

**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
COMMENTS IN RESPONSE TO
ASSIGNED COMMISSIONER'S RULING REQUESTING
COMMENT ON PROPOSED MODIFICATION
OF D.13-09-045**

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I. INTRODUCTION

Pursuant to the March 25, 2014 Assigned Commissioner’s Ruling Requesting Comment on Proposed Modifications to Commission Decision (“D.”) 13-09-045, *Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry* (the “Commissioner’s Ruling”), which ruling was issued by Assigned Commissioner Michael R. Peevey in this proceeding, the Taxicab Paratransit Association of California (“TPAC”) respectfully submits its comments. The Commissioner’s Ruling sought comments on two subject areas: (1) proposed modifications to the insurance requirements set forth in D.13-09-045; and (2) whether the Commission’s reporting procedures for *ex parte* communications should be made applicable to this proceeding.¹ TPAC presents herewith its comments on both topics.

On October 23, 2013 TPAC and another party, Uber Technologies, Inc. (“Uber”), each filed an application for rehearing of D.13-09-045, raising multiple claims of legal error. TPAC is deeply troubled that the Commissioner’s Ruling, by proposing modifications to D.13-09-045 as currently written and soliciting comments on the proposed modifications, *while TPAC’s application for rehearing of the decision proposed to be modified remains pending*, may indicate that the Commission has improperly prejudged the claims of legal error set forth in TPAC’s application for rehearing. TPAC is also troubled by the implication that *any ex parte* contact may have been carried out while this proceeding is in an adjudicatory phase, with active applications for rehearing pending. The Commission has always viewed the application for rehearing process as a first-level appeal in which, like a

¹ Commissioner’s Ruling, pp. 2-3.

court of law, it adjudicates claims of legal error and only claims of legal error.² Because the applications for rehearing have now been pending for nearly six months, TPAC is additionally concerned that the Commission's purpose of "expeditiously" correcting legal errors through the application for rehearing process will be further delayed by calling for comments on the narrow set of insurance issues raised in the Commissioner's Ruling. In this important proceeding, TPAC respectfully asks the Commission, consistent with its policy of *promptly* correcting legal errors as articulated in Rule 16.1(c), to expeditiously decide TPAC's application for rehearing and not to hold the application hostage by reason of undue delay. While TPAC would be entitled to deem its application for rehearing denied under Public Utilities Code section 1733, subd. (b),³ TPAC has endeavored to give the Commission every opportunity to address and, as appropriate, correct the legal errors claimed in TPAC's application for rehearing. TPAC respectfully requests prompt resolution of its application for rehearing by the Commission.

Because the rehearing applications of TPAC and Uber remain pending, TPAC urges the Commission to expeditiously decide those applications for rehearing *before* considering any modifications to D.13-09-045. As discussed below, the Commission should not seek to fix piecemeal what TPAC believes to be a fundamentally-flawed decision. It should first correct the fundamental flaw in D.13-09-045, which, simply stated, is the failure of the Commission to develop a sufficient record to adequately understand the industry it seeks to restructure and the consequent failure to conduct any analysis of the unsupported assumptions that serve as the basis for creating the category of so-called "Transportation

² Rule 16.1 (c).

³ *Sokol v. Public Utilities Com.* (1966) 65 Cal.2d 247, 252.

Network Companies” or “TNCs,” as well as identifying TNCs’ services as “pre-arranged.” Undertaking minor “modifications” to isolated insurance provisions of D.13-09-045 will not correct this fundamental flaw in the Commission’s decision. Instead, the Commission should vacate D.13-09-045, make a full record sufficient to enable it to understand the industry it wishes to restructure, and render a new and different decision that is supported by evidence, findings and analysis. Subsequent real-world developments, many of them cited in news articles referenced in footnotes to the Commissioner’s Ruling, have confirmed that D.13-09-045 is ill-conceived – based as it is on an unsupported and false perception of the real-world impact of preferentially light-handed regulation of TNCs – and thwarts, rather than protects, public safety and welfare, financial responsibility, environmental protection, consumer protection, fair competition, and the equal protection of the laws.

To the extent TNCs are providing unlicensed taxicab services, the Commission’s decision impermissibly intrudes on the exclusive jurisdiction of California Cities and Counties in a way that harms the considered public health and safety judgments made by those local authorities. To the extent TNCs are providing service as charter-party carriers subject to the Commission’s jurisdiction, the Commission’s decision inappropriately carves out a favored subcategory of carriers with lighter and less-costly safety requirements, thus incentivizing limousine services and other traditional charter-party carriers to become TNCs to lower their safety-related costs. In either circumstance, it is the public health and safety that will inevitably suffer.⁴

⁴ TPAC acknowledges that the vacation of a Commission decision, like the modification of a Commission decision, requires a decision of the full Commission. TPAC respectfully submits that a grant of TPAC’s pending application for rehearing would provide a vehicle for promptly correcting the fundamental deficiencies of D.13-09-045 and avoiding the adverse outcomes herein noted.

