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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

Rulemaking 12-12-011

SECOND AMENDED PHASE III. C. SCOPING MEMO AND RULING OF ASSIGNED COMMISSIONER

Summary

This *Second Amended Scoping Memo and Ruling* for Phase III of this proceeding (*Second Amended Phase III. C. Scoping Memo*) sets forth the category, issues, need for hearing, schedule, and other matters necessary to scope this proceeding pursuant to Public Utilities (Pub. Util.) Code § 1701.1 and Article 7 of the Commission's Rules of Practice and Procedure.¹

1. Background

Commencing with Decision (D.) 13-09-045, the Commission adopted rules and regulations to protect public safety while allowing Transportation Network Companies (TNC) to provide transportation services in California.² As more information about the TNC industry and their business models became known, the Commission has issued additional decisions to maintain the appropriate

¹ California Code of Regulations, Title 20, Division 1, Chapter 1; hereinafter, Rule or Rules.

² The Commission's assertion of authority over TNCs has been confirmed by the Legislature with the enactment of Pub. Util. Code § 5430 *et seq.*, particularly §§ 5440 and 5441. (See Ch. 389, Sec. 1 Assembly Bill (AB) 2293, Effective January 1, 2015.)

regulatory oversight necessary to promote public safety but without stifling an industry offering a mode of transportation that has gained widespread public support in California.

In accordance with Ordering Paragraph 19 of D.16-04-041, the *Scoping Memo and Ruling* dated October 26, 2016 opened a Phase III in this proceeding, and Phase III was broken down into two sub phases: III. A. and III. B. While many of the scoped issues from Phases III. A. and B. have been resolved, there are still some issues that require further Commission analysis and investigation before final decisions can be issued.

As a result, the previous *Scoping Memo* dated April 27, 2018, opened Phase III. C. in order to address issues not yet resolved from Phase III. B., as well as any new issues that have come to the Commission's attention while performing its duty to ensure that the TNCs operate in a manner consistent with the authority that the Commission has granted them.

This *Second Amended Phase III. C. Scoping Memo* supplements and clarifies the scope of this proceeding by adding additional questions to issues previously scoped and adjusting the ordering of the subject tracks. With respect to trip data, this *Second Amended Phase III. C. Scoping Memo* incorporates by reference the questions regarding trip data that were set forth in the *Amended Phase III. B. Scoping Memo and Ruling* dated June 12, 2017, the *Phase III. C. Scoping Memo and Ruling* dated April 27, 2018, and the *Assigned Commissioner's Ruling Seeking Comments on Proposed Data Reporting Requirements*, dated February 8, 2019. As directed by this or subsequent rulings, parties may file additional comments to the previously scoped issues to the extent their comments raise new issues. Otherwise, in their comments, the parties may refer the Commission to their previously filed comments.

Finally, there have been two important and recent developments that have impacted this *Second Amended Phase III. C. Scoping Memo*: first, the reporting of sexual assault and sexual harassment claims; and second, the applicability of AB 5 on TNC drivers. Each of these issues are addressed in the next section.

2. Recent Developments Impacting the Scope of the Issues

2.1. The Need for TNCs to Protect Against, Investigate, and Resolve Sexual Assault and Sexual Harassment Claims

As TNC operations continued to grow and become a preferred mode of publicly regulated transportation,³ the Commission has maintained its regulatory oversight to ensure that TNCs comply with their duty to provide safe and reliable TNC services. The need to provide safe TNC services was underscored by Uber Technologies, Inc.'s publication of its December 5, 2019 *US Safety Report* that identified 5,981 incidents of claimed sexual assault and sexual harassment that allegedly occurred in 2017 and 2018. Of that number, Uber states that 1,243 of the incidents (or 21%) occurred in California.⁴ While Uber has been subject to follow up investigation from the assigned Administrative Law Judge (ALJ), it is important that the Commission determine whether all TNCs operating in California should be subject to additional measures to ensure that there are uniform minimum standards and practices in place to prevent sexual assault and sexual harassment, either by drivers or passengers. It is important to have

³ This *Ruling* acknowledges that there has been a drop off in ridership because of the COVID-19. Nevertheless, TNC rider patronage remains in effect and will likely increase once California allows businesses to return to operation. While it is unclear if ridership will return to pre COVID-19 levels, the Commission must still monitor TNC operations and enact regulations as needed to protect the riding public.

