

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission’s Own Motion into Why the Commission Should not Impose Appropriate Fines and Sanctions Against Rasier-CA LLC for Violating the Commission’s Decision 13-09-045, Safety Requirement D by Failing to Comply with The Zero Tolerance Rules and Public Utilities Code 5381.

FILED
PUBLIC UTILITIES COMMISSION
SAN FRANCISCO
APRIL 6, 2017
I.17-04-009

ORDER INSTITUTING INVESTIGATION AND
ORDER TO SHOW CAUSE WHY THE COMMISSION
SHOULD NOT IMPOSE APPROPRIATE FINES
AND SANCTIONS ON RASIER-CA LLC

I. SUMMARY

By this Order, the California Public Utilities Commission (“CPUC” or “Commission”) institutes a formal investigation to determine whether the named Respondent, Rasier-CA LLC, (“Rasier”) repeatedly violated the Commission’s Decision (“D.”) 13-09-045, Safety Requirement D by failing to comply with the Zero Tolerance rules and Pub. Util. Code § 5381.

The alleged violations of D.13-09-045 and Pub. Util. Code § 5381 involve instances where Raiser failed to either suspend promptly and/or investigate drivers after a zero-tolerance complaint had been filed between August 12, 2014 and August 31, 2015. The Consumer Protection and Enforcement Division’s (“CPED”) investigation determined that of the 154 complaints reviewed, Rasier failed to suspend and/or investigate drivers in 151 complaints. This results in a total of 151 violations. CPED recommends assessing \$7,500 per violation pursuant to Pub. Util. Code § 5378(b), or a total penalty of \$1,132,500.

The Respondent, Rasier, is a Transportation Network Company (“TNC”), subject to the Commission’s safety oversight. (Pub. Util. Code §§ 5378, 5381, and 5415 and D.13-09-045).

Responses to the proposed scope, schedule, and need for hearings are due 30 days after the effective date of this Order Instituting Investigation (“OII”). The assigned Administrative Law Judge in this proceeding will set a Prehearing Conference as soon as practicable after receiving responses.

By initiating this OII, the Commission seeks to investigate and address Rasier’s safety culture and Zero Tolerance policies and procedures.

II. BACKGROUND

The Commission began to assert jurisdiction over Rasier’s transportation network company (“TNC”) service in 2011-2012, which lead to Order Instituting Rulemaking (“R.”) 12-12-011 to develop TNC rules. The Commission adopted TNC rules and reporting requirements in September 2013.¹ As part of its oversight authority, staff reviews annual compliance report filings regarding TNC operations, which the Commission requires TNCs to submit to the Safety and Enforcement Division² each September. The most recent compliance filing was due September 19, 2016. The Commission exempted TNCs from certain requirements, applicable to all other charter-party carriers, including mandatory enrollment in a controlled substance and alcohol testing program pursuant to Pub. Util. Code §§ 5374 and 1031.1 et seq. In its place, D.13-09-045, Safety Requirement D requires TNCs to establish a zero-tolerance policy in order to protect the public against intoxicated drivers according to certain provisions:

TNCs shall institute a zero tolerance intoxicating substance policy with respect to drivers as follows:

1. The TNC shall include on its website, mobile application and riders’ receipts, notice/information on the TNC’s zero-tolerance policy and

¹ Decision (“D.”) 13-09-045.

² In June 2016, the Commission relocated the Transportation Enforcement Branch (“TEB”) that was part of the Safety and Enforcement Division to the newly-formed Consumer Protection and Enforcement Division (“CPED”).

the methods to report a driver whom the rider reasonably suspects was under the influence of drugs or alcohol during the course of the ride.

2. The website and mobile application must include a phone number or in-app call function and email address to contact to report the zero-tolerance complaint.
3. Promptly after a zero-tolerance complaint is filed, the TNC shall suspend the driver for further investigation.
4. The website and mobile application must also include the phone number and email address of the Commission's Passenger Section: 1-800-894-9444 and CIU_intake@cpuc.ca.gov.

CPED's investigation and Case Summary focused on Part 3 of Safety

Requirement D.

A. CPED Investigation

D.13-09-045's Safety Requirement D, Part 3 requires a TNC to take two actions: to "Promptly...suspend the driver" and to "further investigat[e]." After review of Rasier's annual reports, including the data regarding zero tolerance complaints, CPED sent follow-up data requests to Rasier. Rasier notified CPED that Rasier's 2015 annual report of zero-tolerance complaints did not include a number of complaints housed by Zendesk, a third-party vendor that provides software to support a portion of Rasier's customer service data. Rasier provided CPED with the missing Zendesk data in December 2015. (See CPED Case Summary, p. 6.)