The Commissioner's Ruling solicits comments on modifications to a narrow portion of the decision, but the Commission can and should take this opportunity to expeditiously correct the fundamental flaw of D.13-09-045, which TPAC believes to be the root cause of the "uncertainty" that prompted the Assigned Commissioner's solicitation of comments in the first place.⁵

II. TPAC'S POSITION ON MODIFICATION OF D.13-09-045

TPAC acknowledges the Commission's stated concern with the potential public safety and financial responsibility implications of certain insurance provisions of D.13-09-045, as well as the Commission's willingness to revisit those portions of the decision in the public interest. TPAC appreciates the opportunity to comment on proposed changes to insurance-related provisions of D.13-09-045, despite its deep concerns outlined above. TPAC also commends the Commission for its initiative in undertaking to perform a regulatory analysis of recently-developed business ventures that are aimed at operations in the existing passenger transportation-for-hire industry by opening this Rulemaking just sixteen months ago.

However, the Commission failed to complete the task it undertook. The fundamental flaw in the Commission's decision-making process is its failure to develop a sufficient record and then to conduct any analysis of the assumptions that serve as the basis for creating the new category of so-called "Transportation Network Companies" or "TNCs" and for identifying TNCs' services as pre-arranged. The Commission should not approach "modification" of D.13-09-045 by considering only minor revisions to isolated insurance provisions of a final decision. Instead, the Commission should reassess its key unsupported

⁵ Commissioner's Ruling, p. 5.

assumptions in D.13-09-045, because those assumptions created the very same uncertainties that are referenced in the Commissioner's Ruling, as well as many other uncertainties affecting the public health and safety, particularly those detailed in TPAC's pending application for rehearing.

The Commission's assumptions made without benefit of analysis and solid record support were: (1) that the carriers the Commission calls TNCs are different from, or are not providing the same services as, other charter-party carriers or taxicab services, merely because they utilize both apps and driver-owned vehicles, and (2) that the so-called TNCs are providing pre-arranged services. By coming to these conclusions without a sufficient record and without any analysis, the Commission seriously strayed from carrying out its clear obligation, under Article XII of the California Constitution and the Public Utilities Code, to ensure that:

Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service . . . necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.⁶

Unfortunately, the Commission's decision condones a proliferation of on-line-facilitated passenger transportation services that are not contemplated or allowed by the Legislature's strict regime for the regulation of passenger services in California, because they bypass measures required for the protection of public health and safety, including the required review of the impacts under the California Environmental Quality Act that the undoubted proliferation of passenger service providers occasioned by D.13-09-045 has engendered. The Commission's regrettable action elevated any modicum of convenience that businesses such as Lyft and Uber may offer to passengers who have access to smartphones above the

⁶ Pub. Util. Code § 451.

safety and health of all California citizens, while simultaneously sacrificing the public's equal access to adequate services at just and reasonable rates.⁷ It also impermissibly substituted the Commission's judgment for that of the Legislature in an area in which the Legislature has expressly limited the Commission's lawful authority.

The recent developments cited in the Commissioner's Ruling alone provide ample evidence of the chaotic state of the passenger transportation services industry, due in part to uncertainties engendered by the Commission's decision.⁸ There are many other examples.⁹

Instead of promoting safety, the uncertainty engendered by the Commission's decision actually frustrates the safety objectives of both the Passenger Charter-party Carriers'

⁷ *Ibid*; Pub. Util. Code §§ 454, 455, 728.

⁸ Commissioner's Ruling, pp. 9-12, fns. 7-15.