⁴ Uber's *Response to the December 19, 2019, ALJ Ruling Ordering Uber Technologies, Inc. to File and Service its US Safety Report*.

standards and practices in place to investigate and resolve claims of sexual assault and sexual harassment; with proper record keeping that memorializes these claims, the TNCs' investigation thereof, and the TNCs' resolution that comport with laws, rules, and regulations.

2.2. The Impact of AB 5 on TNCs and Their Drivers

AB 5 was signed into law by Governor Newsom on September 18, 2019 and became effective on January 1, 2020. AB 5 modified the California Labor Code to direct that a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all the following conditions are satisfied:

- A. The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- B. The person performs work that is outside the usual course of the hiring entity's business; and
- C. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

ALJ Robert Mason, assigned to this proceeding, issued a Ruling on December 19, 2019, asking for briefing on the applicability of the AB 5 criteria on TNCs. In response, the TNCs argued that their drivers met the criteria to be considered independent contractors. Others argued they do not and drivers are employees. On May 5, 2020, the California Attorney General, along with the City Attorneys for Los Angeles, San Diego, and San Francisco filed suit in Superior Court of the State of California, County of San Francisco, and are seeking injunctive relief, restitution, and penalties against Uber and Lyft for allegedly

misclassifying their TNC drivers as independent contractors.⁵ Uber has filed a lawsuit in federal court for injunctive relief to enjoin the enforcement of AB 5 against it and its drivers.⁶ Lyft drivers have sued Lyft in federal court seeking an order requiring Lyft to reclassify all of its drivers in California from independent contractor to employee.⁷

Further, Uber and Lyft, have successfully placed on the November 2020 ballot a measure that would exclude all app-based drivers from AB 5.

The presence of these lawsuits and ballot measure does not mean that the Commission can abdicate its regulatory responsibility over TNCs. As a matter of California constitutional law, the Commission is tasked with enforcing those laws applicable to the entities subject to its jurisdiction until such time as a higher court, the legislature, or the public through their right to vote, determine otherwise.⁸ Thus, for now, TNC drivers are presumed to be employees and the Commission must ensure that TNCs comply with those requirements that are applicable to the employees of an entity subject to the Commission's jurisdiction.

3. Scope of the Issues

3.1. Sexual Assault and Sexual Harassment

- A. What definitions of sexual assault and sexual harassment should the Commission adopt that should be applicable to all TNCs subject to its jurisdiction?

⁵ *People of the State of California v. Uber Technologies, Inc., a Delaware Corporation; Lyft, Inc., a Delaware Corporation*, Case No: CGC 20-584402.

⁶ *Lydia Olson, et al., v. State of California, et al.* CV 19-10956-DMG (RAOx); and John

⁷ *John Rogers, et al., v. Lyft, Inc.*, 20-cv-01938-VC.

⁸ See California Constitution, Article III, Section 3.5.

- B. What minimum training protocols should the Commission require TNCs to adopt to train its drivers that sexual assault and sexual harassment are punishable by law and must be prevented?
- C. What minimum standards should the Commission require TNCs to adopt for investigating and resolving claims of sexual assault and sexual harassment?
- D. What reporting requirements should the Commission adopt that TNCs must follow regarding claims of sexual assault and sexual harassment?

3.2. Application of AB 5 to TNCs

- A. In addition to the certificate of workers' compensation coverage issued by an admitted insurer or a certification of consent to self-insure issued by the Director of Industrial Relations,⁹ what additional requirements should the Commission impose on TNCs?
- B. Should the Commission amend General Order 157-E in light of the enactment of AB 5 and the modification of the Labor Code?

3.3. Accessibility (Previously Identified as Track 5)

The Commission opened a separate Rulemaking (R.) 19-02-012 to address the accessibility issues raised by Senate Bill (SB) 1376, and codified by Pub. Util. Code § 5440.5.¹⁰

⁹ See Pub. Util. Code § 5374(a)(1)(I) and Commission Resolutions TL-18716 and TL-18760.

