BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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OPENING COMMENTS OF LYFT, INC. RE: PHASE III. B., TRACK 3: WHETHER THE COMMISSION SHOULD PUBLICLY DISCLOSE OR SHARE TNC DATA WITH THIRD PARTIES

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OPENING COMMENTS OF LYFT, INC. RE: PHASE III. B., TRACK 3: WHETHER THE COMMISSION SHOULD PUBLICLY DISCLOSE OR SHARE TNC DATA WITH THIRD PARTIES

Lyft submits the following Opening Comments in response to the Assigned Commissioner's June 12, 2017 Amended Phase III. B. Scoping Memo And Ruling ("Amended Scoping Memo"), and in particular, regarding the matters identified in the newly-designated Track 3 concerning the propriety of the Commission disclosing data that TNCs are compelled to submit to the Commission pursuant to Commission rules and orders.

I. Introduction

The TNC industry has experienced substantial growth in the three and a half years of its existence, but it remains a rapidly evolving industry subject to an evolving regulatory landscape and extreme competitive pressures, forcing TNCs to continually develop new and more efficient methods of complying with regulations and offering new products and better service to their users to remain competitive.[1] Indeed, more than a few competitors have exited the market because they were unable to adapt to these challenges or raise adequate capital.[2] Significantly, the ability of TNCs to adjust to the changing competitive and regulatory environment depends in large part upon their ability to utilize the reams of data generated in the course of their daily operations. These data – and the methods by which they collect, compile, analyze and apply them -- are developed at

[1] Notably, Uber recently reported that it lost $2.8 billion last year. *See* https://www.bloomberg.com/news/articles/2017-04-14/embattled-uber-reports-strong-sales-growth-as-losses-continue

[2] For example, Sidecar ceased operations as of December 31, 2015. *See* http://www.bizjournals.com/sanfrancisco/blog/techflash/2015/12/sidecar-early-uber-and-lyft-competitor-shut-down.html ; Shuddle ceased operations April 14, 2016. *See* http://fortune.com/2016/04/14/shuddle-shutting-down/ Non-TNC competitors have also been forced to shut down in response to regulatory pressures. *See, e.g.*, "Leap Transit Forced to Cease Operations by State," https://archives.sfweekly.com/thesnitch/2015/05/20/leap-transit-forced-to-cease-operations-by-state

great effort and expense and are closely guarded trade secrets, the disclosure of which would result in substantial harm to TNCs' ability to effectively compete for users and raise the investment capital necessary to fund their operations.

The Amended Scoping Memo notes heightened interest in the data generated by TNCs by outside parties other than the Commission and asks whether, in light of this interest, the Commission should make TNC data available on a "website portal" or share it with local agencies.[3] Lyft strongly opposes any proposal by the Commission to publicly expose competitively sensitive and highly confidential data submitted by TNCs under compulsion of law. Lyft cautions the Commission that wholesale disclosure of trade secret information, in the absence of a particularized determination that to do otherwise would result in a "serious injustice,"[4] would violate longstanding principles of California law and would be contrary to established Commission procedures for evaluating public requests for access to data submitted by regulated entities. Furthermore, disclosure of TNC data that includes personally identifiable information ("PII") would result in an intolerable invasion of user privacy and may lead to misuse and abuse.[5] Significantly, even "anonymization" of such data cannot prevent this harm, as numerous studies have shown that so-called "anonymized" data can be reverse engineered to reveal highly personal details. Likewise, the aggregation of such data, in what is essentially a two-competitor market composed of Uber and Lyft, does nothing to eliminate the competitive harm that would result from disclosure, as each TNC could simply back out its own data and thereby glean invaluable details regarding its competitor's operations.

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[3] It is unclear precisely what sort of website portal is envisioned, but the specific questions posed in the Amended Scoping Memo suggest a proposal for the Commission to begin exposing data submitted to the Commission by TNCs on a public-facing website. *See* Amended Scoping Memo, p. 4, ("1. What is the public and/or research value of a website, database, or other publicly accessible means to host data about transportation for hire that is under the Commission's jurisdiction?"). This vague suggestion of a data portal is alarming to Lyft. The annual report data was given to the Commission after vigorous negotiations regarding the TNC annual report requirements, including the need to maintain the confidentiality of the data, particularly PII and trade secret data. The data were ultimately proffered under an assurance of confidentiality, particularly data that reveals personal details, destinations, destination patterns, or other sensitive information of TNC drivers and users.

[4] *Bridgestone/Firestone, Inc. v. Superior Court*, (1992) 7 Cal.App.4th 1384, 1391, *reh'g denied and opinion modified* (July 23, 1992).

[5] *See, e.g.,* FTC Testifies on Geolocation Privacy at https://www.ftc.gov/news-events/press-releases/2014/06/ftc-testifies-geolocation-privacy For example, the ability to track the pattern of pick-ups and destinations for a specific person (e.g., a politician, a celebrity, or an ex-husband or ex-wife) can be potentially damaging if revealed to an adversary or person with improper motives.

In Decision (D.) 13-09-045, the Commission ordered TNCs to provide verified reports to the Commission's Safety and Enforcement Division (SED) and to do so confidentially.[6] As a regulated entity subject to the jurisdiction of the Commission, Lyft also routinely responds to various data requests from Commission staff.[7] The data supplied to the Commission includes highly confidential competitively sensitive data, as well as PII concerning Lyft drivers, passengers and third parties, the disclosure of which would cause irreparable harm to Lyft and its users. In dutifully complying with Commission demands for data, Lyft has relied upon the Commission's explicit direction and assurances that submitted data is confidential and upon other Commission rules and orders affirming the confidentiality of data submitted to the Commission.[8] The Commission has long recognized that competitively sensitive or otherwise confidential data submitted to the Commission under assurances of confidentiality should not be publicly disclosed absent a particularized evaluation of whether disclosure is consistent with the California Public Records Act, the California Trade Secret Act, and related principles of California law.[9] To that end, the Commission has established procedures for evaluating requests for access to confidential data and is currently in the process of revising those procedures in a parallel rulemaking proceeding.[10] It would be highly inappropriate for the Commission to single out TNC data for disparate treatment by making blanket *a priori* determinations to publicly expose that data simply because certain parties have expressed interest in obtaining access to it.[11] Any requests for access to TNC data should be evaluated in the manner in which requests for data regarding other regulated entities are evaluated -- on a case-by-case basis, in accordance with established

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[6] *See* D.13-09-045, fn. 42.

