



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

R.12-12-011 Filed December 20, 2012

CENTER FOR ACCESSIBLE TECHNOLOGY'S OPENING COMMENTS ON OIR

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January 28, 2013

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I. INTRODUCTION

In accordance with the schedule set in the Order Instituting Rulemaking issued in this proceeding on December 27, 2012, the Center for Accessible Technology (CforAT) timely files these comments asking for the scope of this new proceeding to be expanded to expressly address the need for new online-enabled transit services to provide access to passengers with disabilities. CforAT is a nonprofit organization that supports use of technology to promote independent living for people with disabilities. As a regular intervenor before the Commission, CforAT seeks to ensure that regulated utilities and services, which are necessities of modern life, are fully accessible to its constituency. As the organization's name might indicate, CforAT strongly supports development of new technology and services that utilize advances in technology provide improvements to the public, while also working to ensure that such new developments are available to and useful for people with disabilities.

In its Order Instituting Rulemaking, the Commission notes a variety of ways in which new businesses that use online-enabled or smartphone-based forms of communication to provide demand-response transit services to the public raise questions that require regulatory review. As discussed in the OIR, these passenger carriers are subject to a variety of existing laws and regulations that impact public safety and transportation access. The Commission specifically notes the obligation of any passenger carrier to comply with rules including "mandatory drug testing of employees; maintaining adequate levels of public liability, property damage, and workers compensation insurance; participating in the Department of Motor Vehicles "Pull Notice"

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¹ See Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).

program, and submitting to a California Highway Patrol safety inspection."² In addition to these obligations, any demand-response transit service must also comply with state and federal anti-discrimination statutes, including requirements that such services be accessible to people with disabilities.

While not expressly addressed in the OIR, this issue of disability access (and non-discrimination in general) is appropriately raised under the general heading of "Transportation Access," identified in the OIR at Section 3.4.³ The section of the California Vehicle Code cited in the OIR states that "the use of the public highways for the transportation of passengers for compensation is a business affected with a public interest," and continues by recognizing the need "to preserve for the public full benefit and use of public highways" as well as "to secure to the people adequate and dependable transportation by carriers operating upon the highways." A carrier or other form of transit service that excludes passengers on the basis of disability would fail to operate in a manner consistent with this provision of the Vehicle Code, in addition to committing multiple violations of the Americans with Disabilities Act (ADA) and California statutes prohibiting disability discrimination.

As also noted in the OIR, "the Commission's authority over passenger carriers is grounded in the need to protect the public's safe and reliable access to California's roadways." Because any review of these new transportation services to evaluate whether they are providing safe and reliable access should consider whether they are

² OIR at p. 3.

³ OIR at p. 8.

⁴ Cal. Vehicle Code § 5352.

⁵ OIR at p. 8.

operating in a non-discriminatory manner, the scope of the proceeding should explicitly include the need to ensure that such businesses are accessible to customers with disabilities, as described in greater detail below.

II. TRANSPORTATION ACCESS IS A CIVIL RIGHTS ISSUE

Transportation as civil rights issue dates back more than a century, arguably beginning with *Plessey v. Ferguson*, ⁶ which famously endorsed the notion of "separate but equal" in considering a Louisiana law requiring separate rail cars for black passengers. Transportation access was also a key element of the Civil Rights movement of the 1960s, including the Montgomery, Alabama bus boycott and the actions of Rosa Parks to challenge the legacy of Jim Crow laws. ⁷ The end of official racial segregation, however, did not end the importance of transportation access to marginalized communities. Today, the civil rights community continues to highlight the importance of transportation access as a vital component of equality and civic participation. The Leadership Conference on Civil and Human Rights, a coalition more than 200 national organizations organized to promote and protect the civil and human rights of all persons in the United States, and including (among many others) the American Association of People with Disabilities (AAPD), AARP, and the ACLU, has described the importance of transit access as follows:

Transportation equity is a civil and human rights priority. Access to affordable and reliable transportation widens opportunity and is essential to addressing poverty, unemployment, and other equal opportunity goals such as access to good schools and health care services. However, current transportation spending programs do not equally benefit all communities and populations. And the negative effects of some transportation decisions— such as the

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⁶ 163 U.S. 537 (1896).

