Decision 16-01-014 January 14, 2016

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

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| Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transportation Services. | Rulemaking 12-12-011 (Filed December 20, 2012) |

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# MODIFIED PRESIDING OFFICER'S DECISION FINDING RASIER-CA, LLC, IN CONTEMPT, IN VIOLATION OF RULE 1.1 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE, AND THAT RASIER-CA, LLC'S, LICENSE TO OPERATE SHOULD BE SUSPENDED FOR FAILURE TO COMPLY WITH COMMISSION DECISION 13-09-045

**Table of Contents**

**Title** **Page**

**Table of Contents (cont'd)**

**Title** **Page**

**Table of Contents (cont'd)**

**Title** **Page**

**Table of Contents (cont'd)**

**Title** **Page**

**Table of Contents (cont'd)**

**Title** **Page**

**Table of Contents (cont'd)**

**Title** **Page**

**MODIFIED PRESIDING OFFICER'S DECISION FINDING RASIER-CA, LLC IN CONTEMPT, IN VIOLATION OF RULE 1.1 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE, AND THAT RASIER-CA, LLC'S LICENSE TO OPERATE SHOULD BE SUSPENDED FOR FAILURE TO COMPLY WITH COMMISSION DECISION 13-09-045**

## Summary

This decision finds that Rasier-CA, LLC (Rasier-CA) is in contempt for failing to comply fully with the Reporting Requirements g, j, and k in Decision (D.) 13-09-045. These requirements address accessibility, availability and driver safety information. This decision further finds that Rasier-CA shall be fined in the amount of $1,000 pursuant to Pub. Util. Code § 2113.

This decision also finds that Rasier-CA violated Rule 1.1 of the Commission's Rules of Practice and Procedure by failing to comply fully with Reporting Requirements g, j, and k in D.13-09-045 and shall pay a fine in the amount of $7,626,000 pursuant to Pub. Util. Code §§ 2107, 2108, 5411, and 5415. The amount of the fine has been adjusted to reflect the fact that Rasier-CA partially complied with Reporting Requirement j on March 6, 2015, and fully complied with Reporting Requirements g, j and k on August 13, 2015.

Finally, this decision finds that Rasier-CA's license shall be suspended. Rasier-CA's suspension shall start 30 days after this decision is issued and Rasier-CA has not paid the above fines. The suspension shall remain in effect until Rasier-CA pays the above-enumerated fines.

## 1. Background

On September 19, 2013, the Commission, in Decision (D.) 13-09-045 (Decision) created a new category of transportation charter party carrier (TCP) of passengers called Transportation Network Companies (TNCs). The Decision set forth the various requirements that TNCs must comply with in order to operate

in California. Among other regulatory requirements, the Decision required TNCs to submit annual reports containing certain information. Specifically, the Decision states that:

- One year from the effective date of these rules and annually thereafter, each TNC shall submit to the Safety and Enforcement Division a report detailing the number and percentage of their customers who requested accessible vehicles, and how often the TNC was able to comply with requests for accessible vehicles.[1]
- One year from the effective date of these rules and annually thereafter, each TNC shall submit to the Safety and Enforcement Division a verified report detailing the number of rides requested and accepted by TNC drivers within each zip code where the TNC operates; and the number of rides that were requested but not accepted by TNC drivers within each zip code where the TNC operates. The verified report provided by TNCs must contain the above ride information in electronic Excel or other spreadsheet format with information, separated by columns, of the date, time, and zip code of each request and the concomitant date, time, and zip code of each ride that was subsequently accepted or not accepted. In addition, for each ride that was requested and accepted, the information must also contain a column that displays the zip code of where the ride began, a column where the ride ended, the miles travelled, and the amount paid/donated. Also, each report must contain information aggregated by zip code and by total California of the number of rides requested and accepted by TNC drivers within each zip code where the TNC operates and the number of rides that were requested but not accepted by TNC drivers.[2]

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[1] D.13-09-045 at 30-31 (Requirement g).

