs' applications, and the Ruling has not (and cannot) provide meaningful information explaining

how TNCs are similar to or different from each other in how drivers "open" and "close" TNC applications and/or signal that they are available or not available to accept rides.[6] This lack of foundation creates further uncertainty, and is another fatal flaw in the proposed definition.

### D. There is no regulatory justification for altering Decision 13-09-045 prior to commencement of Phase II and within the first year after the Decision was adopted.

To put the proposed rule changes in their regulatory context, Lyft notes that the Ruling was issued on March 25, 2014, which is:

- just six months after adoption of Decision 13-09-045;
- just a few months prior to the anticipated commencement of Phase II of Rulemaking 12-12-011;
- just six months prior to the one-year workshop review of Rulemaking 12-12-011, as set forth in Decision 13-09-045;
- prior to action on several pending applications for TNC status;
- just two business days after a March 21, 2014 "informational" Insurance Commission hearing in which insurance issues were aired; and
- on the same date as the Insurance Commissioner's letter providing "initial" recommendations following the March 21 hearing.

Weighing risks and benefits, it is difficult to understand why the Commission is considering taking the precipitous steps of redefining the scope and meaning of "TNC services" and significantly altering the insurance requirements adopted just six months ago. To the extent that there are unresolved issues regarding when and how personal insurance policies will cover TNC drivers, the adequacy of the Phase I Decision's TNC commercial insurance requirements, and the need for new insurance products to meet industry needs, the best way to address such issues is

[6] Another layer of sematic ambiguity arises from the proposed definition's characterization of transportation in a "public or livery conveyance" as "including" use of the vehicle when the application is open. The use of the word "including" suggests that a TNC driver could also be providing TNC services when the application is *not* open. This is probably not the intent, but illustrates why definitions and rules should be developed in formal proceedings and not through this sort of piecemeal process.

*not* through piecemeal rule changes in response to undefined and undocumented risk and perceptions of risk, but rather through a deliberative investigatory and rulemaking process.

## III. The Commission need not and should not revise the insurance requirements established in Decision 13-09-045.

### A. There is no documented "coverage gap" that requires addressing through Commission action at this time.

As justification for proposed changes in the TNC insurance requirements adopted six months ago in Decision 13-09-045, the Ruling cites "uncertainty" over the definition of TNC services (as discussed above), "whether a TNC driver's personal automobile insurance would apply to an incident where the TNC driver is wholly or partially at fault, the app is open, and there is no passenger in the vehicle," and "whether TNCs should provide coverage beyond coverage mandated under Decision 13-09-045."[7] This alleged uncertainty, according to the Ruling, creates a "specter of potential gaps" that should be addressed by providing "the widest scope of coverage to protect the TNC drivers, subscribing TNC passengers, other drivers, and pedestrians on a consistent basis."[8]

Lyft respects and supports the Commission's good intention, and has voluntarily purchased additional insurance to ensure full coverage of all contingencies while insurance issues are resolved through the Commission's Phase II process. However, this voluntary action should not be viewed as an endorsement of the Commission's speculation regarding potential "gaps." Indeed, Lyft strongly disagrees that a driver's reliance on a personal insurance policy while driving prior to accepting a Lyft passenger's request for a ride creates a "gap" in coverage. To the contrary, there is *no* documented gap in coverage during this period of time; for example, in

[7] ACR at 5.
[8] Id.

the tragic New Year's Eve accident, the driver's insurance company has offered up the full limits of his policy.[9]

Personal insurance policies include exclusion clauses for "livery" or "public" conveyance, but such exclusion clauses would not apply simply as a result of entering Match Mode (or its equivalent) on a cellphone application. A Lyft driver may open the Lyft application at any time and may take the further step of indicating that he or she is in "Match Mode" or available to respond to a ride request at any time. These actions do not mean that the Lyft driver is or ever will perform TNC services. Match Mode does not obligate the driver to complete a prearranged ride, or do anything at all. There is nothing inherently "commercial" about driving around in Match Mode; there is no transaction, and most importantly there is no provision of transportation in the driver's vehicle.

If there is no charge, fee or compensation-paying passenger in the driver's car, or if the driver is not on the way to pick up a charge, fee or compensation-paying passenger, any "public or livery conveyance" exclusion is not satisfied, and the exclusion would not apply. The fact that there is some possibility that at some point in the future a driver may voluntarily choose to pick up a paying passenger identified through the TNC platform does not mean that they are providing TNC services at any other time, simply by virtue of the fact that their TNC app is "on" or in Match Mode (or its equivalent on other platforms).

