

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



**FILED**

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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.

R.19-02-012  
(Filed February 21, 2019)

**DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, DISABILITY RIGHTS  
CALIFORNIA, AND THE CENTER FOR ACCESSIBLE TECHNOLOGY'S  
APPLICATION FOR REHEARING OF TRACK 4 DECISION**

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## TABLE OF CONTENTS

<b>I. Introduction</b> .....	1
<b>II. Discussion</b> .....	1
A. Procedural Background .....	1
B. Legal Standard.....	5
C. The TNC Exemption Requirements Adopted in the Track 4 Decision Do Not Comply with the Statutory Requirements of the TNC Access for All Act .....	6
<b>III. Conclusion</b> .....	12

**TABLE OF AUTHORITIES**

**Page(s)**

**Statutes**

California Public Utilities Code § 5440.5(a)(1)(G) ..... *passim*

**Rules and Regulations**

CPUC Rules of Practice and Procedure Rule 16.1(a)..... 1

CPUC Rules of Practice and Procedure Rule 16.1(c)..... 5

## **I. INTRODUCTION**

In accordance with Rule 16.1(a) of the Commission’s Rules of Practice and Procedure, the Disability Rights Education & Defense Fund, Disability Rights California, and the Center for Accessible Technology (collectively the Disability Advocates) submit this Application for Rehearing of D.21-11-004, the Decision on Track 4 Issues (the Track 4 Decision), issued on November 8, 2021. This Application for Rehearing is timely.

The Disability Advocates specifically challenge the provisions of the Track 4 Decision that set TNC Exemption Requirements, which must be consistent with Section 5440.5(a)(1)(G) of the California Public Utilities Code, codifying the TNC Access for All Act. Because the TNC Exemption Requirements established in the Track 4 Decision do not require TNCs seeking to qualify for an exemption from collecting access fees to, at minimum, have response times for 80% of WAV trips requested within a time established by the Commission for that geographic area, the Decision commits legal error. The Disability Advocates also challenge the provisions of the Track 4 Decision that set the Exemption Time Standard and Trip Completion Standard for exemption eligibility for the first quarter of 2022 and for prior quarters without revising them to be consistent with Section 5440.5(a)(1)(G).

## **II. DISCUSSION**

### **A. Procedural Background**

The TNC Access for All Act allows a TNC to be exempt from collecting and submitting per-trip WAV access fees in a geographic area if, after the Commission adopts a “designated level of WAV service that is required to be met,” the TNC meets the Commission’s standard.<sup>1</sup> The statute authorizes the Commission to set the standard, but it also sets a floor for exemption

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<sup>1</sup> Pub. Util. Code § 5440.5(a)(1)(G).

eligibility by requiring “a TNC, at a minimum, to have response times for 80 percent of WAV trips requested via the TNC’s online-enabled application or platform within a time established by the commission for that geographic area.”<sup>2</sup> If a TNC meets the requirement, the TNC will be exempt from collecting and remitting the per-trip WAV fee for the next year for that geographic area.<sup>3</sup>

In order to exercise its authority to set an exemption eligibility standard while remaining consistent with the statute, the Commission invited proposals from parties in Track 2 of this proceeding, asking for input on “What information should be used to establish the required response time for 80 percent of WAV trips *requested*?”<sup>4</sup> The Disability Advocates submitted proposals in response to that question.<sup>5</sup>

While parties were asked to provide input to assist the Commission in setting standards for responses to trips *requested*, in keeping with the statutory requirement, the Track 2 Decision subsequently deviated from this statutory provision. In the Track 2 Decision, the Commission did not establish a response time standard for 80% of WAV trips *requested*, but rather set a response time standard for 80% of WAV trips *completed*. Specifically, the Track 2 Decision set the following standard for exemption eligibility:

For exemption eligibility, a Transportation Network Company (TNC) must demonstrate that:

- (a) 80 percent of its *completed* wheelchair accessible vehicle (WAV) trip response times achieve the corresponding Level 2 WAV response time, for a quarter and geographic area, and
- (b) The TNC achieved the requisite response times for four consecutive quarters.<sup>6</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> May 7, 2019 Assigned Commissioner’s Scoping Memo and Ruling, Section 2.2, Track 2, topic 2.c. at p. 6.

<sup>5</sup> Disability Advocates’ Track 2 Proposal, Sept. 30, 2019, at pp. 17-18.