[2] *Id*. at 31-32 (Requirement j).

- One year from the effective date of these rules and annually thereafter, each TNC shall submit to the Safety and Enforcement Division a verified report in electronic Excel or other spreadsheet format detailing the number of drivers that were found to have committed a violation and/or suspended, including a list of zero tolerance complaints and the outcome of the investigation into those complaints. Each TNC shall also provide a verified report, in electronic Excel or other spreadsheet format, of each accident or other incident that involved a TNC driver and was reported to the TNC, the cause of the incident, and the amount paid, if any, for compensation to any party in each incident. The verified report will contain information of the date of the incident, the time of the incident, and the amount that was paid by the driver's insurance, the TNC's insurance, or any other source. Also, the report will provide the total number of incidents during the year.[3]
- One year from the effective date of these rules and annually thereafter, each TNC shall submit to the Safety and Enforcement Division a verified report detailing the average and mean number of hours and miles each TNC driver spent driving for the TNC.[4]
- TNCs shall establish a driver training program to ensure that all drivers are safely operating the vehicle prior to the driver being able to offer service. This program must be filed with the Commission within 45 days of the adoption of this decision. TNCs must report to the Commission on an annual basis the number of drivers that became eligible and completed the course.[5]

[3] *Id*. at 32 (Requirement k).

[4] *Id*. at 32-33 (Requirement l).

[5] *Id*. at 27 (Requirement f).

### 1.1. Rasier-CA[6] Failed to Submit All of the Information Ordered in D.13-09-045

On September 19, 2014, Rasier-CA submitted its annual report information to the Safety and Enforcement Division (SED). SED reviewed the information and found that Rasier-CA had failed to provide all of the information specified in the Decision.

Specifically, SED alleged that Rasier-CA failed to respond to certain reporting requirements in the following manner:

| Requirement | Title | What Respondent Failed to Provide |
|---|---|---|
| g | Accessibility Information | 1.) The number and percentage of customers who requested accessible vehicles;<br><br>2.) How often the TNC was able to comply with requests for accessible vehicles; |
| j | Report on Service Information by Zip | 1.) The number of rides requested |

[6] For the sake of clarity, some initial identifications are in order. First, there is Uber Technologies, Inc. (Uber). Second, there is Rasier, LLC (Rasier), a wholly-owned subsidiary of Uber. Third, there is Rasier-CA, LLC (Rasier-CA), which is also a wholly-owned subsidiary of Uber. Rasier-CA applied for and was granted permission by the Commission to operate as a TNC. Fourth, there is UberX, which this Commission determined in D.13-09-045 to be a TNC. These corporate relationships will be explored in more detail later in this decision.

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|---|---|---|
| | Code | and accepted by TNC drivers within each zip code where the TNC operates;<br><br>2.) The number of rides that were requested but not accepted by TNC drivers within each zip code where the TNC operates;<br><br>3.) The date, time, and zip code of each ride request;<br><br>4.)The concomitant date, time, and zip code of each ride that was subsequently accepted or not accepted;<br><br>5.) Columns that displays the zip code of where each ride that was requested and accepted began, ended, the miles travelled, and the amount paid/donated;<br><br>6.) Information |

| | | |
|---|---|---|
| | | aggregated by zip code and a statewide total of the number of rides requested and accepted by TNC drivers within each zip code where the TNC operates and the number of rides that were requested but not accepted by TNC drivers; |
| k | Problems with Drivers | 1.) For the report on issues with drivers, the cause of each incident reported;<br><br>2.) For each incident reported, the insurance amount paid, if any, by any party other than the TNC's insurance.[7] |

[7] *See* Exhibit 1 at 4-5.

