

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

FILED
10/08/18
02:59 PM

October 8, 2018

**Agenda ID #16921
Adjudicatory**

TO PARTIES OF RECORD IN INVESTIGATION 17-04-009:

This is the proposed decision of Administrative Law Judge Robert M. Mason III. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's November 8, 2018 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

/s/ ANNE E. SIMON

Anne E. Simon
Chief Administrative Law Judge

AES:avs
Attachment

Decision PROPOSED DECISION OF ALJ MASON (Mailed 10/8/2018)

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.

Investigation 17-04-009

DECISION ADOPTING THE SETTLEMENT AGREEMENT, AS AMENDED, BETWEEN RASIER-CA, LLC AND THE CONSUMER PROTECTION AND ENFORCEMENT DIVISION REGARDING ZERO TOLERANCE RULES IN SAFETY REQUIREMENT D OF DECISION 13-09-045

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ATTACHMENT A - The Settlement Agreement

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**DECISION ADOPTING THE SETTLEMENT AGREEMENT, AS AMENDED,
BETWEEN RASIER-CA, LLC AND THE CONSUMER PROTECTION AND
ENFORCEMENT DIVISION REGARDING ZERO TOLERANCE RULES IN
SAFETY REQUIREMENT D OF DECISION 13-09-045**

Summary

This decision adopts the Settlement Agreement, as amended, between Rasier-CA, LLC (Rasier-CA) and the Consumer Protection and Enforcement Division (sometimes collectively referred to as the Parties), thus resolving the dispute as to whether Raiser-CA failed to comply with the zero tolerance rules in Safety Requirement D of Decision 13-09-045.

1. Background

1.1. Decision 13-09-045's Zero Tolerance Rules

The Commission began to assert jurisdiction over Rasier-CA, LLC (Rasier-CA) transportation network company (TNC) service in 2011-2012, which led to Rulemaking (R.) 12-12-011 to develop TNC rules. With the adoption of Decision (D.)13-09-045, the Commission established TNC regulations, rules, and reporting requirements. As part of its oversight authority, Commission staff reviews annual compliance report filings regarding TNC operations, which the Commission requires TNCs to submit each September. 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 according to certain provisions in order to protect the public against intoxicated drivers.

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 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.¹

1.2. Consumer Protection and Enforcement Division's Investigation

Following Rasier-CA's submission of its annual reports, the Commission's Consumer Protection and Enforcement Division (CPED) began its investigation to determine their compliance with D.13-09-045. After review of Rasier-CA's annual reports, including the data regarding zero tolerance complaints, CPED sent follow-up data requests. Rasier-CA notified CPED that Rasier-CA'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-CA's customer service data. Rasier-CA provided CPED with the missing Zendesk data in December 2015.

¹ D.13-09-045 at 23.

Rasier-CA reported receiving 2,047 zero-tolerance complaints between August 12, 2014 and August 31, 2015; Rasier-CA deactivated drivers in 574 of those complaints. CPED reviewed 154 complaints, and determined that Rasier-CA 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-CA 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-CA's records appear to contradict that Rasier-CA did indeed suspend drivers prior to initiating an investigation.

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-CA's pool of drivers after Rasier-CA suspended them. (*See* CPED Case Summary at 8-12.)

CPED also determined that Raiser 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-CA must first review a complaint to determine whether it contains a DUI allegation. If Rasier-CA determines that the complaint should be categorized as a DUI allegation, Rasier-CA 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.*)

In CPED's estimation, Rasier-CA's suspension policy violates 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-CA fails to identify a complaint as "zero tolerance," Rasier-CA will likely fail to promptly suspend and investigate the driver, or include the complaint in its annual required submission of zero tolerance complaints. Per CPED, these examples and others also support a violation of Rule 1.1 of the Commission's Rules of Practice and Procedure, as Rasier-CA's records contradict its statements that Rasier-CA suspends drivers after passengers filed zero tolerance complaints against them.

As a result of these claimed violations, CPED recommends assessing \$7,500 per violation pursuant to Pub. Util. Code § 5378(b), or a total penalty of \$1,132,500 (151 instances where Rasier-CA failed to suspend and/or investigate drivers after receiving a zero tolerance complaint times \$7,500).