⁹ *E.g.*, City and County of San Francisco, Board of Supervisors' Agenda March 6, 2014, *Hearing - Regulatory Status of Private Transportation Networks*, agenda and hearing video available at http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=164&clip_id=19516&meta_id;

Davila, V, *Chief McManus: City will enforce rules for Lyft, Uber*, San Antonio Express-News, April 2, 2014, available at <http://www.mysanantonio.com/news/local/article/Chief-McManus-City-will-enforce-rules-for-Lyft-5371005.php>;

Florida Taxicab Association, *Florida Taxicab Association Assails Uber's Rating of Passengers – Cites Safety, Privacy and Discrimination*, Press Release of April 1, 2014, available at <http://www.floridataxicabassociation.com/site/florida-taxicab-association-assails-ubers-rating-of-passengers-cites-safety-privacy-and-discrimination/>;

Galvan, A., *Arizona Joins Fray Over Ridesharing Services*, Insurance Journal, March 31, 2014, available at <http://www.insurancejournal.com/news/west/2014/03/31/324849.htm>;

May, P., *Hail me a creepy driver, er, I mean, an Uber!*, March 31, 2014, "siliconbeat, the tech blog" of the San Jose Mercury News, available at <http://www.siliconbeat.com/2014/03/31/hail-me-a-creepy-driver-er-i-mean-an-uber/> (suggesting that users' ability to report and have inappropriate driver behavior redressed is severely diminished with TNCs in comparison to taxicab services and conventional charter-party carriers);

McCrary, K., *Uber bill targets Hillsborough Public Transportation Commission*, Tampa Bay Times, April 4, 2014, available at <http://www.tampabay.com/blogs/the-buzz-florida-politics/uber-bill-targets-hillsborough-public-transportation-commission/2173585>;

Said, C., *S.F. startup provides rental cars for Uber, Lyft drivers*, SFGate, April 1, 2014, available at <http://www.sfgate.com/default/article/S-F-startup-provides-rental-cars-for-Uber-Lyft-5363955.php>.

Act¹⁰ and section 53075.5 of the Government Code, which requires local regulation of taxicab services (local governments “shall protect the public health, safety, and welfare” by regulating taxicab services within their jurisdiction). By needlessly creating a different set of less rigorous insurance, safety and operating regulatory standards for an arbitrarily-defined set of business operations, the Commission has rendered its commendable effort to bring safety to an unregulated sector of the industry a counterproductive act.

The public health and safety require this Commission to complete the work that it began by correctly determining, upon a full record and a thorough analysis, whether or not TNCs qualified for the rideshare exemption of Public Utilities Code section § 5353, subdivision (h). The Commission correctly concluded that TNCs do not qualify, because they “actually are providing transportation services for compensation.”¹¹ However, because the Commission did not conduct a similarly thorough analysis of the purportedly pre-arranged nature of TNC services, it should immediately vacate D.13-09-045 so that it may undertake a necessary and comparably thorough analysis of whether the services provided by TNCs are pre-arranged or on-demand in nature, and on that basis, whether the taxicab services exemption of the Passenger Charter-party Carriers’ Act applies to TNCs.¹² The Commission’s unsupported and unsupportable conclusion that TNC services are exclusively pre-arranged turns a long line of contrary Commission authority on its head.¹³ Moreover, in conducting such an analysis, the Commission would also have an opportunity to examine

¹⁰ Pub. Util. Code §§5351-5420.

¹¹ D.13-09-045, pp. 18-20, 44-52, 67 at Finding of Fact (“FOF”) 20, 72 at Conclusion of Law (“COL”) 10.

¹² Pub. Util. Code § 5353, subd. (g).

¹³ See e.g., fns. 38, 39, 40 *infra*.

whether or not TNCs provide the same pre-arranged transportation services as other charter-party carriers, and on that basis, whether there is any permissible justification for regulating TNCs differently from, and less rigorously than, the way it regulates other charter-party carriers.

While the Commission undertakes an analysis under section 5353, subdivision (g), it should only permit TNCs to operate if they are in strict compliance with the terms of their permits under the Passenger Charter-party Carriers' Act.¹⁴ In this connection, the Commission should promptly void or annul the Safety and Enforcement Division's existing operating agreements with TNCs because TNCs should not be allowed to operate illegally.¹⁵ Compliance with permits under the Passenger Charter-party Carriers' Act would require, among other things, that the TNCs provide only pre-arranged services.¹⁶ It would also require compliance with the Commission's existing insurance regulations for holders of Class "P" charter-party carrier permits.¹⁷ Alternatively, TNCs who wish to provide on-demand services can choose to comply with local regulations for taxicab services, including each local jurisdiction's insurance regulations, which the Commission expressly noted is an option available to them.¹⁸

As the Commissioner's Ruling observed, the Commission has inherent power to modify its prior decisions at any time.¹⁹ The Commission would be manifestly correct to

¹⁴ D.13-09-045, p. 67 at FOF 17. *See* Pub. Util. Code § 5384, subd. (b).

¹⁵ Whatever Safety and Enforcement Division's authority may have been to enter into such agreements, that authority clearly does not encompass illegal terms of settlement.

¹⁶ Pub. Util. Code § 5360.5.