¹⁰ *Order Instituting Rulemaking to Implement Senate Bill 1376 Requiring Transportation Network Companies to Provide Access for Persons with Disabilities, Including Wheelchair Users who need a Wheelchair Accessible Vehicle.*

3.4. Data Confidentiality, Collection, and Sharing Issues (Previously identified as Track 3)

3.4.1. Confidentiality Issues¹¹

3.4.2. Granularity and Disaggregation of Trip Data Collected

The questions posed in this Section and 2.3.3 pertain to TNC reporting of trip data for the purpose of public disclosure or disclosure to interested government entities. This reporting would be in addition to the TNCs' annual reports as required by D.13-09-045. The questions posed below build upon the issues raised in the February 6, 2019 *Assigned Commissioner Ruling*.

1. At what level of granularity and disaggregation should TNCs report trip data? For example, for each trip taken, should the data be reported as to the exact date and time the trip occurred; day of the week the trip occurred; the hour within which the trip started and ended; the location of a passenger at the time of trip request as well as the location of a driver at the time of trip request, passenger pick-up, and passenger drop-off, by geographic coordinates (*i.e.* latitude and longitude), zip code, or census block; the number of passengers; the trip service category (*e.g.* pooled or nonpooled service); and/or any other criteria?
2. Should the Commission require TNCs to report the miles traveled in Periods 1, 2, and 3 for each trip?¹²
3. Should the Commission require TNCs to report additional information about fare charged for each trip including the tip amount of the total amount paid and whether surge pricing was in effect?
4. Should the Commission require TNCs to report when a passenger requests a wheelchair accessible vehicle (WAV) and whether the trip occurred in a WAV?

¹¹ These issues were addressed in D.20-03-014.

¹² Periods 1, 2, and 3 are defined in D.14-11-043 at 2.

5. For TNC trip data that is deemed non-confidential, should such information be shared only with interested government entities?
6. If non-confidential trip data should be shared only with interested government entities, how should those entities to be selected? (*e.g.* metropolitan planning organizations, state and local transportation agencies, and the State Air Resources Board.)
7. How should the information be made available to interested government entities? For example, should such information be hosted on the California Public Utilities Commission's (CPUC) website or by a third-party entity (*e.g.* university, research institution, etc.)?

3.4.3. Sharing Exempted Trip Data with Interested Government Entities

1. If the Commission determines that any or all trip data collected from a TNC is exempt from public disclosure on either trade secrets, privacy or any other established claim of confidentiality, should any or all exempted trip data be shared with interested government entities? If so, how should the Commission determine which interested government entities receive the data (*e.g.* metropolitan planning organizations, state and local transportation agencies, and the State Air Resources Board)?
2. If the answer to 2.3.3.1. is yes, should the exempted trip data be shared with interested government entities in a disaggregated format? If so, what format should disaggregation encompass? For example, for each trip taken, should the data be reported as to the day of the week the trip occurred; the hour within which the trip started and ended; the zip code or census block within which each trip started and ended; the passenger occupancy; and/or the trip service category (*e.g.* pooled or nonpooled service)?
3. If any or all trip data collected from TNCs that is exempt from public disclosure is to be shared with interested government entities, should the exempted trip data be

provided pursuant to a nondisclosure agreement? If so, what terms should be included in the nondisclosure agreement?

4. How should the information be made available to interested government entities? For example, should such information be hosted on the CPUC's website or by a third-party entity (*e.g.* university, research institution, etc.)?

3.5. Transportation of Minors (Previously Identified as Track 6)

1. Should TNC apps be required to verify age and prohibit minors from utilizing the app under any or all circumstances?
2. Should legal guardians of minors be allowed to authorize the transport of minors by drivers of TNCs that do not primarily market to children?
3. Should TNCs that don't primarily transport minors be required to allow only drivers who have been certified by Trustline to transport minors when authorized by legal guardians? What other requirements should be applied to these drivers or these rides?
4. Should rides to minors be reported separately by TNCs?
5. Should the TNCs be required to compile information on minors transported on their platforms or reports of trip cancellations due to suspicion of minors utilizing the app without proper authorization?
6. Should TNCs be required to provide drivers with the opportunity to expunge low ratings given in response to trips cancelled due to suspicion or confirmation of a minor passenger?
7. Should there be a minimum age requirement to sign up to use a TNC app?