<sup>6</sup> D. 20-03-007, Ordering Paragraph 24, at p. 91.

The Track 2 Scoping Memo and Ruling had not asked parties to address whether or not the Commission was bound by the statutory requirement of “response times for 80 percent of WAV trips *requested*.” Indeed, the obvious answer would have been that the Commission must comply with the law. Nor did the Commission’s Track 2 Decision discuss or attempt to justify in any way the issue of why the Commission decided to depart from the clear legal standard. In fact, the Track 2 Decision did not comment on the change in language at all, making it easy for parties assuming that the Commission would follow the law to miss the language discrepancy.

The language adopted in the Track 2 Decision was only the first step in the creation of an exemption program. In Track 2, the Commission only set time standards for TNCs’ responses to customer ride requests (it called the standard applicable to exemptions the “Exemption Time Standard”). In Track 3, the Commission took the next step of creating a Trip Completion Standard.<sup>7</sup> In a subsequent Scoping Memo, the Commission initiated Track 4 of the proceeding and invited parties to submit proposals putting the pieces together and asking what, if any, modifications should be made to the interim time standards and the Trip Completion Standard in finalizing an exemption standard.<sup>8</sup>

Parties submitted their initial Track 4 proposals in response to the Commission’s request for input, and then Uber put forth a revised proposal addressing the time standards (including the Exemption Time Standard) and Trip Completion Standard.<sup>9</sup> The Disability Advocates supported many aspects of the proposal but objected that Uber’s proposed exemption standard took “into account completed rides, not the number of ‘WAV trips requested via the TNC’s online-enabled

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<sup>7</sup> D. 21-03-005 at pp. 11-12.

<sup>8</sup> Amended Track 4 Scoping Memo and Ruling, Mar. 19, 2021, at p. 3. The Track 2 Decision had stated that the order on exemption standards was merely “the initial implementation of the exemption process” and that the Commission would “monitor the process and may adjust requirements as needed in future years. D. 20-03-007, para. 24 of Order, at p. 45.

<sup>9</sup> Uber Revised Track 4 Proposal.

application or platform.”<sup>10</sup> The Disability Advocates explained that Uber’s proposal would therefore “allow a TNC to obtain an exemption with fewer than 80 percent of WAV trips meeting the response time standards,” contrary to the statutory requirement.<sup>11</sup>

Subsequently, the Commission issued a Proposed Decision on Track 4 Issues that replicated this legal flaw in the exemption standard. The Track 4 Proposed Decision described the provisions of an “Exemption Standard” as follows: “For exemption eligibility, a Transportation Network Company (TNC) must demonstrate that: (a) 80 percent of its completed wheelchair accessible vehicle (WAV) trip response times achieve the corresponding Level 2 WAV response time, for a quarter and geographic area, and (b) The TNC achieved the requisite response times for four consecutive quarters.”<sup>12</sup> The Commission also provided a belated explanation for its prior decision to depart from the Legislature’s statutory mandate regarding the exemption standard, noting that in Track 2, it had defined “response time” as “the time elapsed between when a WAV ride was requested and when the vehicle arrived.”<sup>13</sup> The Track 4 PD continued by asserting: “As such, the Commission further interpreted the cited provision and the 80 percent minimum threshold to be meant to apply to completed WAV trips, not merely any requested WAV trip, because in order to have a ‘response time’ under the adopted definition, the WAV trip must be completed.”<sup>14</sup>

In comments on the Track 4 Proposed Decision, the Disability Advocates stated that this new standard, like Uber’s proposal, did “not meet the explicit statutory requirement that exemptions can only be made available for TNCs that meet appropriate standards for “80 percent

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<sup>10</sup> DA Track 4 Post-Workshop Reply Comments, June 10, 2021, at p. 4.

<sup>11</sup> *Id.*

<sup>12</sup> Track 4 Proposed Decision, Order para. 22, at p. 82.

<sup>13</sup> Track 4 Proposed Decision, at p. 31.