2. Procedural Facts

2.1. The Instant Oil

As a result of CPED's investigation and findings, on April 6, 2017, the Commission opened this proceeding to determine whether Rasier-CA violated the zero tolerance rules in Safety Requirement D of D.13-09-045, Pub. Util. Code § 5381,² and Rule 1.1³ of the Commission's Rules of Practice. As a result of these

² "To the extent that such is not inconsistent with the provisions of this chapter, the commission may supervise and regulate every charter-party carrier of passengers in the State and may do all things, whether specifically designed in this part, or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

³ "Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission, by such act represents that he or she is

Footnote continued on next page

claimed violations, this proceeding stated it would decide whether to adopt CPED recommended penalty assessment of \$7,500 per violation pursuant to Pub. Util. Code § 5378(b),⁴ for a total penalty of \$1,132,500.

2.2. Rasier-CA's Response

On May 11, 2017, Rasier-CA served and filed its Response. Rasier-CA asserts that sanctions are not appropriate for four reasons: first, since for the period at issue –August 12, 2014 to August 31, 2016 – Rasier-CA has worked to address issues upon their discovery, such as conducting a review of zero tolerance complaints, fixing technology issues, and implementing positive changes to its zero tolerance practices and procedures; second, Rasier-CA has made a good faith effort to comply with D.13-09-045's zero tolerance requirements; third, Rasier-CA has self-reported inadvertent errors and deficiencies in the zero tolerance data that it previously reported to the Commission; and fourth, Rasier-CA has expressed willingness to work with the CPED to resolve any outstanding issues.

2.3. The Prehearing Conference

On June 30, 2017, the Parties appeared for the prehearing conference presided over by the assigned Administrative Law Judge (ALJ).

A Scoping Memo and Ruling was issued in April 9, 2017.

authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, member 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."

⁴ "The commission may levy a civil penalty of up to seven thousand five hundred dollars (\$7,500) upon the holder of an operating permit or certificate issued pursuant to this chapter, for any of the grounds specified in subdivision (a), as an alternative to canceling, revoking, or suspending the permit or certificate."

3. The Settlement Discussions and Resolution

Both before and after the Assigned Commissioner issued her August 9, 2017 Scoping Memo and Ruling, the Parties have worked to address the issues raised in this proceeding, including those issues raised in the Scoping Ruling. In addition, on September 1, and September 20, 2017, the Parties participated in two mediation sessions. These negotiations have resulted in the Settlement Agreement that the Parties now ask that this Commission adopt. The Settlement Agreement:

- Resolves the amount of the penalty that Rasier-CA agrees to pay (\$750,000);
- Requires Rasier-CA to implement interim zero tolerance complaints (ZTC) education and investigation protocols; and
- Requires Rasier-CA to file a motion to expand the scope of R.12-12-011 to include an opportunity for the Commission to develop industry-wide standards for the investigation requirement in Safety Requirement D.

On October 13, 2017, the Parties filed and served a *Joint Motion for Adoption of a Settlement Agreement*, with the Settlement Agreement attached thereto as Exhibit A.

On September 7, 2018, the Parties served a *Joint Motion of Rasier-CA, LLC and the Consumer Protection and Enforcement Division to Amend a Provision in Proposed Settlement Agreement filed on October 13, 2017*. Parties claim that in the months since the Settlement Agreement was filed, the Uber app has been updated to include an emergency button that gives riders an option to connect directly to 911 in the event of an emergency. As a result of this development, the Parties ask that “Part A of Proposal, Part 1” of the Settlement Agreement be revised as follows:

Part A of Proposal: Rasier-CA will take steps to increase rider awareness that safety incidents should be directed to law enforcement by:

Part 1: Adding an in-app feature allowing riders to contact 911 directly in the event of an emergency or need for immediate assistance.⁵

Beyond this one change, the Settlement Agreement remains the same.