¹⁷ Pub. Util. Code §§ 5391, 1040; Commission General Order ("G.O.") 115-F, § 1.

¹⁸ D. 13-09-045, p. 25, fn. 38 (TNCs have the choice of pursuing taxicab licenses).

¹⁹ Commissioner's Ruling, pp. 4-5, *citing* Pub. Util. Code § 1708.

reconsider the wisdom of its earlier decision in this proceeding, but it must also resolve issues raised in the pending applications for rehearing, so as to put further uncertainties to rest and to avoid additional delay in the appellate process for the two parties – TPAC and Uber – that have applied for rehearing. Moreover, the proposed modifications to D.13-09-045 – while possibly more protective of public safety than requirements enumerated in the existing decision – do nothing to resolve the fundamental shortcomings of D.13-09-045. The Commission should seize this opportunity to correct those shortcomings, and get its decision right, for the good of all California citizens.²⁰

III. THE UNCERTAINTIES ENGENDERED BY D.13-09-045 ARISE FROM ONE FUNDAMENTAL FLAW: LACK OF ANALYSIS OF WHETHER THE TNCs ARE DIFFERENT FROM CHARTER-PARTY CARRIERS OR TAXICABS, AND WHETHER THEIR SERVICES ARE PRE-ARRANGED

As noted above, the Commissioner’s Ruling referenced “uncertainties” arising from D.13-09-045. Those uncertainties include the very meaning of the phrase “providing TNC services,” as well as questions about whose insurance may cover passengers and drivers as well as third parties, and whether the coverage required by D.13-09-045 is adequate.²¹ The Commissioner’s Ruling requests comments concerning the meaning of the phrase “providing TNC services” in the context of attempting to ascertain which insurance policy may cover TNC vehicles and drivers at a given time. But uncertainty surrounding the definition of “providing TNC services” encompasses far more than the issue of insurance coverage. It exposes the fundamentally flawed premise of the Commission’s decision to create a new regulatory category and special regulations, because a “personal” vehicle – with non-commercial insurance coverage for its owner and driver – cannot also be utilized in a

²⁰ See fn. 4, *supra*.

²¹ Commissioner’s Ruling, p. 5.

commercial endeavor without invalidating the insurance coverage.²² There are not “potential gaps” in insurance coverage under the Commission’s decision;²³ rather, there exists a complete lack of valid insurance unless a full commercial auto insurance policy is in place at all times.

Rather than addressing the uncertainties engendered by D.13-09-045 in a piecemeal fashion, TPAC urges the Commission to vacate its existing decision, make a full record, and undertake a thorough analysis of how the entities that it has decided to call TNCs are any different from existing charter-party carriers and/or taxicabs. TPAC respectfully submits that there is significant evidence that they are not, and that, absent a restructuring of the industry by the Legislature, the TNCs should be regulated without discrimination under the existing regulatory regimes for charter-party carriers and for taxicabs.

A. The Commission Analyzed TNCs’ Claims of a Rideshare Exemption.

In D.13-09-045, the Commission carefully and correctly analyzed the claims of some TNCs that they should not be subject to regulation because they purportedly qualify for the rideshare exemption to the Commission’s regulation of charter-party carriers under section 5353, subdivision (h), of the Public Utilities Code.²⁴ The Commission concluded that some of the services it evaluated *do* meet the rideshare exemption, because they are *not* providing transportation services for compensation.²⁵ However, despite the fact that the TNCs continue

²² Cal. Dept. of Insurance “Background White Paper” dated Mar. 21, 2014 (Attachment 1 hereto), p. 2; *see also* Jan. 28, 2012 Comments of Personal Insurance Federation of Calif., p. 2 (“using a private passenger vehicle in a livery service” “is not covered under a standard policy; if an accident occurs, coverage would not exist”).

²³ Commissioner’s Ruling, pp. 5, 7.

²⁴ D.13-09-045, pp. 18-20, 44-52, 67 at FOF 20, 72 at COL 10.

²⁵ *Id.* at 52, 67, 72.

to improperly refer to themselves as “rideshare” services,²⁶ the Commission found that the TNCs do not qualify for the rideshare exemption, because they “actually are providing transportation services for compensation.”²⁷ The Commission must conduct a similar analysis of the TNCs’ other claims.

B. The Commission Assumed, Without Analysis on a Sufficient Supporting Record, That TNCs Provide Services Different from Those Provided by Other Charter-Party Carriers and/or Taxicab Services.