There needs to be a bright-line rule for when a driver is considered to be "providing TNC services," and thus subject to a standard exclusion clause and covered under the TNC's liability policy. Looking to the plain language of standard insurance policies, that line appears to be whether a ride is *solicited and accepted* via a TNC digital platform. This is exactly the line that

[9] http://blog.uber.com/uberXridesharinginsurance

currently exists in the Phase I decision, and the likely outcome of the courts' interpretation of existing insurance policies.

It is a standard principle of insurance contract interpretation that any exclusion in a policy (including the exclusion for public and livery conveyance) will be narrowly construed against an insurer. Insurance is "interpreted broadly so as to afford the greatest possible protection to the insured, [whereas] … exclusionary clauses are interpreted narrowly against the insurer." *White v. Western Title Ins. Co.*, 40 Cal.3d. 870, 881 (1985). Exceptions must be clearly stated, conspicuous, plain and clear. *State Farm Mut. Auto Ins. Co. v. Jacober,* 10 Cal.3d 193, 201-202 (1973). And the burden is on the insurer to establish that the claim is specifically excluded. *Aydin Corp. v. First State Ins. Co.,* 18 Cal.4th 1182, 1188 (1998).

California decisions that have construed the "public or livery conveyance" exclusion have interpreted the exclusion much more narrowly than that proposed by the ACR; limiting application of the exclusion to activities after a ride request has been accepted. *See Farmers Ins. Exchange v. Knopp*, 50 Cal.App.4th 1415, 1421, 58 Cal.Rptr.2d 331, 334 - 335 (Cal.App. 4 Dist. 1996) (exclusion applies to the dispatching of the vehicle to pick up the customer, physical transportation of the customer as directed, and return of the transporting vehicle to its place of business); *Truck Ins. Exchange v. Torres*, 193 Cal.App.2d 483, 495 (Cal.App.1961) (exclusion applies only while actually transporting freight and not to return trip). See also *American Motorists Ins. Co. v. Moses*, 111 Cal.App.2d 344, 349, 244 P.2d 760, 763 (Cal.App. 2 Dist.1952) (collecting cases in which courts found that "public or livery conveyance" exclusion did not apply even though driver provided transportation for compensation in share-the-ride situations).

While an insurance company may seek to deny a TNC driver's coverage under a personal policy during periods when the driver is in match mode, it is unlikely that such a challenge

would be supportable, let alone successful. It is very important to emphasize, in the meantime, that the Commission's *existing* definition of TNC services by reference to completion of a prearranged ride is the most defensible "bright line" for determining which insurance policy will apply in the case of an accident.

### B. Modifying the Commission's established definitions and insurance requirements without a clear and documented need could have significant negative unintended consequences on consumers.

The Commission typically adopts rules and rule changes only after fully airing the issues, and upon due deliberation of all possible consequences of the proposed action. Employing this deliberative approach is particularly important where, as here, the Commission is developing rules for a nascent industry and dealing with an undeveloped factual and legal record. Here, there is no documented need for the Commission to modify the Phase I Decision.

More importantly, making the proposed changes to the definition of "TNC services" and insurance requirements could have significant unintended negative consequences and create a gap where there is none. For example, there are numerous TNC drivers that have signed up with more than one TNC and that may have the apps of Lyft, UberX, Sidecar or other TNCs "open" and "available to accept rides" at the same time prior to the point at which the driver accepts a specific passenger's request for a ride. In this case, under the proposed rule change, that driver would be "providing TNC services" for more than one TNC simultaneously, leading to confusion regarding which TNC policy applies. Because of the "other insurance" clauses of liability policies, and such clauses' differing language, protracted conflicts and litigation could then ensue among injured parties, drivers, TNCs, the driver's insurer and TNC insurers. In California, creating such rules would conflict with the express purpose of Insurance Code section 11580.8, which states that it is the public policy of the State of California "to avoid so far as

possible conflicts and litigation, with resulting court congestion" involving the order in which two or more liability policies covering the same loss apply. The Phase I Decision's current language, suggesting that TNC services only arise upon completion of prearrangement, supports a clear, bright-line approach to making a driver's personal policy apply while the driver is simply making him or herself available to provide TNC services, and the TNC's liability policy apply when a TNC driver is actually providing TNC services to an identified rider for compensation.