4. Discussion: The Standards for Approval of a Settlement

4.1. The Rule 12.1 Standard

The standard of review for settlement agreements is set forth in our Rules of Practice and Procedure, Rule 12.1(d), which states as follows: “The Commission will not approve settlements, whether contested or uncontested, unless the settlement is (1) reasonable in light of the whole record, (2) consistent with law, and (3) in the public interest.” The proponents of a settlement have the burden of demonstrating that the settlement satisfies Rule 12.1(d).

4.2. The Standard if All Parties Support the Settlement

In addition, if the moving parties assert that a settlement is supported by all parties, then the Commission must confirm:

- That the settlement commends the unanimous sponsorship of all active parties to the proceeding;
- That the sponsoring parties are fairly reflective of the affected interests; and
- That no term of the settlement contravenes statutory provisions or prior Commission decisions; and

⁵ Appendix A to September 7, 2018 *Joint Motion*.

- That the settlement conveys to the Commission sufficient information to permit us to discharge our future regulatory obligations with respect to the parties and their interests.⁶

The Commission favors the settlement of disputes.⁷ This policy supports many goals, including reducing the expense of litigation, conserving scarce Commission resources, and allowing parties to reduce the risk that litigation will produce unacceptable results.⁸ The policy favoring settlements weighs against the Commission's alteration of uncontested settlements such as the one before us here.⁹ (*Id.*) As long as a settlement is reasonable in light of the whole record, consistent with the law, and in the public interest, it should normally be adopted without alteration.¹⁰

4.3. The Standard if the Settlement Includes a Penalty or Fine

⁶ Decision 92-12-019; 46 CPUC 2d 538, 552; and Decision 90-08-068 at 37.

⁷ Decision 07-05-060 at 6.

⁸ *Id.* Slip Op. at 6.

⁹ *Id.*

¹⁰ Decision 06-06-014 at 12.

Finally, the Commission must analyze the settlement amount. As noted above, part of the Settlement Agreement requires Rasier-CA to pay a penalty of \$750,000. To determine the reasonableness of that settlement amount, it will be helpful to examine the Commission's general criteria for establishing the amount of a fine that we set forth in D.98-12-075 (84 CPUC2d 155, 188-90):

4.3.1. The Severity of the Offense

A fine amount should be proportionate to the severity of the offense. To determine the severity of the offense, the Commission considers the following factors:

- Physical harm: The most severe violations are those that cause physical harm to people or property, with violations that threatened such harm closely following.
- Economic harm: The severity of a violation increases with (i) the level of costs imposed upon the victims of the violation, and (ii) the unlawful benefits gained by the public utility. Generally, the greater of these two amounts will be used in setting the fine. The fact that economic harm may be hard to quantify does not diminish the severity of the offense or the need for sanctions.
- Harm to the regulatory process: A high level of severity will be accorded to violations of statutory or Commission directives, including violations of reporting or compliance requirements.
- The number and scope of the violations: A single violation is less severe than multiple offenses. A widespread violation that affects a large number of consumers is a more severe offense than one that is limited in scope.¹¹

¹¹ 1998 Cal. PUC LEXIS 1016 at 71-73.

4.3.2. Conduct of the Utility

The size of a fine should reflect the conduct of the utility. As such, the Commission considers the following factors:

- The utility's actions to prevent a violation: Utilities are expected to take reasonable steps to comply with applicable laws and regulations. A utility's past record of compliance may be considered in assessing a penalty.
- The utility's actions to detect a violation: Utilities are expected to diligently monitor their activities. Deliberate, as opposed to inadvertent wrongdoing, is an aggravating factor. The level and extent of management's involvement in, or tolerance of, the offense will be considered in determining the amount of any penalty.
- The utility's actions to disclose and rectify a violation: Utilities are expected to promptly bring a violation to the Commission's attention. What constitutes "prompt" will depend on circumstances. Steps taken by a utility to promptly and cooperatively report and correct violations may be considered in assessing any penalty.¹²

4.3.3. Financial Resources of the Utility

The size of a fine should reflect the financial resources of the utility. When assessing the financial resources of the utility, the Commission considers the following factors:

- Need for deterrence: Fines should be set at a level that deters future violations. Effective deterrence requires that the Commission recognize the financial resources of the utility in setting a fine.
- Constitutional limitations on excessive fines: The Commission will adjust the size of fines to achieve the

