

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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

**MOTION OF UBER TECHNOLOGIES, INC. REQUESTING ALTERNATIVE
DISPUTE RESOLUTION, NOTICE AND CLARIFICATION OF THE JULY 27
RULING, AND POSTPONEMENT OF THE PROCEDURAL SCHEDULE**

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I. INTRODUCTION AND RELIEF REQUESTED

Uber Technologies, Inc. (“Uber”) issued a first-of-its kind Safety Report¹ in December 2019 after a multi-year collaboration with sexual violence prevention advocacy groups.² Although neither the California Public Utilities Commission (“Commission”) nor any other regulatory agency required such a report, Uber committed to do more than was required and hoped to inspire companies across industries to do the same. Efforts to raise awareness of critical safety issues and to support victims of sexual violence should be incented and not punished, particularly when the Commission and Uber should share the common goal of ensuring victims of sexual assault control how and to whom their information is shared.³

¹ See Uber, *Uber’s US Safety Report* (Dec. 5, 2019) (“Safety Report”). The Safety Report is a comprehensive publication that shares details on Uber’s safety progress, its processes, and national aggregate and anonymized data related to the most serious safety incidents reported in connection with its platform. See Attachment A to its January 10, 2020 Motion for Reconsideration of the December Ruling and <https://www.uber.com/us/en/about/reports/us-safety-report/>.

² See Foreword by Karen Baker, Chief Executive Officer, National Sexual Violence Resource Center Safety Report at 6.

³ In response to the *Administrative Law Judge’s Ruling Ordering Uber Technologies, Inc. to File and Serve Its US Safety Report for 2017-2018 and to Answer Questions Regarding Alleged Sexual Assault and Sexual Misconduct Incidents*, Rulemaking (“R.”) 12-12-011 (Dec. 19, 2019), leading experts in sexual violence prevention – including the Rape, Abuse & Incest National Network; The California Coalition Against Sexual Assault; the Pennsylvania Coalition Against Rape and National Sexual Violence Resource Center; and The National Network to End Domestic Violence – submitted letters to the Commission explaining why sweeping disclosures victim information or information about sexual assaults would be harmful to sexual assault victims, would violate hard-won privacy rights, and would have a chilling effect

These sensitive and important issues can and should be readily resolved through a dialogue, not through a premature and adversarial adjudicatory proceeding established by Administrative Law Judge (“ALJ”) Mason’s July 27, 2020 Order to Show Cause (“OSC”) Ruling.⁴ If such discussions could occur without violating ex parte restrictions, this issue could be quickly addressed. If, however, the OSC process continues, the ALJ should provide fair notice and clarification of the procedures that will apply and allow Uber time to fairly prepare. Accordingly, pursuant to Rule 11.1 of the Commission Rules of Practice and Procedure, Uber moves for:

1. an opportunity to resolve the issues raised in the OSC Ruling through the Commission’s Alternative Dispute Resolution Program (“ADR”);
2. fair notice and clarification of the procedures associated with the OSC phase of this proceeding; and,
3. postponement of any OSC deadlines to allow time for ADR and/or notice and clarification of the OSC procedures, including through a prehearing conference to address these issues.

II. REQUESTS FOR RELIEF

A. Request for Alternative Dispute Resolution

The issues outlined in the OSC can and should be addressed efficiently through ADR. The nature of these proceedings has been unusual. They began with an ALJ demanding Uber, and only Uber, produce documents and answers questions concerning sexual assaults and sexual

on future sexual assault reporting. *See* Attachment A in *Motion of Uber Technologies, Inc. for Reconsideration to Full Commission of the January 27, 2020 ALJ Ruling*, R.12-12-011 (Jan. 31, 2020). The issues raised by these sexual assault victims’ advocacy groups have not been addressed. Instead, Uber faces an OSC and the threat of license revocation for aligning with these advocacy groups.

⁴ *See Administrative Law Judge’s Ruling Directing Uber Technologies, Inc. To Show Cause Why It Should Not Be Sanctioned By The Commission For Refusing To Answer Questions Regarding Sexual Assaults And Sexual Harassment Claims And For Refusing to Submit The Information Under Seal*, R.12-12-011 (July 27, 2020).

misconduct. While Uber has motions pending with the Commission seeking to address those demands, the ALJ unilaterally instituted these OSC proceedings.