Rasier reported receiving 2,047 zero-tolerance complaints between August 12, 2014 and August 31, 2015; Rasier deactivated drivers in 574 of those complaints. CPED reviewed 154 complaints, and determined that Rasier failed to promptly suspend drivers in 149 complaints, failed to investigate 133 complaints, and failed to either suspend or investigate 113 complaints.

Of the 154 complaints CPED reviewed, Rasier provided evidence for just 22 instances when it suspended the driver within one hour of when a passenger filed a complaint. Even within those 22 complaints, Rasier's records appear to contradict that Rasier did indeed suspend drivers prior to initiating an investigation. (Id.)

CPED identified one instance when Rasier apparently suspended a driver, but other records indicate that the driver continued to be logged on to the app and available to accept ride requests for another two hours after the suspension. That driver provided one ride during the first hour, and subsequently responded to four ride requests and provided two additional rides.

Also within the 22 suspensions, CPED found two other instances of drivers who similarly appeared to remain available within Rasier's pool of drivers after Rasier suspended them. (See CPED Case Summary, p.8-12.)

CPED also determined that Rasier does not provide a method for a complainant to "flag" or identify the complaint as a driving while under the influence ("DUI") allegation. Rather, Rasier must first review a complaint to determine whether it contains a DUI allegation. If Rasier determines that the complaint should be categorized as a DUI allegation, Rasier must then take action on the driver's account and suspend his/her ability to log onto the app and respond to ride requests. (Id.)

The flaw with that approach, however, is that a driver will not be suspended until Rasier has reviewed and categorized each individual complaint and identified those that involve DUI allegations. This is contrary to Safety Requirement D, Part 3, which requires that a TNC driver be suspended promptly "after a zero-tolerance complaint is filed." This method of handling zero tolerance complaints also creates many opportunities for human error. If Rasier fails to identify a complaint as "zero tolerance," Rasier will likely fail to promptly suspend and investigate the driver, or include the complaint in its annual required submission of zero tolerance complaints. (Id. at 8.)

These examples and others also support a violation of Rule 1.1 of the Commission's Rules of Practice and Procedure, as Rasier's records contradict its statements that Rasier suspends drivers after passengers filed zero tolerance complaints against them.³

³ Rule 1.1 states, in relevant part "Any person who...transacts business with the Commission and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law."

B. CPED's Investigation Demonstrates the Commission Should Penalize Rasier for Violating Rule 1.1 and D.13-09-045, Safety Requirement, Part D.

CPED's investigation identified at least 89 instances where a driver remained logged into the Uber app within one hour after a passenger filed a zero tolerance complaint against him/her. Of those 89 instances, CPED further identified 64 instances where a driver provided one or more rides within one hour after a passenger filed a zero tolerance complaint against him/her.

In many instances, CPED found no evidence that Rasier followed up in any way with zero tolerance complaints several hours or even one full day after passengers filed such complaints. (Id. at 13.) CPED identified just three instances when Rasier both suspended a driver and investigated a zero-tolerance complaint.

Occasionally, Rasier checked back with a passenger to question whether the passenger actually meant to file the zero tolerance complaint. That practice contradicts the Commission's TNC rules which state that a TNC must follow any zero tolerance complaint with a suspension of the driver prior to investigating the complaint. The Commission does not require TNCs to verify the validity of the complaint before suspending the driver.

Failure to suspend a driver promptly after receiving a zero tolerance complaint is a serious violation of the TNC rules because it places passengers and the public at immediate risk. (Id.)

C. Rasier's Deficient Methods to Confirm a Zero Tolerance Complaint and Rasier's Inadequate Treatment of Zero Tolerance Complaints.

In response to a CPED data request, Rasier states that the company considers a zero tolerance allegation confirmed if: 1) the driver provides an admission; 2) an arrest/conviction results from driving under the influence; 3) there is a law enforcement-administered blood alcohol test resulting in a level over the limit or near the time of the incident that led to the complaint; and 4) video or physical evidence demonstrating that the driver was under the influence. (Id. at 13-14.)

All four confirmation options are problematic, and Rasier could only reasonably obtain the first and fourth option. Even so, it is not likely a driver would openly admit to being under the influence, nor reasonable to assume that passengers will consistently be able to capture a driver's incapacitation on videotape.

Rasier's second option to receive an arrest/conviction requires a police officer to be present and pull over the driver. And Option 3, the alcohol blood test, similarly relies on a third party to conduct the test and provide the results to Rasier. Both Options 2 and 3 contradict Rasier's own practices, as Rasier does not attempt to obtain any physical evidence in its zero tolerance investigations. (See Id. at 14.)

In the majority of instances, Rasier does not attempt to contact a driver following a zero-tolerance complaint. CPED found that of the 154 complaints CPED reviewed, Rasier only attempted to contact a driver in 50 such instances. Of those 50 attempts to contact the driver, CPED identified only 21 instances where Rasier conducted any sort of driver investigation, which contravenes what the Commission requires: suspension and investigation of the zero tolerance complaints. CPED's in-depth example on "Joshua," demonstrates Rasier's method to handle zero tolerance complaints.