<sup>14</sup> *Id.*

of WAV trips *requested*.”<sup>15</sup> The Disability Advocates also explained that the Commission’s Track 2 response time definition could not be the basis for a contrary conclusion, as the statute requires TNCs “*to have response times for 80 percent of WAV trips requested.*”<sup>16</sup>

The final Track 4 Decision did not correct this legal error, and the Commission did not alter its analysis of the Exemption Standard’s compliance with the statute or offer further explanation, other than to note that Uber and Lyft supported the provision of the PD regarding the response time definition.<sup>17</sup> The Commission thus adopted the Exemption Standard from the Proposed Decision.<sup>18</sup> The Commission also ordered that “[t]he Exemption Standard requirements are effective beginning in the 2<sup>nd</sup> Quarter of 2022. For exemption eligibility for the 1<sup>st</sup> Quarter 2022 and prior quarters, the previously adopted E[xemption] T[ime] S[tandard] and T[rip] C[ompletion] S[tandard] shall apply.”<sup>19</sup>

## **B. Legal Standard**

An application for rehearing of a Commission order or decision “shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law.”<sup>20</sup> “The purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.”<sup>21</sup>

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<sup>15</sup> DA Track 4 PD Comments at pp. A-3 – A8. San Francisco commented likewise. SF Comments on Track 4 Proposals, June 10, 2021, at pp. 3-4.

<sup>16</sup> DA Track 4 PD Comments at p. A-7. See discussion of this issue below.

<sup>17</sup> D. 21-11-004 at p. 30.

<sup>18</sup> *Id.*, Order at para. 10, p. 61.

<sup>19</sup> *Id.*

<sup>20</sup> CPUC Rules of Practice and Procedure, Rule 16.1(c).

<sup>21</sup> *Id.*



### **C. The TNC Exemption Requirements Adopted in the Track 4 Decision Do Not Comply with the Statutory Requirements of the TNC Access for All Act**

The standard in the Track 4 Decision for exemption from paying the TNC Access for All Act per-trip charge – the Exemption Standard – constitutes legal error. The Exemption Standard does not meet the explicit statutory requirement that exemptions can only be made available for TNCs that meet appropriate time standards for “80 percent of WAV trips *requested*.”<sup>22</sup> The adopted Exemption Standard does not comply with this requirement and instead requires a TNC to meet or exceed Level 1 response time benchmarks only for 80% of *completed* WAV trips in a particular geographic area for four consecutive quarters.<sup>23</sup> The Exemption Standard also requires a TNC to have qualified for an offset in that geographic area for the same four quarters.<sup>24</sup> But a TNC can qualify for an offset with a trip completion rate of only 50 to 75 percent each quarter,<sup>25</sup> a rate below (and potentially substantially below) the 80% statutory standard for exemptions. This means that, under the Exemption Standard adopted in the Track 4 Decision, a TNC could complete as few as 50% of the rides requested, and, as long as 80% of those completed trips were within the time benchmarks, the TNC would qualify for an exemption.

This is contrary to the explicit language of the TNC Access for All Act, as well as the overall intent of the statute. The Act is designed to ensure access to TNCs for people who use wheelchairs. It requires the Commission to set standards for the TNCs to demonstrate accessibility, including adoption of “a designated level of WAV service that is required to be met” in order to establish that a TNC is accessible and thus eligible for an exemption from collecting and remitting the per-trip fee.<sup>26</sup> Within those parameters, the overall standard is left to

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<sup>22</sup> Cal. Pub. Util. Code § 5440.5(a)(1)(G) (emphasis added).

<sup>23</sup> D. 21-11-004 at p. 61.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at p. 59.

<sup>26</sup> Cal. Pub. Util. Code § 5440.5(a)(1)(G).

the discretion of the Commission, but the statute sets a floor by requiring that the Commission “require a TNC, at a minimum, to have response times for 80 percent of WAV trips requested via the TNC’s online-enabled application or platform within a time established by the commission for that geographic area.”<sup>27</sup> The Act allows the Commission to set the response time requirements, and it also would allow the Commission to require more than 80 percent of requested WAV trips to have response times that meet the Commission’s standards. But it does *not* give the Commission the discretion to grant exempt status if that number falls below 80 percent. Eighty percent of rides requested (not completed) is a floor set by the statute itself, and the Commission cannot override or disregard this legislative requirement.

The express language of the TNC Access for All Act can be illustrated through an example of a TNC that has 100 WAV rides requested on its platform each quarter. The clear language of the statute states that the TNC can only be eligible for an exemption if it shows that it responded to at least 80 of those requested rides within the Commission’s established response time standards, and that it did this for four consecutive quarters. But under the adopted Exemption Standard, a TNC that had 100 WAV rides requested each quarter could qualify for an exemption even if the TNC met the Commission’s response time standards for many fewer than 80 requested WAV rides.