¹² *Id.*, at 73-75.

objective of deterrence, without becoming excessive, based on each utility's financial resources.¹³

4.3.4. Totality of the Circumstances

The fine should be tailored to the unique facts of each case. When assessing the unique facts of each case, the Commission considers the following factors:

- The degree of wrongdoing: The Commission will review facts that tend to mitigate the degree of wrongdoing as well as facts that exacerbate the wrongdoing.
- The public interest: In all cases, the harm will be evaluated from the perspective of the public interest.¹⁴

4.3.5. The Role of Precedent in Setting the Fine or Penalty

Any decision that imposes a fine or penalty should address previous decisions that involve reasonably comparable factual circumstances, and explain any substantial differences in outcomes.¹⁵

5. Application of the Settlement Approval Standards to the Facts

5.1. The Settlement Agreement, as Amended, is Reasonable in Light of the Whole Record

¹³ *Id.*, at 75-76.

¹⁴ *Id.*, at 76.

¹⁵ *Id.*, at 77.

A proposed settlement is reasonable, *inter alia*, if it saves the Commission significant expenses and use of its resources, when compared to the risk, expense, complexity, and likely duration of further proceedings, while still protecting the public interest.¹⁶ Generally, the parties' evaluation should carry material weight in the Commission's review of a settlement.¹⁷

The Parties' evaluation of the issues leading up to the settlement took into account the issues raised in this proceeding, which includes CPED's confidential case summary. The Parties also took into account that D.13-09-045 did not specify minimum standards for the investigation requirement in Safety Requirement D. 3. Furthermore, the Parties acknowledged Rasier-CA's contention that, based on its experience, ZTCs usually involve one person's word over another, and Rasier-CA may not be able to determine the intoxication or sobriety of the driver. In addition, the Parties discussed potential best practices to identify and investigate ZTCs since TNCs are not and cannot hold themselves out to be a branch of law enforcement.

¹⁶ *In re Southern California Gas Co.* (1999) D.00-09-034, 2000 Cal. PUC LEXIS 694, at *29.

¹⁷ *Id.*, at *31.

In light of the record, the Commission finds that the Settlement Agreement, as amended, is reasonable. Given that the various considerations identified in the preceding paragraph might have led to a risky, expensive, and complex evidentiary hearing, and that the Parties expressed a mutually sincere effort to adopt appropriate and effective processes to investigate and suspend suspected drivers, we find it better on the whole to find that this Settlement Agreement, as amended, to be reasonable as it both resolves the current dispute and forges a reasonable pathway forward for Rasier-CA to comply with Safety Requirement D in the future.

**5.2. The Settlement Agreement, as Amended,
is Consistent with the Law**

The Parties assert, and the Commission agrees, that there is no known statutory provision or prior Commission decision that would be contravened by adopting the Settlement Agreement, as amended. D.13-09-045 was the first decision in the United States to adopt regulations and rules applicable to the TNC industry, so there is no prior legal precedent to compare how the Settlement Agreement, as amended, resolves this Safety Requirement D dispute. Yet, the Commission has approved and adopted settlement agreements where, as here, the alleged violation at issue presents a matter of first impression, and the adversaries have been cooperative in the settlement negotiation process.¹⁸

¹⁸ See Decision 15-07-012 (Decision approved the settlement agreement between the Commission's Safety and Enforcement Division and Lyft, Inc. (Lyft) regarding Lyft's compliance with D.13-09-045's reporting requirements)

Additionally, and under similar circumstances, the Commission has adopted settlement agreements in other situations where the settlement resolves the issues raised in the scope of an OSC in an expeditious manner.¹⁹

Finally, the Settlement Agreement, as amended, is consistent with other proceedings where a TCP has been charged with violations of Pub. Util. Code § 5381, among other statutes.²⁰

In sum, the Commission finds that there is sufficient analogous law to conclude that the Settlement Agreement, as amended, is consistent with Commission law.