Because neither the Commission at large nor the Consumer Protection and Enforcement Division (“CPED”) has been directly involved and ex parte rules limit communications with the ALJ, there has not been any party or representative with whom Uber could engage to resolve these issues in a manner consistent with victims’ rights and the Commission’s safety interests. If CPED or another Commission representative is authorized to engage in ADR to discuss the need for the requested information and the options for addressing that need without jeopardizing victims and their privacy rights, Uber expects this issue could be easily resolved. Uber, therefore, moves for authorization to conduct ADR with CPED or another Commission representative. ADR will allow resolution of these sensitive issues of sexual assault and sexual misconduct, including extremely private incident details and sharing of victim and Uber employee information, in a non-confrontational manner protecting the interests of victims of sexual assault, as well as the Commission and Uber.⁵

B. Request for Clarification

If ADR is not permitted, the unusual OSC Ruling should be clarified to ensure Uber is provided proper notice and opportunity to defend itself. The unusual nature of these proceedings leaves many questions concerning the witnesses/parties permitted; the pre-hearing process and scope of proceedings; the hearing process; and the post-hearing process. Uber seeks clarification of these items before any OSC deadlines.

⁵ In Resolution ALJ-185, the Commission “endorse[d] the policies behind ADR” and “encourage[d] its more frequent and systematic application in formal proceedings.” The Resolution states, “ADR may be used in a specific phase of the proceeding or as a means to resolve a set of issues.” The Commission “believe[s] ADR offers great potential to the Commission, and all who practice before the Commission, for improving decisionmaking processes in formal proceedings and certain other disputes.” Resolution ALJ-185 at 1, 3 and 9 (Aug. 25, 2005).

1. Unlike this OSC, Typical Commission OSCs Provide Clear Notice of the Process Involved

The unusual procedural nature of this OSC is contributing to the lack of clarity concerning the OSC process ahead. Typically, an OSC begins with a Commissioner initiating a proceeding and assigning the presiding officer. Here, the ALJ initiated the proceeding and assigned himself as the presiding officer. In so doing, the ALJ is acting as prosecutor and judge without providing notice of the procedures he has in mind, all of which impairs Uber's ability to respond fairly to the OSC and to address the ALJ's concerns.

A prior OSC in this same rulemaking provides an example of the typical Commission process for OSCs. In response to a Safety and Enforcement Division ("SED") Staff Report alleging noncompliance in 2014, Assigned Commissioner Peevey issued a ruling expanding the scope of the proceeding to include an order to show cause against Rasier-CA, LLC and Lyft ("Respondents").⁶ President Peevey assigned ALJ Mason as the presiding officer for the previous order to show cause phase and also designated the phase as adjudicatory.⁷ ALJ Mason then issued orders to show cause ("2014 Orders") against the two Respondents. Unlike the OSC Ruling, the 2014 Orders were specific as to the process. They required Respondents to file statements responding to the allegations contained in the orders and in the SED Staff Report; SED was required to file replies to Respondents' statements. The 2014 Orders further provided that, in addition to the "officers, employees or agents necessary to explain and address" the allegations at the evidentiary hearing, Respondents "may provide other competent witnesses to provide relevant testimony."⁸ "[W]itnesses shall be placed under oath and subject to cross-

⁶ See *Assigned Commissioner's Ruling Expanding Scope of Proceeding to Include an Order to Show Cause Against Rasier-CA, LLC and Lyft, Inc.*, R.12-12-011 (Nov. 7, 2014).

⁷ *Id.* at 2-3.

⁸ *Ruling of Assigned Administrative Law Judge Ordering Raiser-CA, LLC to Appear for Hearing and to Show Cause Why it Should Not Be Found in Contempt*, R.12-12-011 at 8 (Nov. 14, 2014).

examination.”⁹ After the hearings, SED and Respondents were permitted to file opening and reply briefs. In contrast, the OSC Ruling merely indicates a deadline for a single written submission and demands the production of a witness to be examined at a hearing. It discloses no opposing party; no opportunity for Uber to call additional witnesses; no opportunity for Uber to cross-examine witnesses; and no clarity as to what and when other evidence may be submitted.

Uber’s right to sufficient notice is evident from reviewing not only the previous OSCs in this rulemaking but also in the processes for OSCs involving other industries. For example, in Application 07-12-026, Assigned Commissioner Randolph and ALJ Colbert issued an OSC against certain telephone companies (“2017 Telephone Order”).¹⁰ The 2017 Telephone Order included a schedule for party opening and reply comments, testimony, evidentiary hearings, and post-hearing opening and reply briefs. In a subsequent ruling, ALJ Colbert scheduled a prehearing conference “to inform the parties as to the factual issues upon which the Commission seeks input in the Order to Show Cause (OSC)”, “to determine the parties, positions of the parties,” “to identify the expected witnesses, and to set hearing dates on which those witnesses are available.”¹¹ The telephone company respondents’ witness list included various officers and

⁹ *Id.*; Similarly, a 2017 order to show cause against Raiser-CA, LLC provided that “Transportation Enforcement staff, [Respondent] Rasier and any other interested party may present evidence and/or arguments at the hearing on the Order to Show Cause.” *Order Instituting Investigation on the Commission’s Own Motion into Why the Commission Should not Impose Appropriate Fines and Sanctions Against Rasier-CA LLC*, I.17-04-009 at 8 (Ordering Para. No. 4) (Apr. 6, 2017)).