With little or no citation to record support for its conclusions, the Commission determined to classify and regulate TNCs differently from other passenger carriers on the basis of two criteria identified by the Commission: (1) the use of internet-based applications or “apps,” and (2) the use of driver-owned or “personal” vehicles.²⁸ However, passengers of taxicab services and of other charter-party carriers also use apps to summon rides, both on-demand and pre-arranged.²⁹ Moreover, the Passenger Charter-party Carriers’ Act does not distinguish between corporate and private ownership in regulating passenger carriers. In addition, many taxicabs are driven by owner-drivers.³⁰ Yet, without analysis or solid evidentiary support, the Commission found that the “primary distinction” between TNCs and other charter-party carriers is TNCs’ use of driver-owned vehicles.³¹ If the Commission cannot rationally justify treating companies such as Lyft, UberX and Sidecar differently from

²⁶ See, e.g., Commissioner’s Ruling, pp. 9-10, fns. 7, 8, 10.

²⁷ D.13-09-045, pp. 52, 67, 72.

²⁸ *Id.* at pp. 2, 24, 65 at FOF 8, 67 at FOF 23.

²⁹ See, e.g., Workshop Report, p. 25 (Luxor Cab uses the TaxiMagic app); TPAC Application for Rehearing, p. 20 (taxicab passengers use apps and telephones to arrange rides) and at fn. 114; Opening Comments of the Greater California Livery Association, p. 1; San Francisco Cab Drivers’ Association Response to TPAC Application for Rehearing, p. 2 (taxicabs may be hailed with smartphone apps such as Flywheel, TaxiMagic, Hailo).

³⁰ See, e.g., TPAC’s Reply Comments on Proposed Decision, p. 4 at fn. 14.

³¹ D.13-09-045, p. 67 at FOF 23.

other charter-party carriers or taxicab services – passenger service transportation providers that provide exactly the same passenger transportation services – on any basis other than the use of apps and driver-owned vehicles, there can be no basis for the distinction and no reason to create a new regulatory category and different rules. TPAC believes that upon a properly supported analysis, the Commission would conclude that these businesses are indeed providing exactly the same passenger transportation services as other charter-party carriers and taxicab services.

C. The Commission Accepted, Without Analysis, the TNCs’ Claims of “Pre-arrangement” and the Inapplicability of the Taxicab Services Exemption.

Because both of the criteria the Commission used to identify TNCs may just as easily apply to taxicab services as they do to charter-party carriers, without a considered analysis of the question there can be no reasonable assumption that on the basis of apps and driver-owned vehicles, TNC services are actually “pre-arranged.” The crucial difference between a taxicab service and a charter-party carrier is the nature of the service, *i.e.*, whether transportation is provided on an on-demand or pre-arranged basis.

Local regulation of taxicab services “is a traditional subject of the police power of cities and counties.”³² It has long been black-letter law that the Legislature intended to exempt taxicab services from state regulation.³³ San Francisco’s local taxi laws, for

³² *Cotta v. City and County of San Francisco* (2007) 157 Cal.App.4th 1550, 1560 (upholding airport commission’s authority to regulate incentives for clean-air vehicles).

³³ *People ex rel. Freitas v. City and County of San Francisco* (1979) 92 Cal.App.3d 913, 924. (City has authority under Cal. Const. to regulate taxicabs, as the Supreme Court held in *In re Martinez* (1943) 22 Cal.2d 259 (overruled on another point by *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621); *Cotta, supra*, citing *People v. Galena* (1937) 24 Cal.App.2d Supp. 770, 775.)

example, date from “horse and buggy days.”³⁴

[I]t is within the power of the [city] supervisors, under the changing conditions of modern transportation, to determine the course most likely to promote the convenience, safety and welfare of the traveling public, and to adopt the measures which will best assure adequate service and will be of the most practical benefit.³⁵

Despite the long-standing and broad authority of the Commission over pre-arranged services provided by charter-party carriers, the Legislature explicitly vested sole and exclusive regulatory authority over on-demand passenger transport, *i.e.*, taxicab services, in local authorities, as each jurisdiction determines will best serve its citizens’ health and safety interests.³⁶ In California and nationally, many jurisdictions are now exercising their local police power over TNC operations, as the Commissioner’s Ruling observed.³⁷

In the past, the Commission upheld this distinction meticulously.³⁸ The Commission

³⁴ *People v. Galena, supra*, 24 Cal.App.2d Supp. at 773-774, 785.

³⁵ *Ibid.*

³⁶ Gov. Code § 53075.5, subd. (a). (Notwithstanding the Charter-party Carriers’ Act (Pub. Util. Code §§ 5351-5420), “every city or county *shall* protect the public health, safety and welfare” by adopting regulations for taxicabs operating within its jurisdiction) (*emphasis added*).