5.3. The Settlement Agreement, as Amended, is in the Public Interest

The Commission is of the opinion that the Settlement Agreement, as amended, is in the public interest. The Settlement Agreement, as amended, requires Rasier-CA to implement ZTC protocols that have been agreed upon with Commission staff that are intended to improve Rasier-CA's ZTC suspension and investigation procedures. Approving the Settlement Agreement, as

¹⁹ See Decision 94-11-018 (1994 Cal PUC LEXIS 1090 at *153 (Decision approved and adopted the proposed settlement agreement that "address[ed] the issues raised in the OSC of the Echo Summit site, and also resolve[d] potential issues concerning" other sites); and D.07-03-048 at 4. (Decision approving and adopting proposed settlement agreement that resolved issues raised in an investigation "quickly and fairly".)

²⁰ See D.06-04-039 (Wine & Roses Limousine was charged with operating without proper workers' compensation insurance coverage in violation of Pub. Util. Code § 5378.1, among other violations. A fine of \$5,000 per violation was stayed, in part, to provide a greater incentive for compliance and cooperation.); D.04-12-037 (The Ultimate Limousine failed to enroll drivers in the California Department of Motor Vehicles (DMV) Pull Notice Program in violation of Pub. Util. Code § 5381, among other violations. Settlement in the amount of \$20,000 was reached, payable in installments. The Commission took into account the size of the business and the need for deterrence in setting the amount.); and D.03-10-079 (Tour Designs failed to enroll drivers in the DMV Pull Notice Program and was fined \$10,200 plus the cost of the investigation into the offenses.)

amended, also provides a pathway for making these process improvements more quickly than if Rasier-Ca and CPED were to engage in potentially protracted litigation and appeals. Thus, the public benefits from Rasier-CA's ability to implement the Settlement Agreement, as amended.

5.4. The Settlement Agreement, as Amended, Commands the Unanimous Support of the Parties

Rasier-CA and CPED are the only two parties to this proceeding and are both signatories to this Settlement Agreement.²¹ The Parties assent that the Settlement Agreement, as amended, has their unanimous support.²²

5.5. The Sponsoring Parties are Fairly Reflective of the Affected Interests

While both Rasier-CA and CPED share the "common goal to promote and improve public, passenger, and driver awareness of zero tolerance rules,"²³ they have approached this issue from two different perspectives. First, there are the interests of the TNC riding public who are relying on TNC drivers like the ones provided by Rasier-CA to provide passengers with a safe transportation experience. CPED represents these interests by serving as the first line of defense for California utility customers. CPED collects and resolves consumer complaints, and through its separate branch known as Transportation Enforcement Bureau, establishes and enforces rules and regulations for transportation carriers, including TNCs such as Rasier-CA.

At the other end of the interest spectrum are the TNCs. The Commission has permitted TNCs to operate in California provided that they comply with the

²¹ *Joint Motion* at 1. Settlement Agreement at 1.

²² *Id.*

²³ Settlement Agreement at 1, RECITALS, ¶ G.

regulatory and reporting requirements, such as Safety Requirement D, set forth in D.13-09-045. Rasier-CA is the TNC with the widest market share of TNC operations in California so its interests in this settlement are representative of the interests shared by other licensed TNC businesses. With compliance with D.13-09-045 comes the opportunity for TNCs to provide transportation services safely and to generate sufficient revenues to make their operations viable.

Thus, both CPED and Rasier-CA represent the two affected interests that are covered by this Settlement Agreement, as amended.

5.6. The Settlement Agreement, as Amended, does not Contravene Statutory Provisions or Prior Commission Decisions

As noted above in Section 5.2 of this decision, that there is no known statutory provision or prior Commission decision that would be contravened by adopting the Settlement Agreement, as amended.

5.7. The Settlement Agreement, as Amended, Conveys Sufficient Information to Permit the Commission to Discharge its Regulatory Function

As part of the Settlement Agreement, as amended, the Parties have adopted interim investigation protocols for ZTCs that will apply to Rasier-CA unless and until the Commission adopts new zero tolerance rules as part of its current or a future rulemaking.²⁴ These protocols are broken into two parts: first Rasier-CA will take steps to increase rider awareness that zero tolerance incidents should be directed to law enforcement.²⁵ Second, Rasier-CA will revise

²⁴ Settlement Agreement, Appendix A.