3.6. Catch-All Safety Category (Previously Identified as Track 7)

3.6.1. Insurance

1. Should insurance levels, or coverage requirements, for TNCs be revisited considering the findings of the report composed pursuant to Pub. Util. Code § 918.2?

3.6.2. Data Collection

1. Should TNC apps be barred from collecting user data when the user is not using the app?¹³
2. Should TNC apps – even when open – be barred from collecting certain types of user data, or be required to offer users the choice to not have certain types of data be collected?
3. For collected user data, should TNC apps be required to more clearly or specifically inform users of the types of data that will be collected, how the data may be used, and how user privacy will be maintained?

3.6.3. Driver Identification and Passenger Safety

1. Should TNC apps always display driver name/photo, license plate number, vehicle make/model, and vehicle color?
2. Should a TNC's trade dress be required to be reflective, illuminated, or otherwise visible in darkness?
3. Should TNC vehicles be equipped with front and rear or rear only dash cameras?

3.6.4. Hours of Service

1. Should there be a system (*e.g.* TNC app or third-party data base) to track driver hours across multiple TNC platforms?
2. Should there be a system to receive TNC driver attestations on their hours logged on to multiple TNC platforms?

¹³ Uber's app on iPhones collects user data all the time rather than only when the app is on.

3.6.5. Vehicle Safety

1. Should the Commission impose requirements on TNCs to address safety recalls for vehicles used in TNC service?

3.6.6. Complaints, including Zero Tolerance Complaints

1. Should the Commission develop industry-wide zero tolerance standards under Safety Requirement D of D.13-09-045? If so, what types of protocols and standards should the Commission adopt?
2. Should the Commission expand the zero-tolerance policy of D.13-09-045 to include all incidents that involve a TNC, such as sexual assault and sexual harassment by drivers or passengers, transporting unaccompanied minors, theft, complaints of unsafe driving, and other safety issues?
3. Should TNCs be required to provide and prominently display a customer service telephone number with texting capabilities and/or e-mail address?

3.6.7. Incident Reporting

1. Should the Commission develop criteria and reporting requirements for all passenger carriers to report incidents of a pre-determined nature (*e.g.*, accidents involving buses, accidents and incidents resulting in bodily injuries or death, media-reported incidents, etc.)?
2. Are there other actions that should be included in zero-tolerance complaints besides the intoxicated driving, sexual assaults, unsafe driving, and app sharing that should have a zero-tolerance policy?

3.6.8. App Sharing

1. Should the Commission impose explicit rules on the sharing of a driver app between an account holder and persons that have not complied with the safety requirements (*e.g.*, driver's license and criminal background check, and driving training) and not authorized by a TNC to drive on the account?

2. Should the TNCs be required to institute a zero-tolerance policy on the sharing of apps?
3. If an enforcement officer or police officer has evidence of app sharing, should the zero-tolerance also apply to any TNCs whose trade dress is displayed on the vehicle regardless if that TNC's app is on?
4. Should General Order 157-E, Part 11.16 be modified to require the driver to produce proof of identity, such as their driver's license along with the waybill to "...any Commission or airport enforcement officer, or to any official of a city, county, or city and county authorized to inspect waybills pursuant to Pub. Util. Code Section 5371.4(h)..."?
5. Should the TNCs be required to report on app sharing complaints and their resolution as part of their annual reporting of data to the Commission?