[7] As of the date of these comments, Lyft has received 16 data request from CPED. The requested data routinely include PII of Lyft users and third parties. For example, CPED has requested all correspondence between specific drivers and Lyft; all ride information relating to specific individuals on specific days; times when specific individuals logged into the Lyft app; maps of specific rides including pickup and dropoff locations; insurance claim information; correspondence between Lyft and Lyft's insurance company; all zero tolerance and harassment complaints, including case notes (with names/numbers/other PII); information about internal systems and processes for handling customer complaints; and information about Lyft's contracts with third parties and partners.

[8] *See* General Order 66-C, §2 ("Public records not open to public inspection include … Reports, records, and information requested or required by the Commission which, if revealed, would place the regulated company at an unfair business advantage.").

[9] *See* D.16-09-024, p. 25 (affirming the need to maintain confidentiality of "competitively-sensitive documents"); Order Instituting Rulemaking To Improve Public Access To Public Records Pursuant To The California Public Records Act ("OIR"), R.14-11-001 (11/14/2014), attaching Proposed GO 66-D, §3.2 (presumptive determinations of confidentiality); §5.3 – 5.5 (particularized evaluations of requests for documents designated confidential) (,

[10] R.14-11-001.

[11] The Commission has long recognized in the telecommunications arena that personal information, including geolocation information can be used to identify, contact, or locate an individual, and has accorded such information strong protection from disclosure. There is no justification for treating PII generated by TNCs any differently.

Commission procedures and those being developed in the parallel rulemaking proceeding convened to address these very issues.

II. Requests for Access to TNC Data Should Be Evaluated Under Established Commission Procedures for the Handling of Such Requests

A. The Commission has established procedures for evaluating requests for information submitted by regulated entities, which require a particularized evaluation prior to disclosure

In California, the disclosure of records submitted to government agencies by the entities they regulate is governed primarily by the California Public Records Act ("the Act"). The Act provides that public records – *i.e.*, records "relating to the conduct of the people's business"[12] -- are open to inspection by members of the public unless those records are exempted by a provision of the Act. Gov. Code §6253, subds. (a) & (b), 6254. Among the records exempted from disclosure are "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Gov. Code §6254(k). This includes "official information," which is "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." Evidence Code §1040(b)(2). Official information should not be disclosed unless the submitting entity consents to its disclosure or a determination is made that the public interest in disclosure outweighs the need to maintain the confidentiality of the information. *Id.* at 1040(b)(2). Significantly, no public interest is served by disclosure of documents maintained by an agency unless they shed light on the ***agency's*** performance of its duties. *Los Angeles Unified School District v. Superior Court*, 228 Cal.App.4th 222, 249 (2014) (where disclosure "would not shed light on an agency's performance of its duties or otherwise let citizens know what their government is up to, '[t]he relevant public interest supporting disclosure ... is negligible, at best.'"). Thus, the confidential information of a regulated entity does not become disclosable simply because it has been submitted to an agency. Unless the data sheds light on the agency's actions, it is not a public record and is not subject to public disclosure.

The Act also exempts trade secrets from disclosure. Evid. Code §1060; *Syngenta Crop Protection, Inc. v. Helliker*, 138 Cal.App.4th 1135, 1170 (2006). A trade secret is any information

[12] *Cal. State University v. Superior Court* (2001) 90 Cal.App.4th 810, 825.

that derives independent economic value from not being generally known to the public or persons who can obtain economic value from its disclosure, and is the subject of reasonable efforts to maintain its secrecy. Civ. Code §3426.1, subd. (d). Trade secrets may not be disclosed unless a "serious injustice" would otherwise result. *Bridgestone/Firestone, Inc. v. Superior Court*, 7 Cal.App.4th 1384, 1391, (1992), *reh'g denied and opinion modified* (July 23, 1992); Evid. Code §1060 (may not be disclosed unless to do otherwise would "tend to conceal fraud or otherwise work an injustice."). The fact that a party with an interest in the matter may find trade secret information helpful is not a valid ground for ordering its disclosure. *See id.* ("Allowance of the trade secret privilege may not be deemed to 'work injustice' within the meaning of Evidence Code section 1060 simply because it would protect information generally relevant to the subject matter of an action or helpful to preparation of a case."). Finally, the Act also exempts from disclosure "files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Gov. Code, § 6254(c).[13] Thus, confidential information provided to the Commission, including trade secrets, should not be disclosed.

Buttressing the provisions of the Act, the Legislature has long recognized that information submitted to the Commission by regulated entities often includes sensitive information that should not be publicly disclosed. Public Utilities Code §583 provides that "[n]o information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding." With respect to charter party carriers more particularly, Public Utilities Code §5412.5 makes it a crime to "disclose[] any fact or information from an inspection of the accounts, books, papers, or documents of a charter-party carrier of passengers" except as authorized by the Commission or a court.