### 1.2. Efforts to Obtain Compliance with Requirements g, j, and k.

Since September 19, 2014, SED has worked to obtain complete information as required by D.13-09-045 through the issuance of an additional data request dated October 6, 2014. (Exhibit 2, Attachment C.) Rasier-CA provided its claimed confidential responses on October 10, 2014, and a digital versatile disc (DVD) on October 20, 2014. (*Id.*) SED reviewed these further responses and determined that SED has not received all of the information ordered by D.13-09-045.[8] Instead, Rasier-CA provided the following:

| Reporting Requirement | Title | What Rasier-CA Provided | Why the Response Is Deficient |
|---|---|---|---|
| g | Accessibility | Rasier-CA provided a narrative of their efforts to date for accommodating visually impaired, persons with service animals, and persons requiring a wheelchair accessible vehicle. (Exhibit 2, Attachment C.) | No actual data was provided.<br><br>(Exhibit 1 at 4; Reporter's Transcript [RT] at 392-393.) |
| j | Report on Providing Service by Zip Code | Rasier-CA provided electronic files entitled "Percent Completed Out of Requested Within ZIP Code Tabulation Area" and "Share of Activity by ZIP Code Tabulation | Rasier-CA did not provide the raw numbers ordered by D.13-09-045. (Exhibit 1 at 5; RT at 393-396.) |

[8] *Id*. at 3-4.

| | | | |
|---|---|---|---|
| | | Area Out of All California." (Exhibit 2, Attachment C.) These files contained folders with data in Excel cvs [comma separated values] that provided information in aggregates, averages, and percentages. (Exhibit 2, Attachment C.) Rasier-CA also provided a Heatmap of service by zip code. (Exhibit 2, Attachment C.) | |
| k | Report on Problems with Drivers | Rasier-CA provided information in a file entitled "CPUC Rasier Report on Problems with Drivers." (Exhibit 2, Attachment C.) Rasier did not provide information regarding causes of incidents and amount paid, if any, by any party other than the TNC's insurance. (Exhibit 2, Attachment C.) Rasier-CA could not provide information regarding amounts paid by third parties as it did not have this data. (RT at 397:23-28.) | Rasier-CA's response was incomplete as it has not provided information regarding the cause of the incidents and which driver was at fault. (Exhibit 1 at 5; RT at 397:17-18.) |

### 1.3. Expansion of the Scope of the Proceeding to Include Order to Show Cause (OSC)

On November 7, 2014, the then-assigned Commissioner, Michael Peevey, issued a ruling amending the scope of this proceeding to include an OSC against both UberX and Lyft.[9] The ruling states:

> As such, this Ruling amends the scope of this proceeding to include an OSC against both UberX and Lyft. As part of the OSC, UberX and Lyft will be given an opportunity to be heard and to explain why they should not be found in contempt, why fines and penalties should not be imposed, and why their licenses to operate should not be revoked or suspended for allegedly violating some of the reporting requirements set forth in D.13-09-045.[10]

The OSC phase of this proceeding was designated as adjudicatory.

### 1.4. Rasier-CA was Ordered to Appear and Show Cause.

On November 14, 2014, the assigned Administrative Law Judge (ALJ) issued a ruling ordering Rasier-CA to appear for hearing and to show cause as to why it should not be found in contempt, why penalties should not be imposed, and why Rasier-CA's license to operate should not be revoked or suspended for its failure to comply with D.13-09-045. The ruling also ordered Rasier-CA to address Rule 1.1 of the Commission's Rules of Practice and Procedure, as well as Pub. Util. Code §§ 701, 2107, 2108, 2113, 5411, 5415, 5378(a), and 5381.

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[9] The Lyft OSC is addressed in a separate decision.

[10] Ruling at 2.

#### 1.4.1. Pub. Util. Code § 2107

Pub. Util. Code § 2107 provides for a penalty of not less than five hundred dollars and not more than fifty thousand dollars for a utility's failure or neglect to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the Commission.