³⁷ Commissioner’s Ruling, pp. 10-11, fn. 10(*e.g.*, regulatory activities in Seattle, Dallas, Houston, Detroit); *see also*

City and County of San Francisco, Board of Supervisors’ Agenda March 6, 2014, *Hearing - Regulatory Status of Private Transportation Networks*, agenda and hearing video available at http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=164&clip_id=19516&meta_id; Davila, V, *Chief McManus: City will enforce rules for Lyft, Uber*, San Antonio Express-News, April 2, 2014, available at <http://www.mysanantonio.com/news/local/article/Chief-McManus-City-will-enforce-rules-for-Lyft-5371005.php>;

Galvan, A., *Arizona Joins Fray Over Ridesharing Services*, Insurance Journal, March 31, 2014, available at <http://www.insurancejournal.com/news/west/2014/03/31/324849.htm>;

McCrary, K., *Uber bill targets Hillsborough Public Transportation Commission*, Tampa Bay Times, April 4, 2014, available at <http://www.tampabay.com/blogs/the-buzz-florida-politics/uber-bill-targets-hillsborough-public-transportation-commission/2173585>.

³⁸ *Application of Cecenas, et al.* “Opinion,” (1995 Cal. P.U.C.) 59 CPUC2d 643 (“D.95-05-017”) at *4-5; *Coast Yellow Cab Coop. v. Perzo* (1988) 27 CPUC2d 891 (“D.88-03-084”) at *6-7 (noting the Commission’s “clear policy prohibiting all elements of service akin to taxicab

recognized the bright-line nature of the division in passenger carrier regulatory jurisdictions.³⁹ It has consistently considered an on-demand response as evidence of taxicab operations.⁴⁰ The reasoning is obvious: because taxicabs cruise the public rights of way, seeking passengers who hail them for an immediate ride, their operation has significant effects on local traffic congestion and air pollution levels, as well as local use of any other available public transportation options.

Without analysis, D.13-09-045 assumed that e-hails on apps (the communication by app that “I need a ride now”) are fundamentally different from street hails or telephone calls for immediate service from vehicles cruising the streets.⁴¹ This is not the case, as TPAC and other Parties demonstrated during the proceeding.⁴² TPAC believes that the Commission’s developing a full record would forcefully confirm this conclusion. D.13-09-045 does not explain why the Commission is now reaching a conclusion in the case of TNCs that is

operation,” in finding violations of regulations, policy and statute); *Coast Yellow Cab Coop. v. Perzo* (1987) 25 CPUC2d 548 (“D.87-10-086”) at *15-16, *21-22 (declining to permit charter-party carrier that responded immediately to calls and failed to maintain waybills to operate as unlicensed taxicab service).

³⁹ D.95-05-017 at *5. (“The Commission does not involve itself with intracity matters, such as taxicab or similar type service. Intracity taxicab service is not under our jurisdiction.”) *Id.* at *4, citing *In re Martinez* (1943) 22 CPUC2d 259. (“There is a traditional division of responsibility between state and local government under which taxicab regulation is a local function.”) *Ibid.*, citing D.87-10-086 (“In our opinion, this division of responsibility is sound public policy. The Commission will do nothing to disturb or weaken it.”)

⁴⁰ D.87-10-086 at *16-17, *21-22; see also *Gorgee Enterprises, Inc. v. Davtyan* (2002) 2002 Cal. PUC LEXIS 231 (“D.02-05-006”) at *4; *Babaeian Transp. Company v. So. Calif. Transit Corp.* (1992) 45 CPUC 2d 85 (“D.92-07-041”) at *14; *City of Los Angeles v. Redfield* (1989) 31 CPUC 2d 520 (“D.89-04-064”) at *5-6; *Transp. Investments, Inc. dba Valley Cab Co. v. Hackett* (1983) 12 CPUC 2d 580 (“D.83-03-12”) at *37-38.

⁴¹ D.13-09-05, pp. 30, 66 at FOF 13.

⁴² See TPAC Application for Rehearing, pp. 11-12 and fns. 59-68 (TNCs display characteristics of taxicab services); D.13-09-045, pp. 37, (S.F. Cab Drivers’ Assoc. members have observed TNCs accepting street hails); 49 (Uber provides “your on-demand private driver”); 53 (Center for Accessible Technology urges Commission to ensure that “demand-response” transit services comply with anti-discrimination and accessibility requirements under federal and state law).

fundamentally different from its consistent past analyses and policy pronouncements. The Commission must explain its reasons for altering its policy, or revise or withdraw its decision if it cannot do so. TPAC fears that the Commission's policies may rest on undisclosed and inaccurate *ex parte* communications that TPAC simply has had no opportunity to rebut.