In recognition of the foregoing principles, in 1974, the Commission adopted General Order 66-C to establish procedures for the treatment of confidential information submitted by regulated

[13] *See also* Government Code Section 6254.15 ("Nothing in this chapter shall be construed to require the disclosure of records that are any of the following: corporate financial records, corporate proprietary information including trade secrets, and information relating to siting within the state furnished to a government agency by a private company for the purpose of permitting the agency to work with the company in retaining, locating, or expanding a facility within California.").

entities.[14] In adopting GO 66-C, the Commission acknowledged that the disclosure of competitively sensitive information submitted by regulated entities could be harmful and may have a chilling effect on the free-flow of information necessary to carry out the Commission's regulatory mission, by expressly providing that "[r]eports, records, and information requested or required by the Commission which, if revealed, would place the regulated company at an unfair business advantage" are not "public records" and are not "open to public inspection." G.O. 66-C, §2. Pursuant to GO 66-C, any request for information must be directed to the Commission Secretary so that a determination may be made as to whether the requested records fall within the listed exclusions or "if there is some public interest served by withholding the records." GO 66-C, §3.3.

In 2006, the Commission modified GO 66-C in order to implement Senate Bill 1488, which directed the Commission to reexamine its "practices regarding confidential information to ensure meaningful public participation in [Commission] proceedings and open decision making procedures." *See* D.06-06-066, *as modified by* D.07-05-032, at p. 2. In D.06-06-066, the Commission established additional procedures for treatment of confidential information submitted by certain categories of regulated entities but, in so doing, affirmed that with respect to "market sensitive" information, "confidential treatment of data may not only be allowed, but may be required in order to carry out our statutory and constitutional duties." D.06-06-066, p. 2-3.[15] To that end, the Commission developed confidentiality matrices, designating certain categories of information presumptively exempt from disclosure, and affirmed the application of GO 66-C for data outside of those matrices. *Id.*, at p. 77-86. Thus, the Commission has repeatedly confirmed that market sensitive information should not be publicly disclosed.

In 2014, the Commission commenced a rulemaking aimed at updating GO 66-C. *See* Order Instituting Rulemaking To Improve Public Access To Public Records Pursuant To The California Public Records Act ("OIR"), R.14-11-001 (11/14/2014), p. 1. In that proceeding, on August 24, 2016, the Commission issued a Decision Updating Commission Processes Relating to Potentially Confidential Documents (D.16-08-024) which offers "guidance for the development of

[14] General Order No. 66-C, Procedures for Obtaining Information and Records in the Possession of the Commission and Its Employees and Commission Policy Orders Thereon (hereafter, GO 66-C").
[15] The Commission expressly determined in D.06-06-066 that "market sensitive" information need not constitute a trade secret to be protected from disclosure. *Id.*, at p. 47.

the process that the Commission will use in determining whether a potentially confidential document will be disclosed." *Id.* at p. 1. That guidance establishes varying procedures depending upon when the information was submitted, but broadly affirms the principle that documents appropriately designated as confidential at the time submitted will not be released without a particularized evaluation by the Commission. D.16-08-024, pp. 19-21. Significantly, certain parties sought a rehearing of D.16-08-024, claiming that it failed to offer sufficient protection for previously submitted confidential data. In denying rehearing of and modifying D.16-08-024, the Commission expressly affirmed that "nothing in D.16-08-024 permits the disclosure by Legal Division of information that is subject to appropriate confidentiality protections" (*id.* at p. 8-9) and that "[n]o information proven to be entitled to confidential protection is automatically subject to public release under the guidelines adopted in D.16-08-024." *Id.* at p. 12.

On April 28, 2017, the Assigned Commissioner issued an Amended Scoping Memo and Ruling soliciting comments on a proposed revised General Order, designated GO 66-D. Lyft has submitted comments on the new GO 66-D and proposed certain modifications to it. As relevant here, the new GO would establish a methodical process for evaluating requests for access to information submitted by regulated entities that includes a particularized evaluation of claims of confidentiality and notice to the information submitter prior to releasing confidential data. *See* April 2017 Scoping Memo, Appendix A, §§5.4 and 5.5. Furthermore, rather than proposing the blanket disclosure of data submitted to the Commission, GO 66-D would, as in D.06-06-066, develop additional matrices to "preemptively designate certain information as confidential." *Id*. at Appendix A, §3.4. The Scoping Memo indicates that the development of these matrices will be accomplished in a future Phase II.b, which has not yet been initiated. *Id.* at p. 5.

As the foregoing makes clear, the Commission has long established procedures governing public requests for access to information submitted by regulated entities. Although those procedures have evolved over time, the Commission has consistently recognized that competitively sensitive information should be protected from disclosure and is either presumptively exempt or should only be disclosed after a particularized evaluation of the confidentiality of the information. To the extent the Amended Scoping Memo proposes making blanket *a priori* determinations regarding disclosure of confidential data submitted by TNCs, the proposal is inconsistent with this long history and would short-circuit the process currently underway in R.14-11-001. As explained below, much of the data submitted by Lyft is highly

confidential data submitted under assurances of confidentiality, and should be protected from disclosure consistent with established Commission procedures and those currently being developed in R.14-11-001. Any proposal to release confidential information of a TNC, even if "anonymized," on a public portal, is inappropriate and contrary to prior Commission law, rules and the direction of the current rulemaking docket.

B. The Data Submitted by Lyft Is Competitively Sensitive and Include Personally Identifiable Information

In D.13-09-045, the Commission ordered TNCs to provide verified reports to the Commission's Safety and Enforcement Division (SED) that include specified categories of information concerning their operations.[16] In recognition of the sensitive nature of this information, the decision ***requires*** TNCs to file these reports confidentially. *Id.*[17] Consistent with and in reliance upon D.13-09-045, GO 66-C, and longstanding Commission practice, Lyft has dutifully submitted such reports, confidentially and with the expectation that they will not be publicly disclosed.[18]

The data submitted to the Commission is captured using data collection, analysis and reporting processes developed by Lyft over time and at great effort and expense.[19] These processes continually capture events occurring across the Lyft platform and store the resulting data in Lyft's proprietary databases.[20] The data is then compiled for both regulatory reporting and business analytics purposes.[21] In addition to enabling Lyft to adapt to continually-evolving regulatory requirements, the data provides Lyft with critical insights into the effectiveness of its services, features, and marketing and promotional efforts, and help Lyft to create an exceptional user experience for passengers and drivers.[22]