D. Rasier's Zero Tolerance Policy Violates Requirement D, Part 3.

Rasier's stated policy is to deactivate a driver after receiving three unconfirmed zero tolerance complaints, which violates Safety Requirement D, Part 3. To confirm Rasier's implementation of its own stated policy, CPED analyzed selected complaints against drivers who received three or more complaints. In at least 25 instances, Rasier failed to suspend or investigate a driver after three or more complaints. (See Id. At 2-6.)

III. ORDER TO SHOW CAUSE AND PENALTIES

CPED's Investigation into Rasier's Zero Tolerance compliance filing establishes sufficient grounds for this Investigation and Order to Show Cause Why the Commission Should Not Impose Appropriate Fines and Sanctions ("OSC") for violations of D.13-09-045 and Public Utilities Code Section 5381. This OII and OSC places Rasier

on notice and provides an opportunity for Rasier to be heard on the issues of whether it violated: 1) D.13-09-045, 2) Pub. Util. Code § 5381, 3) Rule 1.1 of the Commission's Rules of Practice and Procedures, and 4) Rasier's own Zero Tolerance procedures

The OII is the proper forum for Rasier to be heard and submit evidence, information, or documents on its behalf.

Pursuant to Pub. Util. Code § 5378(b), the Commission may impose penalties up to \$7,500 in lieu of suspension or revocation per day per offense for on-going violations of the Public Utilities Code, and may consider other remedies under Pub. Util. Code § 701.

IV. PRELIMINARY SCOPING MEMO

The scope of the issues to be determined in the proceeding shall be whether Rasier failed to comply with the Zero Tolerance Rules included in D.13-09-045's Safety Requirement D, whether to impose penalties for such violations, whether Rasier violated Rule 1.1 of the Commission's Rules of Practice and Procedure, and whether Rasier should be penalized for such violations.

Within 10 days of the mailing date of this order, Respondent shall file and serve a response to this OII and OSC. If more time is needed, Respondent shall meet and confer with CPED staff prior to requesting an extension from the Administrative Law Judge ("ALJ").

If a hearing is requested by Respondent or other party, the assigned ALJ will determine if hearings are necessary, and, if necessary, will set a schedule for hearings and/or briefs. The Assigned Commissioner will issue a scoping memo setting forth the scope of the proceeding and establish a procedural schedule.

V. PROCEEDING CATEGORY AND NEED FOR HEARING

Rule 7.1 (c) of the Commission's Rules specifies that an "order instituting investigation shall determine the category of the proceeding [and] preliminarily determine the need for hearing." CPED has determined, and we concur, that this proceeding is adjudicatory as defined in Rule 1.3 (a), and that evidentiary hearings may

be necessary. The categorization is appealable under Rule 7.6 of the Commission's Rules of Practice and Procedure.

VI. EX PARTE COMMUNICATIONS PROHIBITED

Article 8 of the Commission's Rules of Practice and Procedure applies to all communications with decision makers and advisors regarding the issues in this proceeding. This proceeding is categorized as adjudicatory and Rule 8.3 (b) prohibits all *ex parte* communications.

IT IS ORDERED that:

1. An Investigation is opened on the Commission's own motion for the purposes of investigating whether the respondent, Rasier, failed to comply with the Zero Tolerance Rules included in D.13-09-045's Safety Requirement D and whether the Commission should determine if Rasier violated Rule 1.1 of the Commission's Rules of Practice and Procedure.

2. The assigned Administrative Law Judge will set a hearing if needed. Rasier and any other interested party may show cause why the Commission should not impose a fine or penalty under Public Utilities Code §§ 5378, 5381, and 5415.

3. A confidential version of CPED's Case Summary is available to the Commissioners and their advisors upon request. CPED will work with Rasier to redact confidential information and file a public version of this report in this proceeding no later than 14 days after this OII is issued.

4. Transportation Enforcement staff, Rasier and any other interested party may present evidence and/or arguments at the hearing on the Order to Show Cause.

5. This proceeding shall be categorized as an adjudicatory proceeding pursuant to Rules 7.1 (d) of the Commission's Rules of Practice and Procedure.

6. All *ex parte* contacts are *prohibited* pursuant to Rules 8.3 (b).

7. The Executive Director shall cause a copy of this order and the Confidential Consumer Protection and Enforcement Division's Case Summary dated October 26, 2016 (Attachment A), to be served upon the Respondent by certified mail.

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This order is effective today.

Dated April 6, 2017, at Santa Rosa, California.

MICHAEL PICKER
President
CARLA J. PETERMAN
LIANE M. RANDOLPH
MARTHA GUZMAN ACEVES
CLIFFORD RECHTSCHAFFEN
Commissioners