TPAC believes that upon a considered analysis of the nature of TNCs and the services they offer, the Commission would inevitably conclude that the so-called TNCs are offering exactly the same services as existing categories of regulated passenger carriers, and that they are either (1) charter-party carriers if their services are entirely pre-arranged, or (2) taxicab services if any of the transportation they provide is on-demand. Therefore, the Commission need only require these carriers to follow the existing regulations for the jurisdiction that is applicable to the nature of their services. The Commission, like other authorities, would be able to, and should, prosecute those who violate its regulations.

IV. TNC INSURANCE REQUIREMENTS SHOULD BE STRENGTHENED SO THEY ARE THE SAME AS THE REQUIREMENTS APPLICABLE TO OTHER SIMILARLY-SITUATED CARRIERS, WHICH WOULD BE THE CASE UNDER EITHER CHARTER-PARTY CARRIER CLASS "P" PERMITS OR TAXICAB REGULATION

If the Commission were to determine, upon a reasoned analysis with citation to record support, that the TNCs' services fall within existing regulatory regimes, it would eliminate the need to consider any different insurance requirements for them.⁴³ As noted above, the Commission's definition of a TNC vehicle as specifically "personal" tends to create the very insurance coverage gap that the proposed modifications seek to address. Notwithstanding

⁴³ Pub. Util. Code §§ 5391, 1040; G.O. 115-F § 1 (setting forth charter-party carrier insurance requirements). *See also* TPAC Application for Rehearing, Appendix B at p. 30, *citing* L.A. Mun. Code, ch. VII § 71.14, S.F. Trans. Code, art. 1100, §§ 1106(t), 1113(s) for examples of taxicab insurance requirements.

TPAC's view that D.13-09-045 must be vacated in its entirety, TPAC responds as follows to the four proposed modifications concerning insurance set forth at pages 2-3 of the Commissioner's Ruling:

1. TPAC believes that appropriate Commercial Auto Liability Insurance would cover the vehicles being used to provide transportation services at all times. Basing coverage instead upon a limited time frame when a driver has a specific app open invites insurance fraud.⁴⁴ It is also of no use in the real-life situation where a driver may have more than one app open, waiting for the first passenger seeking transportation to appear. It also invites uncertainty and increased litigation about insurance coverage and the precise nature of the activity being undertaken when the claim arose. Additional confusion and market disruption may result, to the extent that entities previously regulated as taxicab services or conventional charter-party carriers would be tempted to switch to operating as TNCs in order to save on insurance and other safety-related costs.
2. TPAC believes that Commercial Auto Liability Insurance should be required at the minimum levels within the applicable jurisdiction (*i.e.*, commensurate with at least the minimum charter-party carrier requirements for TNCs that provide exclusively pre-arranged services), and that any insurance policies issued to cover vehicles in California must be issued by an insurance company legally permitted to do so.
3. TPAC believes that Commercial Auto Liability Insurance should be required at the minimum levels within the applicable jurisdiction (*i.e.*, commensurate with at least the minimum charter-party carrier requirements for TNCs that provide exclusively pre-arranged services).
4. If Uber provides exclusively pre-arranged services, like all charter-party carriers it should be required to comply with the Passenger Charter-Party Carriers Act, because Uber receives compensation every time a passenger is transported through use of its app. In other words, Uber receives financial compensation from the transportation service, not merely the use of its app. If Uber were solely a technology company, it could simply license its app to existing passenger transportation services. Indeed, its initial

⁴⁴ See Mar. 21, 2014 Dept. of Insurance "Background White Paper" (Attachment 1), pp. 3-5.

comments misleadingly stated that very intended purpose for its business in California, claiming that its “product simply provides lead generation service to Commission licensed charter party carriers.”⁴⁵

Instead, Uber has created a business model where its app facilitates illegal taxi or limousine services, making enormous low-risk profits while avoiding the cost of employee and passenger protections that are mandatory for taxi and limousine services, seriously disrupting local markets and evading clean vehicle requirements in local jurisdictions, and simultaneously imposing upon the public in California a price structure that is illegal to the extent it is not based solely on time and/or distance. (Pub. Util. Code §§ 451, 5401, 5402.)

To the extent Uber is “enjoying the privilege of conducting business in California subject to the Commission’s jurisdiction,” the Commission must apply the Public Utilities Code and its charter-party carrier rules to Uber, just as it does to other charter-party carriers, and enforce those rules.