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[16] D.13-09-045, p. 31.
[17] The Commission stated in D.13-09-045 that "[f]or the requested reporting requirements, TNCs shall file these reports confidentially unless in Phase II of this decision we require public reporting from TCP companies as well." The Commission did not impose any additional public reporting requirements in Phase II, and has not otherwise imposed any such requirements.
[18] Declaration of Joseph Okpaku In Support Of Opening Comments Of Lyft, Inc. Re: Phase III.B., Track 3: Whether The Commission Should Publicly Disclose Or Share TNC Data With Third Parties ("Ambrose Lobato Declaration"), ¶3.
[19] *Id.* at ¶4.
[20] *Id.*
[21] *Id.*
[22] *Id.*

The "trip data" referenced in Track 3.b. of the Amended Scoping Memo is a prime example of the highly confidential data collected by Lyft and submitted to the Commission.[23] Lyft continually collects data regarding trips completed on the platform, including the time and location of the request, the location of the driver, the drop-off location, the miles traveled and the fare.[24] The data is continually collected, compiled and analyzed as an integral aspect of Lyft's business operations and the success of Lyft's business model depends upon continually optimizing the balance between ride demand and vehicle supply.[25] Lyft endeavors to optimize supply and demand by using competitive pricing and promotions, such as ride credits and other discounts, to stimulate passenger demand, while increasing the supply of vehicles to areas with high demand by offering drivers minimum hour guarantees, bonuses, and other driver incentives.[26] Lyft is continually tweaking these two levers to ensure, on the one hand, that fares are low enough to attract passengers, and, on the other hand, that fares are high enough to attract drivers.[27] This delicate balance is central to Lyft's competitiveness in California and in markets nationwide.[28]

The trip data collected by Lyft allows it to continually evaluate the effectiveness of its promotional, advertising, and incentive campaigns used to balance supply and demand.[29] For example, by comparing the number of rides completed during a particular time period in a particular location against the driver incentive programs deployed during that period, Lyft can gauge the effectiveness of those incentives in increasing the supply of drivers and can adjust its incentive programs going forward.[30] Similarly, by cross-referencing its ride numbers against the particular passenger promotions run at that time, Lyft can track, assess, and understand the efficacy of its passenger-directed promotions, and can adjust them accordingly.[31] Equally important, Lyft can identify those promotions that are ***ineffective*** and can avoid further expenditures on ineffective promotions.[32]

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[23] *Id.* at ¶5.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at ¶6.
[30] *Id.*
[31] *Id.*
[32] *Id.*

Not coincidentally, this data is also among the most competitively sensitive forms of data maintained by Lyft because Lyft's competitors could use that data to determine Lyft's market share in a given market, and to reverse engineer the effectiveness of Lyft's pricing and promotional activity and product positioning.[33] If Lyft's competitors were provided access to Lyft's ride data, they could and would compare that data to Lyft's driver acquisition programs and passenger promotions – which, by their nature, are publicly discoverable – to better understand which of Lyft's strategies are effective.[34] This would allow a competitor to tailor its operations to more effectively deploy its resources to compete with Lyft, utilizing for its own benefit data that Lyft has generated over time and at great expense.[35] Such a competitor would not need to invest the significant resources that Lyft has invested to test these programs and analyze the data to understand the market and optimize revenue generation.[36] Instead, a new competitor could enter the market without substantial investment, while existing competitors could use the data to increase their market share, or undercut Lyft's marketing campaigns, by "free-riding" on Lyft's data.[37]

In addition to the aforementioned ride data, Lyft collects various other forms of data from its operations that are reported to the Commission confidentially pursuant to D.13-09-045, including data regarding the number of drivers completing driver training programs, data regarding incidents on the platform, and data regarding the number of miles and hours driven by Lyft drivers.[38] These data are also collected using proprietary processes developed by Lyft for regulatory compliance and business analytics purposes.[39] The ability to efficiently and accurately collect this data for submission to the Commission provides Lyft with a competitive advantage over potential new entrants into the TNC marketplace.[40] The data is also highly sensitive because it serves as a proxy for Lyft's market share, customer growth, and revenue figures, and may

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[33] *Id.* at ¶7. The rideshare industry is characterized by fierce competition and, Uber, in particular, has been ruthless in its efforts to undercut Lyft's market share. In one well-document example, Uber hired teams of independent contractors to request Lyft rides and then attempt to convince Lyft drivers to convert to Uber before arriving at their destination. Calling this program "SLOG," Uber armed the contractors with special Uber-approved phones and credit cards and awarded commissions of $750 for successfully recruiting a single new driver to Uber. *See* https://www.theverge.com/2014/8/26/6067663/this-is-ubers-playbook-for-sabotaging-lyft

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at ¶8.

[39] *Id.*

[40] *Id.*

disclose Lyft's proprietary processes for responding to user feedback and addressing incidents on the platform.[41]

Finally, Lyft also responds to various data requests from Commission staff.[42] To date, Lyft has received sixteen separate data requests from CPED. These requests include highly confidential personal information of drivers, passengers and third parties, including:

- correspondence between certain Lyft drivers and Lyft;
- all ride information relating to specific individuals on specific days;
- dates and times when specific individuals logged into the Lyft app; maps of specific rides including pickup and dropoff locations;
- insurance claim information;
- correspondence between Lyft and Lyft's insurance company; all zero tolerance and harassment complaints, including case notes (with names/numbers/other personally identifiable information);
- information about internal systems and processes for handling customer complaints;
- information about Lyft's contracts with third parties and partners.[43]

Because disclosure of this sensitive and confidential data would cause harm to Lyft, its users, and its partners, this data is also submitted confidentially as appropriate.[44]