**3.7. Autonomous Vehicles
(Previously Identified as Track 8)**

1. How should the Commission define what constitutes an "autonomous vehicle" (AV) used in prearranged passenger transportation service for-hire?
2. How should the Commission define what constitutes a "remote operator" of an AV used in prearranged passenger transportation service for-hire?
3. What requirements under the Charter-Party Carriers (TCP) Act and all applicable Commission decisions, rules, and orders which apply to drivers physically present in vehicles should the Commission also adopt for "remote operators" of AVs used in prearranged passenger transportation service? What additional requirements should the Commission consider for the remote operators?
4. What amount of insurance coverage (*i.e.* evidence of ability to respond to judgments for personal injury, death, or property damage) should the Commission

require of a person or entity to provide prearranged passenger transportation service using AVs?

5. Should the Commission require that certain information, such as how to contact the person or entity authorized to provide prearranged passenger transportation service using AVs, be made available to passengers inside an AV operated without a driver in the vehicle?
6. Should the Commission require certain unique identifying information be made available on each AV, operated without a driver in prearranged passenger transportation service, to enable passengers to easily identify the exact AV offered for that trip?
7. Should the Commission require that a two-way communication link, between passengers and the person or entity authorized to provide prearranged passenger transportation service using AVs, be available and maintained at all times in each AV operated without a driver in the vehicle?
8. How should the information be made available to interested government entities? For example, should such information be hosted by a third-party entity (*e.g.* university, research institution, etc.)?
9. Should the Commission designate a new regulatory category, such as Autonomous Vehicle Carrier (AVC), to authorize a person or entity to provide prearranged passenger transportation service using AVs operated without a driver in the vehicle?
10. In a new regulatory category, what requirements of TCP or TNC permit-holders under the TCP Act and all applicable Commission decisions, rules, and orders should the Commission also adopt in order to authorize a person or entity to provide prearranged passenger transportation service using AVs operated without a driver in the vehicle?

11. In a new regulatory category, what information should the Commission require to be reported by a person or entity authorized to provide prearranged passenger transportation service using AVs operated without a driver in the vehicle to the Commission; how often (*e.g.* monthly, annually, per trip, etc.) should this information have to be reported to the Commission; and under what conditions, if any, should this information be made available to the public?
12. Should the Commission prohibit or impose any requirements on prearranged passenger transportation service to, from, or within airports using AVs operated without a driver in the vehicle?
13. Should the Commission prohibit or impose any requirements on prearranged passenger transportation for unaccompanied minors in AVs operated without a driver in the vehicle?
14. Should the Commission impose any requirements to ensure the safety of all passengers on the chartering by more than one party (*i.e.* fare-splitting) of AVs operated without a driver in the vehicle?
15. Should the Commission modify D.13-09-045 to allow TNCs to own AVs or allow AVs leased or rented by TNCs from partnering entities on their online-enabled applications or platforms?
16. Should the Commission modify D.16-04-041 to allow inspections of AVs performed by the manufacturers of AVs to fulfill the inspection requirements for vehicles used to provide prearranged passenger transportation service using online-enabled applications or platforms?
17. Should the Commission modify the definition of “personal vehicle” pursuant to D.16-12-037 to include AVs used to provide prearranged passenger transportation service using online-enabled applications or platforms?

3.8. Vehicle Emissions Reductions

The Commission intends to open a new rulemaking that will address implementation of SB 1014 (Skinner, 2018), the California Clean Miles Standard and Incentive Program, and other issues related to passenger carriers and greenhouse gas emissions.

4. Scheduling

Opening comments on the sexual assault and sexual harassment questions shall be filed and served by June 26, 2020.

Reply comments on the sexual assault and sexual harassment questions shall be filed and served by July 7, 2020.

Opening comments on the AB 5 questions shall be filed and served by July 24, 2020.

Reply comments on the AB 5 questions shall be filed and served by August 7, 2020.

Either I or one of the assigned ALJs will issue a subsequent ruling that sets a schedule for briefing for the remainder of the issues as well as for workshops.

5. Categorization

In the Order Instituting Rulemaking (OIR), issued on December 20, 2012, the Commission preliminarily determined that the category of the proceeding was quasi-legislative. The *Scoping Memo and Ruling* from Phase I of this proceeding, issued on April 2, 2013, confirmed that categorization.

6. Need for Hearing

The Commission in the OIR also preliminarily determined that hearings are not required. This *Second Amended Phase III. C. Scoping Memo* confirms that hearings are not needed.