#### 1.4.2. Pub. Util. Code § 2108

Pub. Util. Code § 2108 provides that every violation of any order, decision, decree, rule, direction, demand or requirement of the Commission is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense.

#### 1.4.3. Pub. Util. Code § 5381

Pub. Util. Code § 5381 provides that the Commission may supervise and regulate every charter-party carrier of passengers in the State and may do all things, whether specifically designated in this part, or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

#### 1.4.4. Pub. Util. Code § 5411

Pub. Util. Code § 5411 provides that a TCP that fails to obey, observe, or comply with any order, decision, rule, regulation, direction, demand, or requirement of the Commission is guilty of a misdemeanor and is punishable by a fine of not less than one thousand dollars and not more than five thousand dollars for every violation or failure to comply with any order or decision of the Commission.

#### 1.4.5. Pub. Util. Code § 5415

Every violation of Pub. Util. Code § 5411 *et seq.* is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof is a separate and distinct offense. (Pub. Util. Code § 5415.)

#### 1.4.6. Pub. Util. Code § 2113

Pub. Util. Code § 2113 states that a utility, corporation, or person which fails to comply with any part of any order, decision, rule, regulation, direction, demand, or requirement of the Commission or any Commissioner is in contempt of the Commission, and may be punished by the Commission in the same manner and to the same extent as contempt is punished by courts of record.

#### 1.4.7. Rule 1.1

Pursuant to Rule 1.1 of the Commission's Rules of Practice and Procedure, any person who transacts business with the Commission may never mislead the Commission or its staff by an artifice or false statement of fact or law. A person who violates Rule 1.1 may be sanctioned in accordance with Pub. Util. Code § 2107.

#### 1.4.8. Pub. Util. Code § 701

In addition to imposing monetary fines, penalties, and holding a utility in contempt, the Commission can do all things necessary and convenient in the exercise of its power and jurisdiction, pursuant to Pub. Util. Code § 701. Accordingly, penalties may also include additional requirements for Respondent to immediately rectify its violations by requiring it to immediately turn over all requested information to SED, or any other measures the Commission deems necessary.

#### 1.4.9. Pub. Util. Code § 5378(a)

Finally, the Commission is empowered by law to permanently revoke the Respondent's operating authority. Pub. Util. Code § 5378(a) provides that the Commission "may cancel, revoke, or suspend any operating permit or certificate" issued to any charter party carrier, including Respondent, for any violation of any order, decision, rule, or requirement of the Commission.

In sum, the November 14, 2014 ruling placed Rasier-CA on notice that the Commission might impose, fines, and/or penalties, hold Respondent in contempt, and/or impose any other punishments consistent with the foregoing Public Utilities Code Sections and Rule 1.1, if found to be supported by the evidence at the OSC hearing.

### 1.5. Party Filings for OSC Hearing

On December 4, 2014, Rasier-CA filed its Verified Statement Responding to Order to Show Cause. (Exhibit 10.) In it, Rasier-CA trivializes the seriousness of its failure to produce by mischaracterizing this matter as presenting "a garden variety discovery dispute about the unduly burdensome, cumulative, and overly broad scope of data production request j, and the form and manner in which TNCs may satisfy that request." (Verified Statement at 3.)

Rasier-CA is in error in several respects. First, this is not a discovery dispute between parties to a proceeding. Rasier-CA has failed to comply with certain reporting requirements mandated by this Commission when it unanimously adopted D.13-09-045. As such, Rasier-CA was and is obligated to comply with the Commission's Orders.

Second, Rasier-CA's assertion that the reporting requirements are unduly burdensome, cumulative, and overly broad is undermined by the fact that other regulated TNCs have complied with Reporting Requirements g, j, and k.[11] Additionally, as we discuss, *infra*, Rasier-CA's unduly burdensome, cumulative, and over broad objections are factually and legally unsupported.