⁷ In the aftermath of the Montgomery bus boycott, the District Court in Alabama held that cities could not legally enforce segregation on buses in *Browder v. Gayle*, 142 F. Supp. 707 (1956) (M.D. Ala.).

disruption of low-income neighborhoods — are broadly felt and have longlasting effects. Providing equal access to transportation means providing all individuals living in the United States with an equal opportunity to succeed.⁸

Even more recently, the AAPD has released a report describing the way in which equity in transportation has particular importance to people with disabilities. ⁹ The report notes persistent gaps in providing transportation access, and the difficulties this creates for the substantial population of people with disabilities. In particular, AAPD notes statistics published by the U.S. Department of Transportation (DOT) that document the fact that people with disabilities make up 40% of the population that reports difficulties in accessing transportation, and further notes that many people with disabilities do not have the option to drive, making lack of transit access disproportionately harmful.¹⁰

In considering the appropriate regulatory framework for new forms of transportation services, the Commission should be informed by the legacy of transit discrimination and should work to ensure that the new services mark a break from this problematic history. Just as it would be unacceptable to allow any form of transit service to operate if it were to engage in racial discrimination, new forms of online-enabled transit services cannot be permitted to exclude people with disabilities. Nevertheless, in reviewing the public websites for Uber, Lyft and Sidecar, the three services expressly identified in the OIR, CforAT has not been able to locate any information on how a person with a disability can ensure that he or she will receive accessible service, or that his or her access needs will be accommodated.

⁸ Leadership Conference website: http://www.civilrights.org/transportation/.

⁹ http://www.civilrightsdocs.info/pdf/transportation/final-transportation-equity-disability.pdf . See also AAPD's "Facts about Equity in Transportation for People with Disabilities," available at http://www.civilrights.org/transportation/disability/facts.html.

 $^{^{10}}$ Id

III. THE NEW SERVICES AT ISSUE ARE REQUIRED TO PROVIDE ACCESS TO CUSTOMERS WITH DISABILITIES

State and federal law require public accommodations to be accessible to people with disabilities. While the transit service providers under review in this proceeding define their operations in various ways, all of them provide services that are available to the public and invite the public to participate; thus, the services are subject to the anti-discrimination provisions of state and federal law.

The most significant state law prohibiting discrimination on the basis of disability (as well as other grounds) is California's broad anti-discrimination statute known as the Unruh Civil Rights Act. The Unruh Act applies to any entity that provides goods or services to the public, and it states in sweeping language that "all persons within the jurisdiction of this state. . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." 12

California courts have stated for decades that the Unruh Act must be construed liberally to provide broad protection against discrimination. One leading case states:

The Legislature used the words "all" and "of every kind whatsoever" in referring to business establishments covered by the Unruh Act (Cal. Civ. Code § 51), and the inclusion of these words without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term "business establishments" was used in the broadest sense reasonably possible. . . . ¹³

Similarly, the California Supreme Court has explained that "the language of the statute encompasses not solely access to business establishments, but also treatment of

¹¹ Cal. Civil Code § 51 *et seg*.

¹² Cal. Civil Code § 51(b).

¹³ O'Connor v. Village Green Owners Ass'n, 33 Cal. 3d 790, 795 (1983).

patrons." An entity that tries to avoid classification as a "business" by relying on donations or other voluntary forms of payment is still subject to the Unruh Act, and only very limited exceptions in the form of activities that are genuinely not available to the public have been acknowledged by state courts. Specifically, courts have found that, while the provisions of the Unruh Civil Rights Act do "not apply to 'truly private social clubs,' or to 'membership decisions of a charitable, expressive, and social organization,' the very broad 'business establishments' language of the Unruh Act reasonably must be interpreted to apply to the membership policies of an entity -- even a charitable organization that lacks a significant business-related purpose – if the entity's attributes and activities demonstrate that it is the functional equivalent of a classic 'place of public accommodation or amusement." ¹⁵ Applying the analysis of *Stevens*, all the transit services under review are public in their operation, in that they are all available for participation by anyone who can access their websites. "There is no attempt to select or restrict membership or access on the basis of personal, cultural or religious affinity, as a private club might do," and interactions between participants "take place more or less in public view and are of a relatively nongratuitous, noncontinuous, nonpersonal and nonsocial sort." Because they are functioning as transit services available to the public, whether or not the service is provided for direct compensation, new online-enabled services may not engage in discrimination based on immutable characteristics such as disability.

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¹⁴ Angelucci v. Century Supper Club, 41 Cal.4th 160, 174 (2007).

¹⁵ Stevens v. Optimum Health Institute – San Diego, 810 F.Supp. 1074, 1085-1086, (2011) (internal citations omitted).

¹⁶ See Isbister v. Boys Club of Santa Cruz, 40 Cal. 3d 72, 81 (1985) (internal quotations omitted).

While serving as an independent guarantee of equal treatment for people with disabilities, the Unruh Act also incorporates the ADA into state law, indicating that a violation of the ADA is a violation of the Unruh Act.¹⁷ Under the ADA, private demandresponse transit services are required to be accessible when viewed in their entirety.¹⁸ Thus federal law provides an additional basis for requiring new online-enabled transit services to be accessible to people with disabilities.