²⁵ *Id.*, Parts A and B.

its investigation protocol to include specific components for each investigation.²⁶ If necessary, Rasier-CA will make adjustments to its protocol to improve its effectiveness in a manner compliant with paragraph 4 and 4(a) of the Settlement Agreement.²⁷ These terms are spelled out clearly and CPED will be able to determine if Rasier-CA is in compliance. If Rasier-CA is not in compliance, CPED can report the noncompliance to the Commission and we can take the necessary enforcement action.

Furthermore, the Settlement Agreement, as amended, provides that Rasier-CA agrees to ask the Commission to consider developing zero tolerance suspension and investigation protocols under Safety Requirement D that would apply to all TNCs.²⁸ The Parties agree that such a request will be useful since Safety Requirement D.3 does not elaborate on the terms “promptly” and “further investigation.” When, Raiser-CA brings such a motion, the Commission will be in a position to discharge its regulatory function by determining what revision will be needed to improve a TNC’s understanding of the obligations it must undertake to be in compliance with Safety Requirement D.

Thus, the Settlement Agreement, as amended, conveys sufficient information to permit the Commission to discharge its regulatory function.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Settlement Agreement at 2, ¶ 3 (Industry-Wide Rulemaking).

5.8 The Settlement Agreement's Penalty Payment is Consistent with Commission Standards for Determining the Amount of a Penalty

5.8.1. Severity of the Offense

The Commission must examine if the violations resulted in physical, economic, or regulatory harm. We must also consider the number and scope of the violations in determining if the penalty amount is commensurate with the offense. According to CPED's findings, Rasier-CA committed 151 violations of Safety Requirement D. If the Commission were to accept that finding, Rasier-CA would face a maximum exposure of \$1,132,500 (151 times \$7,500).

While multiple offenses is something that the Commission takes into account in determining the severity of the offense and the corresponding financial penalty amount, the Commission does not always have to impose the maximum penalty. Pub. Util. Code § 5378(b) states that the Commission can impose a penalty up to \$7,500, meaning we do have the discretion to impose a lesser amount depending on the circumstances.

Those mitigating circumstances are present. Since the Parties have worked diligently to reach this Settlement Agreement, as amended, Rasier-CA should receive some benefit for working cooperatively with CPED staff rather than forcing CPED to expend monies litigating the allegations in what could have turned into a protracted proceeding and caused further harm to the regulatory process. A settlement of \$750,000 represents a penalty of approximately \$4,966.88 per offense if we accept that there were 151 violations of Safety Requirement D, a per offense compromise amount that falls within the scope of Pub. Util. Code § 5378(b) and warranted given the factual circumstances leading up to the Settlement Agreement, as amended.

5.8.2. Conduct of the Utility

The Commission must take into account Rasier-CA's conduct to prevent a violation, the actions it took to detect a violation, as well as its actions to disclose and rectify a violation. Once CPED brought the problem of noncompliance with Safety Requirement D to Rasier-CA's attention, Rasier-CA took steps to improve its ZTC process. Rasier-CA provided confidential business information to CPED, and held several in-person and telephonic conferences.²⁹ Rasier-CA brought to the in-person meetings internal decision makers and staffers who handle the ZTC processing on Rasier-CA's behalf.³⁰ Through these meetings, Rasier-CA demonstrated to CPED how it had addressed many of the issues raised in this proceeding on a going-forward basis.³¹

Given Rasier-CA's cooperative attitude and documented efforts to improve compliance with Safety Requirement D, we believe that a penalty amount less than the \$7,500 maximum per offense is appropriate.

5.8.3. Financial Resources of the Utility

In assessing a penalty, the Commission is mindful that the level should be set at an amount that deters future violations, but is not so large as to run afoul of the federal constitutional prohibitions against excessive fines. The Commission has determined that a penalty of \$750,000 is sufficiently large to deter future violations of Safety Requirement D. The fact that Rasier-CA has agreed to this sum and has agreed to make corrective steps in the future indicates to the

²⁹ Settlement Agreement at 1, RECITALS, ¶¶ E and F.