Because of the enormous value that Lyft derives from its data, and because of Lyft's commitment to protect the personal privacy of is users, Lyft goes to significant lengths to ensure that such data remains confidential.[45] Lyft employs multiple layers of physical and virtual security to maintain the confidentiality of the data and to ensure that the data do not fall into the hands of Lyft's competitors.[46] Lyft's information security program is consistent with or exceeds industry standards, and strict limits are placed on access to Lyft data.[47] Access is restricted to a limited set of employees who have a business need for the information and are subject to confidentiality agreements, and who have been approved to receive access to the data.[48] This allows Lyft to maintain the value and utility of the data to Lyft and preserve the personal privacy of its users

[41] *Id.*
[42] *Id.* at ¶9.
[43] *Id.*
[44] *Id.*
[45] *Id.* at ¶10.
[46] *Id.*
[47] *Id.*
[48] *Id.*

while protecting the data from disclosure to Lyft's competitors or others who would misuse or abuse the data.[49]

C. Data submitted by Lyft to the Commission is exempt from disclosure under established law

The data Lyft submits to the Commission constitutes trade secret information under established law and is therefore exempt from disclosure under Gov. Code §6254(k), Civ.Code § 3426.1 and Evid. Code §1060. A trade secret is any information that "[d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use" and "[i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Civ.Code § 3426.1(d)." It is well established that data compilations may constitute a trade secret under California law and it matters not that the underlying data is generated from events initiated in the public sphere. *United States v. Nosal*, 828 F3d 865, 882 (9th Cir 2016) ("[A] trade secret may consist of a compilation of data, public sources or a combination of proprietary and public sources."); *Buffets, Inc. v. Klinke*, 73 F3d 965, 968 (9th Cir 1996) ("[T]rade secrets frequently contain elements that by themselves may be in the public domain but together qualify as trade secrets").

As explained above, the data submitted to the Commission in accordance with D.13-09-045 has enormous economic value to Lyft and is the subject of extensive efforts to maintain its confidentiality.[50] If disclosed, the data would have significant economic value to Lyft's competitors.[51] It would allow Lyft's competitors to determine Lyft's market share, to evaluate the efficacy of its marketing and incentive programs, and to free ride on the enormous effort and expense Lyft has incurred in developing its data capture, analytics and reporting processes.[52] This is precisely the kind of information that has been consistently found to constitute a trade secret. *See, e.g., Lion Raisins Inc. v. USDA*, 354 F3d 1072, 1080-81 (9th Cir 2004) (where information collected by agency would allow competitor to "infer critical information about its competitors' volume, market share, and marketing strategy," agency appropriately refused to produce in response to Freedom of Information Act request); *Mattel, Inc. v. MGA Entm't, Inc*., 782 F.Supp.2d 911, 972 (C.D.Cal.2011) ("This information has potential or actual value from not being generally

[49] *Id.*
[50] Okpaku Decl., ¶¶4-10.
[51] *Id.* at ¶7.
[52] *Id.* at ¶¶6-7.

known to the public: information about customers' preferences can aid in 'securing and retaining their business.'"); *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 521 (9th Cir. 1993) ("The Customer Database has potential economic value because it allows a competitor like Peak to direct its sales efforts to those potential customers that are already using the MAI computer system."); *National Information Center, Inc. v. American Lifestyle*, 227 U.S.P.Q. 460, 1985 WL 4035 (E.D. La. 1985) (trade secret protection extended to advertising, market studies used in developing advertisements, and to data, internal codes and methods of allocation used in accounting and control procedures); *Editions Play Bac, S.A. v. Western Pub. Co., Inc.*, 31 U.S.P.Q.2d 1338, 1342 n.3 (S.D. N.Y. 1993) ("'how and why' behind marketing strategies" protectable as trade secret); *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1155 (4th Dist. 2002) ("pricing concessions, promotional discounts, advertising allowances, volume rebates, marketing concessions, payment terms and rebate incentives …[have] independent economic value because Schlage's pricing policies would be valuable to a competitor to set prices which meet or undercut Schlage's."); *Brunswick Corp. v. Jones*, 784 F.2d 271, 275 (7th Cir. 1986) (confidential information concerning plaintiff's financial performance and projections and marketing plans would help competitor to determine how aggressively it should price new products and to preempt plaintiff's new products before they reached the market); *Black, Sivalls & Bryson, Inc. v. Keystone Steel Fabrication, Inc.*, 584 F.2d 946, 952 (10th Cir. 1978) (confidential data regarding operating and pricing policies can qualify as trade secrets, because the ability to predict a competitor's bid with reasonable accuracy would give a distinct advantage to the possessor of that information).

Because the data constitutes trade secret information, it is exempt from disclosure under the CPRA and may not be disclosed unless to do otherwise would constitute a fraud or work a serious injustice. Gov. Code §6254(k); Evid. Code §1060; *Bridgestone/Firestone,* 7 Cal.App.4th at 1391. The prospect that such data might be useful to local agencies or researchers interested in studying the TNC industry falls far short of a sufficient justification for destroying Lyft's immensely valuable trade secrets. *Ibid.* Furthermore, because Lyft submitted this data in reliance upon the Commission's determination in D.13-09-045 that such data would remain confidential, public disclosure of the data – which would allow Lyft's competitors to make use of it – would constitute an unlawful taking under the United States Constitution. *Syngenta Crop Protection,* 138 Cal.App.4th at 1167-68 (*citing Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003–1005-1011

(1984)) (where company had "reasonable investment-backed expectation of confidentiality" in data submitted to agency, using that data to the benefit of competitor constitutes unlawful taking).