The proposed rule change could also have the unintended consequence of providing free insurance to TNC drivers at the expense of TNCs. If, under the Commission's revised definition, a driver is "providing TNC services" whenever he or she has opened the TNC app and become "available to accept rides" and if the TNC is required to insure the driver accordingly, a driver could obtain access to the TNC's $1 million liability policy every time he or she drives by simply connecting with the TNC platform. This would be a natural consequence of a rule that redefines providing transportation services by reference to use of a mobile phone application and nothing more.

Attempting to write an insurance policy from the dais as the Commission proposes to do here could have a chilling effect on the nascent TNC insurance industry. Every risk is insurable and, as evidenced by the leaps and bounds taken by insurers over the past year, the insurance market has responded in just the manner that the Commission would desire. At this time a year ago, Lyft was the only TNC holding a $1 million per occurrence excess liability policy. Since that time, several other TNCs have obtained a similar policy. Additionally, insurers have begun to offer (and certain TNCs have purchased) additional coverage options and limits. An attempt by the Commission to mandate and dictate the terms of unavailable coverage could have the effect of chilling the entire TNC insurance industry and slowing the growth in the market.

Lastly, Lyft is troubled by language in the Ruling suggesting that the Commission's proposed changes may be motivated in part by the decision of Lyft and Uber to voluntarily purchase additional insurance coverage for drivers that have not yet picked up a rider.[10] To be very clear, Lyft does not agree that a driver's personal policy would decline coverage for an accident that occurs prior to accepting a ride request. In the newspaper article cited on page 8 of the Ruling, a spokesperson for Lyft stated clearly and unequivocally that Lyft "expects personal carriers to cover the time period prior to carrying a passenger" and that the added insurance was purchased solely "to erase any uncertainty" during this period in which insurance coverage issues are being resolved in appropriate forums. If the Commission were to respond to Lyft's cautious and responsible action by altering existing rules in a manner that will *increase* uncertainty and the likelihood of litigation, it would certainly discourage any similar proactive efforts in the future and send a very bad signal to an industry that is trying to act responsibly and proactively during a period of uncertainty.

## IV. Revising ex parte reporting requirements will limit Commissioner access to information and will not ensure due process and effective dissemination of information on TNC issues.

The Assigned Commissioner's Ruling proposes to deviate from Rule 8.3 of the Commission's Rules of Practice and Procedure by requiring reporting of all ex parte communications with decision makers. The intent underlying this proposal is to ensure due process and "the orderly and efficient dissemination of information."[11] While Lyft strongly supports an orderly and efficient process, we do not agree that departing from Commission practice and adopting ex parte reporting requirements for a quasi-legislative rulemaking will

[10] ACR at 7-8.
[11] ACR at 12.

meaningfully contribute to the process. In fact, it could have the opposite of its intended effect by limiting the flow of information to Commissioners and staff.

Lyft sees no reason for the Commission to depart from custom here. Orderly and efficient dissemination of information can be served, just as in other rulemaking proceedings, by employing other procedural tools at the Commission's disposal. In order to ensure due process and address TNC policy development in an orderly and efficient manner, the Commission can use ALJ rulings and requests for submission of information, party comments and responses on the record, workshops or technical panels on specific issues, workshop reports, etc.

///

///

## V. Conclusion

At this time, the Commission should take a wait-and-see approach to get a thorough understanding of the effects and efficacy of the current rules. With the second phase of this proceeding scheduled to begin in the near future, the Commission already has a planned mechanism for addressing new issues. The Commission should not create a new definition of "providing TNC services" and should not alter the TNC insurance requirements very recently established in Decision 13-09-045. The Commission should address any issues related to TNC insurance coverage requirements cautiously and deliberately. Further, the Commission should only consider making changes to the existing TNC rules after the existing rules have been given a chance to work for at least 12 months as called for in Decision 13-09-045, and only upon the basis of a complete record.

Dated: April 7, 2014

Respectfully submitted,

/s/

Kristin Sverchek
General Counsel
Lyft, Inc.
548 Market St #68514
San Francisco, CA 94104
Tel: (855) 946-7433
kristin@lyft.com