TPAC fundamentally disagrees with the Commission’s conclusion that the TNCs’ business is a “new industry”⁴⁶ that may require “new” insurance products. True, passengers’ use of an app on a smartphone to request taxi or limousine transport is a fairly recent technological development. But use of an app is common among passengers of taxicab and charter-party carrier services, not just businesses that rely on apps exclusively, like Lyft and Uber.⁴⁷ The notion that such businesses are providing “new” or different services, and so they should be subject to a regulatory regime entirely different from the regime that already applies to taxicab and charter-party carrier services, including different insurance

⁴⁵ Comments of Uber Technologies, Inc. on Order Instituting Rulemaking, p. 1.

⁴⁶ Commissioner’s Ruling, p. 4; D.13-09-045, p. 4.

⁴⁷ *See, e.g.*, Workshop Report, p. 25 (Luxor Cab uses the TaxiMagic app); TPAC Application for Rehearing, p. 20 (taxicab passengers use apps and telephones to arrange rides) and at fn. 114; Opening Comments of the Greater California Livery Association, p. 1 (limousines use apps); San Francisco Cab Drivers’ Association Response to TPAC Application for Rehearing, p. 2 (taxicabs may be hailed with smartphone apps such as Flywheel, TaxiMagic, Hailo).

requirements, is simply – as TPAC recently stated to the Department of Insurance – a “corporate shell game.”⁴⁸

More importantly, driver-owned vehicles have been used to provide for-hire transportation for well over a century in California, and such vehicles still comprise an important part of the state’s taxi and limousine fleets. The vehicles become “commercial,” not “personal,” when they are put in to service for the transportation of paying passengers, regardless of who owns them.⁴⁹ Thus, the Commission’s definition of a “TNC” as using a “personal” vehicle is a legal and logical impossibility, as D.13-09-045 demonstrated in finding that TNCs, using personal vehicles, carry passengers for compensation.

V. EX PARTE REPORTING RULES SHOULD APPLY TO THIS PROCEEDING

Safety issues in this proceeding, including the basis for the Commission’s insurance determinations, are too important a part of the peoples’ business to entirely shield all *ex parte* communications about those issues from public scrutiny. TPAC believes that this constitutes good cause for making the Commission’s *ex parte* reporting rules applicable to the *ex parte* communications of Parties to this proceeding and interested persons with Commission decision-makers – including the Commission’s Policy and Planning Division. It is frightening to think that the Commission’s decision may have been predicated, in whole or in part, on undisclosed statements made in private conversations with decision-makers, with adverse parties having no opportunity to rebut or clarify the statements made.

As the Commissioner’s Ruling observed, the Department of Insurance recently

⁴⁸ Statement of L. Silva to Calif. Dept. of Insurance at Mar. 21, 2014 Investigatory Hearing (written copy attached hereto as Attachment 2).

⁴⁹ Veh. Code § 260; Pub. Util. Code § 5360; Civ. Code § 2168.

conducted public proceedings concerning the impact of the Commission's determinations on the insurance industry. Though the Commissioner's Ruling did not make mention of them, TPAC and other transportation and insurance industry representatives participated in those proceedings.⁵⁰ Those proceedings were undertaken publicly, underscoring the propriety of making public the occurrence and substance of the Commission's *ex parte* communications with Parties in this proceeding.

This very important proceeding requires public disclosure of the who, what, when and where of communications between Party representatives and decision-makers. It should also require the development of a full public record that would enable the Commission to reach reliable and fully-vetted conclusions about the real-world operations and practices of the industry it wishes to consider restructuring. The Commission should require the reporting of *ex parte* communications pursuant to Rule 8.4. The Commission should order disclosure retroactively of all *ex parte* communications that have taken place in this proceeding, including those with representatives of the Commission's Policy and Planning Division.

VI. CONCLUSION

TPAC urges the Commission to expeditiously process its pending application for rehearing before considering any modifications to D.13-09-045. Whether in response to TPAC's application, or in connection with the Commissioner's Ruling soliciting comments on proposed insurance-related modifications to D.13-09-045, the Commission must expeditiously correct its failure to make an adequate record and to fully and fairly analyze its basis for creating a new and unnecessary regulatory subcategory of carriers and for its

⁵⁰ For the information of the Commission and the Parties, a copy of the "Background White Paper" issued by the Cal. Dept. of Insurance in connection with the Mar. 21, 2014 Investigatory Hearing is attached hereto as Attachment 1.

unfounded conclusion that this new subcategory of carriers provides exclusively “pre-arranged” services.

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Respectfully submitted,

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