In addition to constituting trade secret information, the data submitted to the Commission by Lyft constitutes official information which is presumptively exempt from disclosure. Because the data is "acquired in confidence" by the Commission in the course of its duty to regulate TNCs,[53] the data qualifies as official information protected from disclosure by Gov. Code §6254(k) and Evidence Code § 1040(b)(2). Indeed, Commission staff recently affirmed that the data constitutes official information exempt from disclosure. *See* Exhibit A hereto (Staff response to San Francisco County Transportation Agency, stating "The reports SFMTA sought was (sic) acquired by Commission staff in confidence, in the course of their official duties and not made public prior to SFMTA's request."). Official information should be disclosed only if the submitting party consents to its disclosure, or a particularized determination has been made that the public interest in disclosure outweighs the need to maintain the confidentiality of the information. *Michael P. v. Superior Court,* 92 Cal.App.4th 1036, 1046 (2001) (particularized evaluation required under §1040); *Marylander v. Superior Court,* 81 Cal.App.4th 1119, 1126 (2000) (official information should not be disclosed without a careful balancing of interests). Lyft has not and does not consent to its disclosure and no public interest has been articulated that could outweigh Lyft's compelling interest in maintaining the confidentiality of the data. *See, e.g.*, *Johnson v. Winter*, 127 Cal.App.3d 435, 439 (1982) (strong public interest in nondisclosure of information submitted under assurances of confidentiality); *Board of Trustees v. Superior Court*, 119 Cal.App.3d 516, 525–26 (1981) ("The custodian [of private information] has the right, in fact the duty, to resist attempts at unauthorized disclosure and the person who is the subject of [it] is entitled to expect that his right will be thus asserted."); *Morlife, Inc. v. Perry,* 56 Cal.App.4th 1514, 1520 (1997) ("Yet also fundamental to the preservation of our free market economic system is the concomitant right to have the ingenuity and industry one invests in the success of the business or occupation protected from the gratuitous use of that "sweat-of-the-brow" by others."); *United States v. Tribune Publishing Company* (C.D. Cal., Mar. 18, 2016, No. CV1601822ABPJWX) 2016 WL 2989488, at *5 ("[T]he preservation of competition is always in the public interest."); *United States v. Columbia Pictures Indus., Inc.*, 507 F. Supp. 412, 434

[53] Evid. Code § 1040(a).

(S.D.N.Y. 1980) ("Far more important than the interests of either the defendants or the existing industry... is the public's interest … in the preservation of competition.").

Lastly, the data submitted by Lyft in response to data requests, which includes the private, personal information of Lyft drivers, passengers, and third parties,[54] is exempt from disclosure under Gov. Code §6254(c). This data identifies particular individuals and their location at given dates and times, among other personal details,[55] and is therefore subject to the exemption for information the exposure of which would constitute an unwarranted invasion of personal privacy. *See, e.g.*, *Los Angeles Unified School District v. Superior Court*, 228 Cal.App.4th 222, 239 (2014) (government records containing "information which applies to a particular individual" protected under Gov. Code §6254(c)). Although efforts to mask or "anonymize" such data may be undertaken, they offer little assurance that individual privacy will be protected when the data is exposed to public scrutiny.[56] Studies have demonstrated that even so-called anonymous ride data can be reverse engineered to identify particular individuals and track their movements.[57] Studies have also found that such data can reveal mobility patterns that can be used to identify gender and ethnicity, potentially leading to discrimination.[58] It is simply impossible to predict in advance the wide array of uses -- and misuses -- to which such could be put.[59]

For the foregoing reasons, the data submitted to the Commission is exempt from disclosure under the Act and applicable law, and no party has asserted a public interest that could possibly outweigh the compelling interests supporting its confidentiality. To the extent any party contends

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[54] Okpaku Decl., ¶9.
[55] *Id.* at ¶¶9-10.
[56] *Id.*, ¶10.
[57] *See* "*New York taxi details can be extracted from anonymised data, researchers say*," The Guardian, June 27, 2014 at https://www.theguardian.com/technology/2014/jun/27/new-york-taxi-details-anonymised-data-researchers-warn
[58]; *See "I Don't Have a Photograph, but You Can Have my Footprints"- Revealing the Demographics of Location Data,* Riederer et al., 2015 at http://sebastianzimmeck.de/riedererEtAlPhotograph2015ShortPaper.pdf (2015 Columbia University research paper showing that mobility patterns can be used to identify gender and ethnicity, potentially leading to discrimination); "*Unique in the Crowd: The privacy bounds of human mobility,"* de Montjoye, et al., 2013 at https://www.nature.com/articles/srep01376 (finding that 95% of individuals can be identified using only four spatio-temporal data points).
[59] See, for example, the research conducted by University of Texas researchers in which they applied a de-anonymization methodology to anonymous movie reviews released by Netflix to identify individual reviewers, and using other publicly available information, to determine their political preferences and other potentially sensitive information. http://www.cs.utexas.edu/~shmat/shmat_oak08netflix.pdf. Or the re-identification of "de-identified" patient health data described by Harvard Professor Latanya Sweeney in "*Weaving Technology and Policy Together to Maintain Confidentiality,*" at https://dataprivacylab.org/dataprivacy/projects/law/law1.html.

that such an interest exists, they should, as discussed next, follow the procedures established by the Commission for such requests.

D. It Would Be Inappropriate for the Commission to Single Out TNC Data for Blanket Disclosure

As explained above, GO 66-C, as modified by subsequent orders of the Commission, and the new proposed GO 66-D, require the Commission to conduct a careful, case-by-case analysis of the circumstances under which the data was submitted and the basis for asserting confidentiality prior to making any public disclosure of confidential information.[60] To date, the Commission has followed that process with respect to requests for access to TNC data; most recently in its responses to recent Public Records Act requests submitted by local agencies. *See* Exhibit A (stating that "[s]ince the [TNC] reports are confidential, SED may not release them" and "[t]he reports SFMTA sought are privileged and not subject to disclosure under the California Evidence Code."); Exhibit B (relying "on both California law and D.13-09-045, p.33, ft. 42 in determining that the TNC reports are confidential."). There is no justification for deviating from that process with respect to TNC data by making that data subject to disclosure on a website portal or otherwise. Any requests for access to TNC data should be evaluated in accordance with established Commission procedures described above and those being developed in R.14-11-001. The Commission should not short-circuit that process with respect to TNC data by making *ad hoc* disclosure decisions in the context of this proceeding.