¹⁰ *Assigned Commissioner and Assigned Administrative Law Judge’s Ruling directing Calaveras Telephone Company, Cal-Ore Telephone Company, Ducor Telephone Company, Kerman Telephone Company, Ponderosa Telephone Company, Sierra Telephone Company, Inc., Siskiyou Telephone Company, and Volcano Telephone Company to show cause why they should not be sanctioned by the Commission for violation of Rule 1.1 of the Commission’s Rules of Practice and Procedure*, A.07-12-026 at 16 (filed June 9, 2017).

¹¹ *See Email Ruling Granting Request for Extension of Time for Pre-Hearing Conference, and Related Changes to Schedule*, A.07-12-026 (June 26, 2017); *Notice of Prehearing Conference*, A.07-12-026 (July 7, 2017).

employees, a “[Commission] Legal Division Staff Attorney,” a “Commission’s Information Technology Division Person Most Qualified,” outside counsel, and an expert witness.¹²

Similarly, in the energy context, a recent OSC shows the extent to which the Commission has clarified the process and ensured that respondents are provided sufficient opportunity to present their defense. In Rulemaking 18-12-005, President Batjer and ALJ Semcer issued a joint order to show cause against Pacific Gas and Electric Company (“2019 PG&E Order”) that set the date for a prehearing conference “to establish the schedule for this OSC” that “will provide for additional testimony, comments and/or recommendations from the impacted parties, including community organizations, local governments, and tribal communities” and “opportunity to provide recommendation for monetary fine and any corrective actions, as appropriate.”¹³ The OSC phase of the proceeding was categorized as adjudicatory.¹⁴ After the prehearing conference, President Batjer and ALJ Semcer issued a scoping memorandum that set a proceeding schedule, which included testimony from PG&E, testimony from other interested parties, rebuttal testimony, the opportunity for hearings with cross examination, and the filing of opening and reply briefs, prior to the issuance of a Presiding Officer Decision.¹⁵

In contrast to the Commission’s normal practice, as illustrated above, the OSC Ruling here was not initiated by the Assigned Commissioner and the OSC Ruling provides sparse and incomplete information about the applicable protocol and process. Further, it is not clear whether Uber will be afforded the opportunity to effectively respond: to provide evidence,

¹² See *Witness List of Independent Small LECs for Evidentiary Hearings*, A.07-12-026 at 1 (Apr. 6, 2018).

¹³ *Assigned Commissioner and Assigned Administrative Law Judge’s Ruling Directing Pacific Gas and Electric Company to Show Cause Why it Should not Be Sanctioned By the Commission for Violation of Public Utilities Code Sections 451 Commission Decision 19-05-042 and Resolution ESRB-8*, Rulemaking 18-12-005 at 5-6 (Nov. 12, 2019).

¹⁴ See *Administrative Law Judge’s Ruling Clarifying the Categorization and Ex Parte Requirements of the Order to Show Cause Portion of the Proceeding*, R.18-12-005 (Nov. 26, 2019).

¹⁵ See *Assigned Commissioner and Assigned Administrative Law Judge’s Ruling Setting the Scope and Schedule of the Order to Show Cause Against PG&E*, R.18-12-005 (Dec. 23, 2019).

witness testimony, or engage with an opposing party beyond submitting a limited “verified statement responding to the issues identified in Section 7 of [the OSC Ruling]”¹⁶ and providing a “representative (either Respondent’s counsel of record or a senior executive) who will be capable of addressing all the issues identified in this *Ruling*, as well as the facts and arguments contained in Respondent’s verified statement.”¹⁷ Due process and basic fairness requires clarification of the OSC process contemplated by the ALJ.

2. Specific Issues for Clarification

In addition to following the formalities of Commissioner appointment of a presiding officer and categorization of the phase, the OSC Ruling should be clarified to address the following issues:

Parties and Witnesses

Typically, one of the Commission’s enforcement divisions – such as the Safety and Enforcement Division or CPED – represents the Commission’s interests in an OSC. In the current OSC Ruling, no enforcement arm of the Commission appears to be a party to these proceedings. The OSC Ruling also does not specify whether other interested parties may participate in this phase of the proceeding. Uber therefore requests clarification of the following:

- a. Will there be an opposing party in this phase? If so, who is the opposing party?
- b. Will the ALJ allow direct participation by victims’ rights advocates or other interested parties at the hearing?
- c. Will the ALJ allow direct participation by victims’ rights advocates or other interested parties in this phase?

¹⁶ OSC Ruling, at 15 (Ordering Para. No. 5).

¹⁷ *Id.* at 15 (Ordering Para. No. 4) (emphasis in original).