³⁰ *Id.*

³¹ *Id.*

Commission that a payment of \$750,000 will have the necessary deterrent effect against future violations of Safety Requirement D.

Moreover, the penalty is not so large as to cause Rasier-CA financial hardship. Based on our review of Rasier-CA's fee payments required by Pub. Util. Code § 421 (the Public Utilities Commission Transportation Reimbursement Account [PUCTRA]), Rasier-CA has sufficient gross revenues to pay \$750,000 without devastating its ability to provide TNC services in California.³²

5.8.4. Totality of the Circumstances

The Commission must consider Rasier-CA's conduct in relation to the wrongdoing (*i.e.* did Rasier-CA mitigate or exacerbate the wrongdoing) and the impact of the wrongdoing on the public interest. Here, once the problem of Rasier-CA's alleged failure to comply with Safety Requirement D in 151 instances came to light, Rasier-CA worked cooperatively with CPED to take steps to rectify the problem and to develop a go-forward path to ensure compliance.³³ In addition, Rasier-CA and CPED's shared common goal to improve public, passenger, and driver awareness of zero tolerances rules will have a positive impact on the public interest.³⁴

In sum, the totality of circumstances weighs in favor of the Commission's adoption of the penalty amount.

³² For example, in Decision 16-01-014, the Commission found that Rasier-CA reported revenues in excess of \$140 million. (Finding of Fact # 36.) A more recent review of Rasier-CA's PUCTRA Revenue Detail shows cumulative revenues through the second quarter of 2018 well in excess of the agreed-upon penalty amount.

³³ See Settlement Agreement at 1, RECITALS, ¶¶ E. and F.; ¶ 4; and Appendix A.

³⁴ *Id.*, RECITALS, ¶ G.

5.8.5. The Role of Precedent in Setting the Fine or Penalty

Previously, at Section 5.2 of this decision, the Commission reviewed precedent involving penalties and settlements regarding other transportation providers. We do believe that a larger penalty is appropriate here given the number of claimed violations of Safety Requirement D, the need for deterrence, and the robustness of Rasier-CA's transportation revenues.

6. Categorization and Need for Hearing

The *Scoping Memo and Ruling* dated August 9, 2017, confirmed the preliminary categorization of this proceeding as adjudicatory.

The *Scoping Memo and Ruling* confirmed that evidentiary hearings may be necessary if the parties were unsuccessful in their settlement efforts. As the Parties have reached a settlement, evidentiary hearings are not needed.

7. Comments on Proposed Decision

The proposed decision of Administrative Law Judge Robert M. Mason III in this matter was mailed to the parties in accordance with Pub. Util. Code § 311, and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on _____, 2018, by the following parties _____.

8. Assignment of Proceeding

Liane Randolph is the assigned Commissioner and Robert M. Mason III is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The Commission began to assert jurisdiction over Rasier-CA's TNC service in 2011-2012, which led to R.12-12-011 to develop TNC rules.
2. With the adoption of D.13-09-045, the Commission established TNC regulations, rules, and reporting requirements. As part of its oversight authority,

Commission staff reviews annual compliance report filings regarding TNC operations, which the Commission requires TNCs to submit each September.

3. 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.

4. Following Rasier-CA's submission of its annual reports, the Commission's CPED began its investigation to determine their compliance with D.13-09-045. After review of Rasier-CA's annual reports, including the data regarding zero tolerance complaints, CPED sent follow-up data requests. Rasier-CA notified CPED that Rasier-CA'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-CA's customer service data. Rasier-CA provided CPED with the missing Zendesk data in December 2015.

5. Rasier-CA reported receiving 2,047 zero-tolerance complaints between August 12, 2014 and August 31, 2015; Rasier-CA deactivated drivers in 574 of those complaints.

6. CPED reviewed 154 complaints, and determined that Rasier-CA failed to promptly suspend drivers in 149 complaints, failed to investigate 133 complaints, and failed to either suspend or investigate 113 complaints.

7. Of the 154 complaints CPED reviewed, Rasier-CA provided evidence for just 22 instances when it suspended the driver within one hour of when a passenger filed a complaint.