7. Ex Parte Communications

In a quasi-legislative proceeding such as this one, *ex parte* communications with the assigned Commissioner, other Commissioners, their advisors, and the ALJs are permitted without restriction or reporting as described at Pub. Util. Code § 1701.4(b) and Article 8 of the Rules.¹⁴

But with respect to communications with the ALJs, any party wishing to communicate with the ALJs, even as to a procedural matter, shall be by e-mail only, with the e-mail sent simultaneously to the proceeding service list.

An e-mail sent only to the ALJs will not receive a response.

Telephone calls to the ALJs will not be answered.

Telephone voice mail messages left with the ALJs will not be returned.

8. Assigned Commissioner and Assigned ALJs

Genevieve Shiroma is the assigned Commissioner. Robert M. Mason III and Debbie Chiv are the assigned ALJs.

9. Filing, Service, and Service List

Rule 1.10 sets out the general rules for service and filing of documents at the Commission. Parties must adhere to the following rules for this proceeding unless specifically instructed differently:

- When serving documents on my office, parties must only provide electronic service. Parties must NOT send hard copies of documents to me or my advisors unless specifically instructed to do so.
- As required by Rule 1.10, when serving document on the assigned ALJ(s), parties must provide both an electronic copy and a hard copy.

¹⁴ Interested persons are advised that, to the extent that the requirements of Rule 8.1 *et seq.* deviate from Pub. Util. Code §§ 1701.1 and 1701.4 as amended by SB 215, effective January 1, 2017, the statutory provisions govern.

The official service list has been created and is on the Commission's website. Parties should confirm that their information on the service list is correct, and serve notice of any errors on the Commission's Process office, the service list, and the ALJ. Persons may become a party pursuant to Rule 1.4.

When serving any document, each party must ensure that it is using the current official service list on the Commission's website.

Rules 1.9 and 1.10 govern service of documents only and do not change the Rules regarding the tendering of documents for filing. Parties can find information about electronic filing of documents at the Commission's Docket Office at www.cpuc.ca.gov/PUC/efiling. All documents formally filed with the Commission's Docket Office must include the caption approved by the Docket Office and this caption must be accurate.

Persons who are not parties but wish to receive electronic service of documents filed in the proceeding may contact the Process Office at process_office@cpuc.ca.gov to request addition to the "Information Only" category of the official service list pursuant to Rule 1.9(f).

10. Discovery

Discovery may be conducted by the parties consistent with Article 10 of the Commission's Rules. Any party issuing or responding to a discovery request shall serve a copy of the request or response simultaneously on all parties. Electronic service under Rule 1.10 is sufficient, except Rule 1.10(e) does not apply to the service of discovery and discovery shall not be served on the ALJ. Deadlines for responses may be determined by the parties. Motions to compel or limit discovery shall comply with Rule 11.3.

11. Public Advisor

Any person interested in participating in this proceeding who is unfamiliar with the Commission's procedures or who has questions about the electronic filing procedures is encouraged to obtain more information at <http://consumers.cpuc.ca.gov/pao> or contact the Commission's Public Advisor at 866-849-8390 or 415-703-2074 or 866-836-7825 (TTY), or send an e-mail to public.advisor@cpuc.ca.gov.

12. Schedule for Completion

It is the Commission's intent to complete this proceeding within 18 months of the date this *Second Amended Phase III. C. Scoping Memo* is filed. This deadline may be extended by order of the Commission pursuant to Pub. Util. Code § 1701.5(a) and (b).

IT IS RULED that:

1. The category of this proceeding continues to be quasi-legislative.
2. The scope of the issues for Phase III. C. of this proceeding is as stated in Section 2 of this *Second Amended Phase III. C. Scoping Memo*.
3. Hearings are not necessary.
4. *Ex parte* communications are permitted without restriction or reporting as described at Public Utilities Code § 1701.4(b) and Article 8 of the Commission's Rules of Practice and Procedure.

Dated June 9, 2020, at San Francisco, California.

/s/ GENEVIEVE SHIROMA

Genevieve Shiroma
Assigned Commissioner