Pre-Hearing Process and Scope

The OSC Ruling leaves open a variety of questions pertaining to pre-hearing process and the scope of issues to be addressed. Uber requests clarification of the following:

- a. As requested above, may Uber engage in ADR? If so, with whom and when?
- b. When will the full Commission consider Uber's pending motion for reconsideration that bears on the issues raised in the OSC Ruling?
- c. How will the ex parte prohibition affect Uber's ongoing work and advocacy on this and other issues in R.12-12-011? May Uber (and other interested parties) continue advocating the best way to address the issue of sexual assault and sexual misconduct in the underlying rulemaking without running afoul of the ex parte prohibition in the OSC? In particular, can Uber and other interested parties continue to recommend in the underlying rulemaking that the Commission not request or investigate individual incident information regarding sexual assault and sexual misconduct as it will actually *reduce* the likelihood of victims reporting sexual assault and sexual misconduct?
- d. When is the appropriate time for Uber to raise any other defenses with respect to the two rulings?
- e. The OSC Ruling raises some, but not all, of the factors that the Commission typically uses to determine the amount of a penalty.¹⁸ For example, the OSC Ruling asks whether Uber's actions "should be considered a continuing offense or multiple continuous offenses pursuant to Pub. Util. Code §§ 2108 and 5415." To the extent that the Commission finds any penalty appropriate, when will be the appropriate time for Uber to discuss and raise any other factors that the Commission should use in calculating a penalty?

Hearing Process

The OSC Ruling does not outline the hearing process, nor does it explain what evidence and pleadings may be filed before or after the hearing. Uber requests clarification of the following:

- a. Will there be a pre-hearing conference to address hearing scope and process?

¹⁸ See e.g., Decision 98-12-075, Final Opinion Adopting Enforcement Rules describing a 5-factor test: "In establishing the appropriate fine, the principles call for the Commission to take into account the severity of the offense, the conduct of the utility (before, during and after the offense), the financial resources of the utility and the totality of circumstances related to the violation. The resulting fine should also be considered in the context of past Commission decisions." D.98-12-075, mimeo at 7.

- b. Will Uber be allowed an opening statement?
- c. Will Uber be allowed to examine its witness?
- d. Will Uber be allowed to call additional witnesses? Typically, a respondent would examine enforcement staff concerning any enforcement report and be allowed to introduce additional witnesses. Here, there was no enforcement report and only a demand from the ALJ. It would be unusual for Uber to examine the ALJ to determine why the demand for information was necessary to meet the Commission's objectives. Is that permissible? Similarly, may Uber present testimony from victim's rights advocates on these sensitive sexual assault victim issues?
- e. Will Uber be allowed to introduce documents as evidence at the hearing or only as part of the August 21 verified statement?
- f. Does the OSC Ruling limit Uber to addressing the specific 10 questions/issues raised in the ruling as well as the authorities described in Rule 1.1?
- g. Will Uber be allowed a closing argument?
- h. How much time is allotted for the hearing?
- i. What Rules of Practice and Procedure will govern the hearing? For example, will an attorney for Uber be allowed to raise an objection to a question asked of the Uber representative at the hearing?

Post-Hearing Process

The current OSC does not specify whether additional filings will be permitted after the hearing. Uber requests clarification of the following:

- a. Will there be post-hearing submissions? If so, what will be permitted?
- b. What is the expected procedure and schedule following the hearing?

These requests for clarification are consistent with the types of notice provided to respondents in other Commission OSCs. While Uber expects the OSC hearing will not be necessary if ADR occurs, it should be given fair notice of a clear process to ensure it properly addresses the ALJ's concerns while defending itself.

C. Request to Postpone the Procedural Schedule Provided in the OSC Ruling Until the Protocols and Procedures are Clarified and/or After ADR Occurs, Or in the Alternative, to Schedule a Prehearing Conference to Address the Clarification Issues Raised Above

Given the unusual nature of the proceedings, as well as Uber's request for ADR and the need for clarification of the procedures and protocols for this adjudicatory phase, Uber seeks to postpone the procedural schedule for the OSC phase of this rulemaking, including postponement of the August 21 deadline to file a verified statement and the September 1 hearing, until these matters are resolved. Alternatively, at a minimum, Uber requests a prehearing conference be held as soon as possible to address the scoping and procedural issues raised above.¹⁹

III. CONCLUSION

For the foregoing reasons, Uber requests:

1. An opportunity to resolve the issues raised in this OSC Ruling through the Commission's Alternative Dispute Resolution Program;
2. Fair notice and clarification of the procedures associated with the OSC phase of this proceeding by addressing the issues raised in Section I.B.2 above; and
3. Postponement of any OSC deadlines to allow time for ADR and/or notice and clarification of the OSC procedures, including through a prehearing conference to address these issues.

Respectfully submitted,

/s/

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¹⁹ See Section I.B.2 *supra*.