In addition to the direct applicability of state and federal nondiscrimination statutes to new transit services, whether or not the actual delivery of transportation is the primary business of such services, the Commission, as an independent policy-making entity, can and should articulate a broad perspective to ensure that people with disabilities are not excluded from new transit services and that historical discrimination in the area of transportation is not perpetuated. Thus, the Commission should actively consider accessibility for people with disabilities as an important public good, even beyond what would be required based on litigation under civil rights laws.

IV. ACCESSIBILITY CHALLENGES FOR THE NEW SERVICES

Based on a preliminary review, CforAT has identified three areas of concern regarding the accessibility of new online-enabled, demand-response transit services.

These are: (1) accessibility of the website/smartphone applications for customers with vision impairments; (2) accessibility of vehicles for customers with mobility disabilities, including wheelchair users; and (3) acknowledgement of the obligation to allow service

¹⁷ Cal. Civil Code § 51(f).

¹⁸ 42 U.S.C. §12182(b)(2)(C); 42 U.S.C. § 12184. *See also* regulations promulgated by the U.S. DOT under authority of the ADA regarding access to demand-response transit systems generally, 49 C.F.R. §35.107, and for transit services offered by entities that are not primarily engaged in the business of transporting people, 49 C.F.R. §37.171. A businesses' assertion that the actual delivery of transit services is not its primary purpose does not excuse it from ensuring that such service, when provided, is accessible.

animals to accompany disabled customers. In addition, CforAT is concerned that some of the new online-enabled transit services' reliance, at least in part, on driver feedback regarding riders may result in discriminatory outcomes, as drivers may provide poor feedback based on a passenger's disability (for example, if the passenger needs assistance or is slow to board or disembark). Each of these accessibility challenges is discussed in greater detail below.

A. Websites and Apps Must Be Accessible to People with Vision Impairments

The transit services under review are seen as innovators primarily because they rely on mobile internet, social media, and location services in order to serve their customer base. Given their dependence on technology, there can be no dispute that the technology itself must be accessible to customers and potential customers, including those with vision impairments who use screen readers and other forms of assistive technology to access information that others obtain visually. This means that the websites and smartphone applications of the transit services must be designed and built in accordance with accessibility requirements.

Standards for website accessibility are well developed; generally, a website that is designed in accordance with the Web Content Accessibility Guidelines (WCAG) 2.0 AA standards will be usable to people who rely on assistive technology.¹⁹ Standards for

¹⁹ WCAG standards have been developed by the World Wide Web Consortium (W3C), an international community that develops open standards with the goal of ensuring the long-term growth of the Web. W3C develops web protocols and guidelines, including access standards as part of its Web Accessibility Initiative. The WCAG standards are generally accepted as appropriate international guidance on accessible websites.

More detail on the WCAG standards can be found at http://www.w3.org/TR/WCAG/. Generally, WCAG standards are intended to cover a wide range of recommendations for making Web content more accessible. The developers state that "Following these guidelines will make content accessible to a wider range of people with disabilities, including blindness and low vision, deafness and hearing loss, learning disabilities,

smartphone applications are less developed, but generally follow the same guidelines in terms of how they interact with assistive technology.

CforAT has conducted a preliminary review of the websites and smartphone applications for the three transit services that are specifically identified in the OIR, namely Uber, Lyft, and Sidecar. For each, some number of features are inaccessible, including mislabeled form fields preventing customers from correctly identifying the field for inputting credit card numbers, exclusive use of a map to set pickup location, and lack of clear headings and links. Each of these problems limit the ability of customers who use assistive technology to access the services, and some customers may be completely excluded. CforAT would be pleased to meet with representatives from these services to discuss necessary improvements to their websites and apps, or to present more generally on accessible technology issues in a workshop setting.

B. Transit Services, When Viewed in their Entirety, Must Be Accessible to People with Mobility Disabilities, Including Wheelchair Users

A transit service cannot deny access to people who use wheelchairs, any more than it can deny access to any other customer based on immutable characteristics. While the legal standards for wheelchair access to demand-response transit systems are ambiguous, there is no doubt that some reasonable effort must be made to ensure that passengers with mobility impairments can use such systems and are not completely excluded.

As discussed above, the standard set out in the DOT Regulations promulgated under the ADA is that a private, demand-response system must be accessible when

cognitive limitations, limited movement, speech disabilities, photosensitivity and combinations of these. Following these guidelines will also often make your Web content more usable to users in general."