For example, a TNC operating in County Group A (per the Trip Completion Standard framework set forth in the chart on page 59 of the Track 4 Decision) could qualify for an exemption even if it only met the Commission’s response time standards for 40 out of 100

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<sup>27</sup> *Id.*

requested WAV rides in the first quarter, which is only half of the statutory requirement.<sup>28</sup> This is because the Trip Completion Standard requires a completion rate of only 50% (i.e. 50 requested rides are completed at all). And of those 50 WAV rides, only 40 rides (i.e., 80% of 50), need to be completed within a set response time. In the second quarter, the minimum required completion level to qualify for an exemption increases only to 44 out of 100 requested WAV rides, then to 46 out of 100 requested WAV rides in the third quarter, and 49 out of 100 requested WAV rides in the fourth quarter, as illustrated by the chart below:

Quarter	WAV Rides Requested	Minimum WAV Rides Completed	Minimum WAV Rides Needed to Meet Response Time Standards for Exempt Status (i.e., 80% of WAV Rides Completed)
1	100	50	40
2	100	54	44
3	100	57	46
4	100	61	49

Each of those numbers (40, 44, 46, and 49 out of 100 WAV rides meeting the Commission’s response time standards) is well below the statutory requirement of 80 out of 100 WAV rides that must meet the Commission’s response time standards. The numbers are even further out of alignment with the statutory requirement for TNCs operating in County Group B and County

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<sup>28</sup> The TNC Access for All Act also requires that a TNC seeking an exemption must establish that it has met the Commission’s designated level of WAV service – which includes the 80% of requested rides standard – “for a particular year.” Cal. Pub. Util. Code § 5440.5(a)(1)(G). In other words, it is not enough for a TNC to show that at least 80 percent of WAV rides requested have met the Commission’s response time standards during the course of a single quarter. The TNC must instead show that 80 percent of WAV rides requested have met the appropriate response time standards for four consecutive quarters, or one full year.

Group C, which have even lower completion rate requirements.

The Commission interprets Section 5440.5(a)(1)(G) of the TNC Access for All Act “to be meant to apply to completed WAV trips, not merely any requested WAV trip.”<sup>29</sup> But this is directly contrary to the express language of Section 5440.5(a)(1)(G), which could not be clearer that the 80 percent requirement applies to *requested* WAV trips, not completed ones. The statute states that “the commission shall require a TNC, at a minimum, to have response times for 80 percent of WAV trips *requested* via the TNC’s online-enabled application or platform within a time established by the commission for that geographic area.”<sup>30</sup> The legislative language could not be more direct.

In the Track 4 Decision, the Commission notes its previous adoption in Track 2 of a definition for the term “response time” as “the time elapsed between when a WAV ride was requested and when the vehicle arrived,” and concludes that therefore a ride that is never completed has no response time.<sup>31</sup> But this definition does not bring the Track 4 Exemption Standard into compliance with the law. No definition of “response time” can change the fact that the TNC Access for All Act does not allow the Commission to disregard ride requests that receive no response in its implementation of Section 5440.5(a)(1)(G).

But even assuming (as the Commission does) that a ride that is never completed does not have a response time, the statute is clear that a TNC that is seeking an exemption must “*have response times* for 80 percent of WAV trips requested via the TNC’s online-enabled application or platform within a time established by the commission” in order to obtain an exemption.<sup>32</sup> If more than 20% of the requested WAV trips on a TNC’s platform do not “have a response time . .

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<sup>29</sup> D. 21-11-004 at pp. 31-32.

<sup>30</sup> Cal. Pub. Util. Code § 5440.5(a)(1)(G) (emphasis added).

<sup>31</sup> D. 21-11-004 at pp. 31-32.

<sup>32</sup> Cal. Pub. Util. Code § 5440.5(a)(1)(G) (emphasis added).

. within a time established by the commission,” then the Commission may *not* exempt that TNC from collecting the required per trip fee.

To explain the matter another way: the percentage of “WAV trips *requested* via the TNC’s online-enabled application or platform” that have a response time “within a time established by the commission for that geographic area” is calculated by dividing (*a*) the total number of WAV trips requested by (*b*) the total number of WAV trips that have a response time within a time established by the Commission. That is, *a* divided by *b* produces the percentage, which must be 80% or greater. A ride that is requested but not completed must be included in *a*, the denominator, because it has been requested via the TNC’s online-enabled application or platform. And a ride that is requested but not completed must be excluded from *b*, the numerator, because it does not have a response time within a time established by the Commission (in fact, by the Commission’s own definition of “response time,” it has no response time at all). The Commission’s error, in essence, is to exclude rides that are requested but not completed from the equation entirely, when the statute provides that they must be included in the denominator.