III. SPECIFIC QUESTIONS POSED BY THE AMENDED SCOPING MEMO

1. What is the public and/or research value of a website, database, or other publicly accessible means to host data about transportation for hire that is under the Commission's jurisdiction?

Lyft does not support the creation of a website portal for TNC data because, as explained above, the data submitted by TNCs to the Commission is highly confidential and competitively sensitive, and the disclosure of that data would cause substantial harm to Lyft and its users.[61] Furthermore, the data submitted to the Commission, even if "anonymized" or "masked," could

[60] *See* GO 66-C (excluding from "public records" information "which, if revealed, would place the regulated company at an unfair business disadvantage."); D.16-08-024, at p. 19-21; 25 (requiring a particularized evaluation of requests for access to confidential data and affirming that "competitively sensitive documents that fall under the trade secrets privilege" would meet requirements for withholding); Assigned Commissioner's Amended Scoping Memo And Ruling, R.14-11-001, Attachment A (proposed GO 66-D affirming that data submitted under assurance of confidentiality would not be disclosed).

[61] Okpaku Decl., ¶¶4-10.

nevertheless implicate the privacy rights of users or otherwise be subject to misuse.[62] Although the data generated by Lyft and other TNCs may have value to researchers, local governments, or the public, the decision whether to share that data must be left to the TNCs, who are in a much better position to evaluate what data can safely be disclosed and under what conditions; including what confidentiality protections are appropriate to limit further disclosure and protect the privacy rights of users, what security measures must be taken to prevent unauthorized access, and what measures must be taken to return or destroy the data upon completion of the research. It would be inappropriate for the Commission to delegate to itself the authority and responsibility to make such decisions; especially when based only upon a general supposition that such data *may* have value to researchers. All requests for access to confidential TNC data must be evaluated on a case-by-case basis, with due regard for both the confidentiality rights of the parties affected and the wide array of implications of such a disclosure, in accordance with Commission procedures and established law.

2. What has been the effectiveness of third-party hosted websites that provide data about Commission programs?

Lyft is unaware of such websites and expresses no opinion on them.

3. What concerns, if any, are there about the ability of a Commission-sponsored website to protect customer privacy and market sensitive data?

Please see response to Question #1.

4. What characteristics or design specifications are needed to ensure that a Commission sponsored website would be flexible enough to adjust to future legislative action including, but not limited to: new background check standards that are germane to the Commission's jurisdiction over TNCs?

Lyft expresses no view regarding technical specifications for a website.

5. Should the Commission share TNC trip data with interested California governmental entities?

As explained above, the trip data submitted by Lyft to the Commission – which includes the time, date and location of all rides completed on the platform – is among the most highly

[62] *Id.* at ¶10.

sensitive data maintained by Lyft,[63] and plainly constitutes a trade secret. It would be inappropriate for the Commission to delegate to itself the authority to disclose that data to local agencies. Lyft does not contest that it may be appropriate in certain instances ***for a TNC*** to voluntarily share certain kinds of data with local government agencies, and Lyft continues to work with those agencies where appropriate to address areas of mutual concern. However, determinations regarding when and under what circumstances such highly sensitive data should be shared should be made by the TNC, and not the Commission. Lyft is far better situated to determine what data is appropriate to share with local agencies and what steps must be taken to ensure that shared data is not used for an unintended purpose or subject to unauthorized public disclosure; *e.g.*, by way of a stipulation, protective order, nondisclosure agreement, or other means of ensuring confidentiality.

Furthermore, although the Amended Scoping Memo notes that local governments have shown heightened ***interest*** in obtaining access to such data, these agencies – who have no regulatory authority over TNCs -- have failed to articulate any particularized need for the data, or to explain precisely what they would do with it. Indeed, the San Francisco City Attorney's office recently served expansively crafted subpoenas on Lyft and Uber seeking a broad array of data on various topics. Lyft is working with the City Attorney in an attempt to resolve the subpoena, however, to date the City has not offered a justification for its demand for production of a vast array of confidential Lyft data. The Commission previously informed the City Attorney that such data could not be produced in response to Public Records Act requests served upon the Commission.[64] The Commission's determination in response to those requests was undeniably correct and should be affirmed here.

6. What steps should the Commission consider implementing to protect the market sensitivity of trip data?

As explained above, the disclosure of trip data, a closely guarded trade secret, would be inconsistent with well-established law and could potentially implicate the privacy rights of Lyft users, even if the data was subject to some form of "anonymization." Lyft also points out here that even aggregating such data (i.e. combining data from multiple TNCs) would not be effective in

[63] Okpaku Decl., ¶¶5-7.
[64] The Commission's responses to San Francisco's CPRA requests are set forth in letters dated March 15, 2017 and May 12, 2017, and attached as Exhibits A and B hereto.

preventing competitive harm from disclosure of the data. This is because in most markets in California, there are only two primary TNC competitors – Lyft and Uber – each of whom is aware of the data regarding its own operations. Were the Commission to disclose aggregate TNC data, Lyft and Uber could quite easily determine which data belonged to the other. Thus, the disclosure of aggregate data would nevertheless result in the exposure of competitively sensitive trade secret information. As a result, Lyft does not believe that the Commission can mitigate the harm from public disclosure by anonymization, aggregation, or other method of data masking or manipulation.

Dated: July 14, 2017

BRYAN CAVE LLP

By: */S/*
Daniel Rockey
Attorneys for Lyft, Inc.