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viewed in its entirety, whether or not the primary purpose of the entity running the system is delivery of transportation services.²⁰ No comparable guidance is provided under the Unruh Act, and there is no caselaw in California to address this issue. However, the flexible framework of reviewing a system in its entirety may be appropriate for adoption by the Commission. This may allow for different options based on the different business models of the services under review. For example, in Washington DC, a recently-adopted municipal ordinance that was developed in conjunction with Uber requires fleets of public vehicles for hire to include a designated percentage of wheelchair-accessible vehicles, with the percentage increasing over time.²¹ A similar standard may be appropriate in California. For services that rely on privately-owned vehicles rather than regulated fleets, other solutions may be required, such as ensuring that the services have a back-up contract in place to provide rides in accessible vehicles to disabled passengers when needed, and/or requiring such services to engage in active recruitment of drivers who own accessible vehicles.

Finally, while wheelchair access is the most obvious limitation for customers with mobility disabilities, many customers have other impairments which may impact their ability to use transit services. For example, a customer may need assistance loading a mobility device into a trunk (and may need a vehicle with a trunk of sufficient size to hold the device), or may only be able to access vehicles with four doors, or vehicles of a certain height. The new online-enabled transit services must ensure that passengers can specify their vehicle needs and receive an appropriate response. Additionally, as discussed below, there must be safeguards to ensure that a passenger's accessibility needs

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²⁰ 49 C.F.R. §37.105; 49 C.F.R. §37.171.

²¹ Washington DC Official Code §50-329(d), adopted via Bill 19-892 in November of 2012.

do not result in the passenger being penalized through poor driver feedback, which may result in reduced opportunities to use the service.

CforAT intends to develop these issues further as the proceeding evolves, and looks forward to addressing its concerns with the transit services either formally (potentially in a workshop-type setting) or in direct discussions with the transit-service operators.

C. <u>Transit Services Must Permit Service Animals to Accompany Passengers</u>

Current law requires that people with disabilities are permitted to be accompanied by their service animals at all times.²² Exceptions exist only in very limited circumstances, such as health care settings, where an animal may be excluded from a sterile environment, though not from patient rooms or examination rooms.²³ California law specifically requires any transit service provider to permit service animals to accompany disabled passengers.²⁴ There is no basis to exclude a service animal for any demand-response transit service. Additionally, both state and federal law prohibit any surcharges or fees for accommodating service animals.

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The U.S. Department of Justice has issued a guidance document regarding service animals that states, in part, "Under the ADA, State and local governments, businesses, and nonprofit organizations that serve the public generally must allow service animals to accompany people with disabilities in all areas of the facility where the public is normally allowed to go." It further notes that "allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals." *See* U.S. Department of Justice, Civil Rights Division, Disability Rights Section ADA 2010 Revised Requirements publication on Service Animals, available at http://www.ada.gov/service_animals_2010.htm.

 $^{^{23}}$ Id

²⁴ California Penal Code §365.5 (a) states: "Any blind person, deaf person, or disabled person, who is a passenger on any common carrier, airplane, motor vehicle, railway train, motorbus, streetcar, boat, or any other public conveyance or mode of transportation operating within this state, shall be entitled to have with him or her a specially trained guide dog, signal dog, or service dog."

At this time, CforAT has not been able to locate any information from any of the services at issue making clear that drivers must permit disabled passengers to bring their service animals in the vehicles, nor has CforAT been able to locate any information indicating that drivers are informed or trained about any obligations regarding service animals. There appear to be no safeguards to ensure that a disabled passenger with a service animal is not denied rides, nor are there any apparent safeguards to prevent passengers from being given poor feedback from a driver based on use of a service animal

D. <u>Driver Feedback on Customers</u>

In its promotional material, Lyft describes the availability of social media feedback as an advantage of its service. Its description of "community" includes the statement: "Passengers and drivers rate each other after every ride. If you rate a driver below 4 stars, you'll never be matched with that driver again. If a driver's average falls below 4.5 out of 5 stars, they are removed from the Lyft community. It's our way of maintaining high-quality standards." While there is no discussion of permitting drivers to refuse service to passengers on the basis of feedback from other drivers, CforAT is concerned that drivers may downrate a passenger based on disability issues, such as the passenger's need for assistance with a mobility device or use of a service animal, and the result may be that future drivers refuse to provide service to the disabled passenger. The Commission must explore ways to ensure that any passenger rating systems do not come to encompass illegal forms of discrimination against passengers who belong to a protected class.

25 http://www.lyft.me/safety

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V. CONCLUSION

For the reasons set forth above, CforAT respectfully requests that the scope of this proceeding be set to expressly include the need to ensure that new transit services are operated in a non-discriminatory manner, and in particular to ensure that they are operated so as to be accessible to people with disabilities. CforAT is not looking to prohibit the development of new forms of transit services or to reduce the availability of transit options. However, the fact that new services are exploring new models of interaction with customers does not remove them from broad obligations to operate without engaging in discriminatory behavior.

Respectfully submitted,

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January 28, 2013