In the discussion of the Track 4 PD at the Commission’s public voting meeting on November 7, 2021, Commissioner Guzman Aceves acknowledged that the Commission had “a denominator problem” on this issue, but called it “one that has been previously decided.”<sup>33</sup> The Commissioner was correct regarding the “denominator problem.” The Commission uses an illegal denominator in the Track 4 Decision to calculate whether a TNC’s service has met the 80% standard for an exemption. It divides the number of trips meeting the Level 1 Offset Response Time Benchmarks by the total number of trips *completed*, not by the total number of

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<sup>33</sup> CPUC Nov. 4, 2021 Voting Meeting, recording available at [http://www.adminmonitor.com/ca/cpuc/voting\\_meeting/20211104/](http://www.adminmonitor.com/ca/cpuc/voting_meeting/20211104/); Comm’r Guzman Aceves’s comments begin at 1h 51m.

trips *requested*. Yet the TNC Access for All Act is clear that the denominator must be “WAV trips *requested* via the TNC’s online-enabled application or platform.”<sup>34</sup>

Presumably, Commissioner Guzman Aceves’s comment that the issue had “been previously decided” was a reference to the fact that the legal error had first appeared in the Track 2 Decision, where the Commission departed from both its own Scoping Memo and the express terms of the TNC Access for All Act to calculate an 80% exemption standard based on the number of trips requested. But past illegality cannot excuse present illegal action by the Commission. The Exemption Standard in the Track 4 Decision does not comply with the law, and the fact that the Commission’s prior Exemption Time Standard in the Track 2 Decision *also* does not comply with the law cannot absolve that. The correct course of action is to remedy the prior illegal standard, not to continue the error in the newly-adopted standard.

The Disability Advocates did not note the legal error in the Track 2 Exemption Standard at the time it was issued. But even if there were a rule that a party’s failure to comment on a past illegal standard could provide the Commission with immunity to set future standards with the same kind of error – and *there is no such rule* – it would not be applicable in a case like this. In Track 2, the Commission appropriately framed the question it put to the parties in the Scoping Memo as “What information should be used to establish the required response time for 80 percent of WAV trips *requested*?”<sup>35</sup> In doing so, the Commission publicly indicated that it was on course to follow the law. The Commission cannot then without discussion substitute a different – and illegal – term into a decision and expect that this somehow provides it with authority to continue making the same kind of legal error on an ongoing basis.

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<sup>34</sup> Cal. Pub. Util. Code § 5440.5(a)(1)(G) (emphasis added).

<sup>35</sup> May 7, 2019 Assigned Commissioner’s Scoping Memo and Ruling, Section 2.2, Track 2, topic 2.c. at p. 6.

Moreover, the principle that Commission cannot use an illegal standard to grant exemptions to the fee-collection requirements of the TNC Access for All Act applies regardless of when the erroneous standard first appeared. The Exemption Standard found in the Track 4 Decision falls below the floor set in the statute and must be revised to require at least 80 percent of trips *requested* meet the Commission’s time standards. The Commission must also revise its Track 4 order that “[f]or exemption eligibility for the 1<sup>st</sup> Quarter 2022 and prior quarters, the previously adopted E[xemption] T[ime] S[tandard] and T[rip] C[ompletion] S[tandard] shall apply,” because the Track 2 standard was based on the number of trips completed, rather than the number of trips requested, in violation of the statute.

The Commission is not above the law. In the TNC Access for All Act, the Legislature mandated that the Commission “shall require a TNC, at a minimum, to have response times for 80 percent of WAV trips requested via the TNC’s online-enabled application or platform within a time established by the commission for that geographic area” in order to be eligible for an exemption.<sup>36</sup> The Commission is obligated to follow that directive.

### III. CONCLUSION

The Disability Advocates respectfully request that the Commission grant rehearing to correct the unlawful and erroneous standard for TNC Exemption Requirements adopted in the Track 4 Decision.

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<sup>36</sup> Cal. Pub. Util. Code § 5440.5(a)(1)(G).

December 8, 2021

Respectfully submitted,

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