EXHIBIT A

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

March 15, 2017

Steve Stamos
Clerk of the Authority
San Francisco County Transportation Authority
1455 Market St, 22 Floor
San Francisco, CA 94103

Dear Mr. Stamos,

This letter replies to your March 2, 2017 email to April Mulqueen requesting the basis for the California Public Utilities Commission's (Commission) denial of the San Francisco Municipal Transportation Agency's (SFMTA) request for reports submitted by each Transportation Network Company (TNC) detailing the number of rides requested and accepted/not accepted by TNC drivers within each zip code where the TNC operates.

In Decision (D.) 13-09-045 (copy attached), the Commission required TNCs to provide verified reports to the Commission's Safety and Enforcement Division (SED) detailing the number of rides requested and accepted or not accepted by TNC drivers within each zip code where the TNC operates. (D.13-09-045 p. 31). The decision requires the TNCs to file these reports confidentially unless in Phase II the Commission requires public reporting from Transportation Charter Party (TCP) companies. (D.13-09-045, ft. 42, p. 33). Since the reports are confidential, SED may not release them.

The reports SFMTA sought are privileged and not subject to disclosure under the California Evidence Code. Under Cal. Evid. Code § 1040(b)(2), the Commission may refuse to disclose official information if disclosure is against the public interest because preserving the confidentiality of the information outweighs the necessity for disclosure. Official information is defined as "information acquired in confidence by a public employee in the course of his or her duties and not open, or officially disclosed to the public prior to the time the claim of privilege is made. (Evid. Code § 1040(a)). The reports SFMTA sought was acquired by Commission staff in confidence, in the course of their official duties and not made public prior to SFMTA's request. In requiring that the information be kept confidential, the Commission has determined that preserving confidentiality outweighs disclosure in the interests of justice at least until Phase II of this rulemaking.

Since the reports are subject to the official information privilege, they are exempt from disclosure under Cal. Govt. Code § 6254(k). Section 6254(k) exempts "records, the

disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege."

SFMTA might consider filing a petition to modify D.13-09-045 pursuant to the Commission's Rules of Practice and Procedure, Rule 16.4. A complete copy of the Commission's Rules of Practice and Procedure is available at: http://cpuc.ca.gov/General.aspx?id=1620. SFMTA may also contact the assigned Commissioner, Liane Randolph, to discuss revisiting the confidentiality requirement of ft. 42. Finally, SFMTA may wish to explore its options in filing a petition to adopt, amend, or repeal a Commission regulation pursuant to Pub. Util. Code § 1708.5.

The San Francisco County Transportation Agency (SFCTA) may wish to seek to become a party to this proceeding, R.12-12-011. During a subsequent phase of the proceeding, the Commission may modify its stance on the confidentiality of the requested reports, or SFCTA may be able to request this relief. Information explaining how to become a party to a proceeding is available on the Commission's website at: http://cpuc.ca.gov/Party_to_a_Proceeding/.

I'm attaching a summary of the transportation network companies' annual reports for 2014 and 2015 which may contain relevant information.

Sincerely,

/s/ IRYNA KWASNY

Iryna Kwasny
Staff Counsel
California Public Utilities Commission

EXHIBIT B

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

May 12, 2017

Mr. Joe Castiglione
Deputy Director for Technology, Data and Analysis
San Francisco County Transportation Authority
1455 Market Street, 22nd Floor
San Francisco, CA 94103

Dear Mr. Castiglione:

This letter replies to your April 19, 2017 e-mail requesting the following information.

- The specific rules/code that prohibit sharing of the data. A recent newspaper article reported, "Previously, the CPUC told the San Francisco Examiner that Uber and Lyft "mark the data as confidential under Public Utilities Code section 583" However, in your letter you referenced Cal. Govt. Code § 6254(k).

In responding to the San Francisco Municipal Transportation Agency's requests for data submitted by each Transportation Network Company (TNC), the CPUC relies on the California Public Records Act, Cal. Gov't Code § 6250 et seq. and Commission Decision (D.)13-09-045. In addition, Pub. Util. Code section 5412.5 applies to information furnished to the Commission on a confidential basis and makes unauthorized disclosure of this information punishable as a misdemeanor with a fine and/or imprisonment

Section 6254(k) exempts from disclosure "records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including but not limited to, provisions of the Evidence Code relating to privilege." Evidence Code § 1040(b)(2) authorizes a public entity to withhold official information if disclosure of the information is against the public interest. "Official information" means "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." Evid. Code § 1040(a).

Decision (D.) 13-09-045 requires the TNCs to submit reports detailing the number of rides requested and accepted or not accepted by TNC drivers by zip code. D.13-09-045, p. 33, ft. 42, also requires that these reports be submitted confidentially. It states, "For the requested reporting requirements, TNCs shall file these reports confidentially unless in Phase II of this decision we require public reporting from TCP companies as well." Thus, the reports are official information protected from disclosure by Gov't Code § 6254(k) and Evidence Code § 1040(b)(2).

Finally, Pub. Util. Code § 5412.5 makes disclosure of documents of a charter-party carrier information without commission or court authorization, punishable as a misdemeanor with a fine of not more than one thousand dollars ($1,000) and/or by imprisonment in the county jail.

- Whether the determination of confidentiality is an administrative decision by CPUC.

Commission staff relied on both California law and D.13-09-045, p.33, ft. 42 in determining that the TNC reports are confidential.

- Whether the determination of confidentiality applies to any derivative data products, such as the total number of TNC trips within SF, or only to the "raw" data.

At this time, the Commission does not have derivative data products and thus has not determined whether these products would be confidential.

On April 7, 2017, the Assigned Commissioner issued a Phase III.B. Scoping Memo and Ruling to address issues reserved from Phase II of Rulemaking 12-12-011. Among the issues within the Scoping Memo is whether the Commission should establish a website portal for TNC data. Consideration of this issue is likely to include an analysis of whether data can be submitted and maintained in a manner that would permit public reporting of TNC and TCP data.

Sincerely,

/s/ IRYNA A. KWASNY
Iryna A. Kwasny
Attorney
Legal Division
California Public Utilities Commission