8. As a result of these claimed violations, CPED recommends assessing \$7,500 per violation pursuant to Pub. Util. Code § 5378(b), or a total penalty of \$1,132,500 (151 instances where Rasier-CA failed to suspend and/or investigate drivers after receiving a zero tolerance complaint times \$7,500).

9. On April 6, 2017, the Commission opened this proceeding to determine whether Rasier-CA violated the zero tolerance rules in Safety Requirement D of D.13-09-045.

10. On May 11, 2017, Rasier-CA served and filed its Response. Rasier-CA asserts that sanctions are not appropriate for four reasons: first, since for the period at issue –August 12, 2014 to August 31, 2016– Rasier-CA has worked to address issues upon their discovery, such as conducting a review of zero tolerance complaints, fixing technology issues, and implementing positive changes to its zero tolerance practices and procedures; second, Rasier-CA has made a good faith effort to comply with D.13-09-045’s zero tolerance requirements; third, Rasier-CA has self-reported inadvertent errors and deficiencies in the zero tolerance data that it previously reported to the Commission; and fourth, Rasier-CA has expressed willingness to work with the CPED to resolve any outstanding issues.

11. The Parties have work to address the issues raised in this proceeding, including those issues raised in the Scoping Ruling, in an effort to resolve this proceeding.

12. In addition, on September 1, and September 20, 2017, the Parties participated in two mediation sessions. These negotiations have resulted in the Settlement Agreement that the Parties now ask that this Commission adopt. The Settlement Agreement:

- Resolves the amount of the penalty that Rasier-CA agrees to pay (\$750,000);
- Requires Rasier-CA to implement interim zero tolerance complaints (ZTC) education and investigation protocols; and
- Requires Rasier-CA to file a motion to expand the scope of R.12-12-011 to include an opportunity for the Commission to develop industry-wide standards for the investigation requirement in Safety Requirement D.

On October 13, 2017, the Parties filed a *Joint Motion for Adoption of a Settlement Agreement*, with the Settlement Agreement attached thereto as Exhibit A.

On September 7, 2018, the Parties served their *Joint Motion of Rasier-CA, LLC and the Consumer Protection and Enforcement Division to Amend a Provision in Proposed Settlement Agreement filed on October 13, 2017*.

Conclusions of Law

1. All issues in this proceeding against Rasier-CA are encompassed by, and resolved in the Settlement Agreement, as amended.
2. The parties to the Settlement Agreement, as amended, are all of the active parties in this proceeding.
3. The parties are fairly reflective of the affected interests.
4. No term of the Settlement Agreement, as amended, contravenes statutory provision or prior Commission decisions.
5. The Settlement Agreement, as amended, is reasonable in light of the record, is consistent with law, and is in the public interest.
6. The penalty payment of \$750,000 should be approved as it satisfies the criteria for the imposition of penalties or fines set forth in D.98-12-075.

O R D E R

IT IS ORDERED that:

1. The Settlement Agreement, as amended, between the Consumer Protection and Enforcement Division and Rasier-CA, LLC, attached hereto as Attachments A, the Settlement Agreement and B the Amendment to the Settlement Agreement, are approved.

2. Rasier-CA, LLC shall make a payment of \$750,000, payable to the California Public Utilities Commission (Commission), and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102, within 10 days of the effective date of this decision. Rasier-CA shall write on the fact of the check or money order "For deposit to the General Fund pursuant to Decision _____."

3. Rasier-CA, LLC shall file a motion to expand the scope of Rulemaking 12-12-011 to include zero tolerance complain protocols within 60 days after the effective date of this decision.

4. The allegations identified in this proceeding and in the *Scoping Memo and Ruling* are resolved.

5. Investigation 17-04-009 is closed.

This order is effective today.

Dated _____, at Fresno, California.

I.17-04-009 ALJ/RIM/avs

[Date] *Internal Review Draft; Subject to ALJ Division Review*

CONFIDENTIAL; *Deliberative Process Privilege*

ATTACHMENT A: THE SETTLEMENT AGREEMENT

**ATTACHMENT B: THE AMENDMENT TO THE SETTLEMENT
AGREEMENT**