[11] The OSC was only directed to UberX and Lyft as the other TNCs complied with D.13-09-045's reporting requirements. Lyft eventually complied with Report Requirement j on November 11 and November 12, 2014. (RT at 440:26-441:6; and 435:1-13.).

On December 4, 2014, Rasier-CA served its Petition to Modify D.13-09-045.

On December 8, 2014, at 5:01 p.m., Rasier-CA served an Emergency Motion Requesting Deferral of Hearings. The assigned ALJ denied the Emergency Motion on December 8, 2014 at 7:13 p.m.

On December 9, 2014, SED filed its Verified Reply to Rasier-CA's Verified Statement Responding to Order to Show Cause.

On December 10, 2014, Rasier-CA filed a Motion to Strike Portions of SED's Verified Reply.

Rasier-CA and SED submitted their respective testimony and the evidentiary hearing was held on December 18, 2014. The following documents were received into evidence:

| Exhibit Number | Title |
|---|---|
| 1 | Report on the Failure of Rasier-CA, LLC to Comply with the Reporting Requirements of Decision (D.) 13-09-045—Public Version |
| 2 | Report on the Failure of Rasier-CA, LLC to Comply with the Reporting Requirements of Decision (D.) 13-09-045—Confidential Version |
| 3 | Safety and Enforcement Division's Responses & Objections to Rasier-CA, LLC's First Set of Data Requests |
| 4 | Safety and Enforcement Division's Reply to the Verified Statement of Rasier-CA, LLC Responding to Order to Show Cause in Rulemaking 12-12-011 |
| 5 | Qualifications of Valerie Kao |
| 6 | Qualifications of Brewster Fong |
| 7 | Decision 13-09-045 |

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|---|---|
| 8 | Assigned Commissioner and Assigned Administrative Law Judge Scoping Memo and Ruling for Phase II |
| 9 | Proposed Decision of Commissioner Peevey (Mailed 7/30/2013) Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry |
| 10 | Verified Statement of Rasier-CA, LLC Responding to Order to Show Cause filed December 4, 2014 |
| 11 | Class P Transportation Network Company Permit issued to Rasier-CA, LLC |

On January 21, 2015, SED and Rasier-CA filed their respective post-hearing opening briefs.

On February 5, 2015, SED and Rasier-CA filed their respective post-hearing reply briefs.

### 1.6. Raiser-CA's Motion on Modification

On December 4, 2014, Raiser-CA filed a Petition to Modify D.13-09-45. The Petition, which was filed on the same day that Raiser-CA filed its Verified Statement, mirrored the arguments from the Verified Statement.

### 1.7. Rasier-CA's Motion to Set Aside Submission and Reopen the Record

On February 17, 2015, Rasier-CA filed its Motion to Set Aside Submission and Reopen the Record in Order to Show Cause in Rulemaking 12-12-011. On February 19, 2015, the assigned ALJ granted the Motion and set a further briefing schedule. The ruling also received the following into evidence:

| | |
|---|---|
| 11-A | Declaration of Wayne Ting |
| 11-B | Declaration of Krishna Juvvadi |

On February 27, 2015, SED filed its Response to Rasier-CA's Motion to Set Aside Submission and Reopen the Record in Order to Show Cause in Rulemaking 12-12-011.

On March 6, 2015 Rasier-CA filed its Reply to SED's Response. The Response included another Declartion from Krishna Juvvadi who claimed that Rasier-CA produced the concomitant data required by Reporting Requirement j to SED on March 6, 2015. This March 6, 2015 Declaration from Mr. Juvvadi is marked and entered into evidence as Exhibit 11-C. As we explain, *infra*, the matter was submitted as of June 23, 2015.

## 2. Matters to Which this Decision Takes Official Notice or Admits as Authorized Admissions and Party Admissions

### 2.1. Official Notice/Judicial Notice

Throughout this decision, there are references to pleadings, filings, decisions, and statements regarding Uber, Rasier, LLC, and/or Rasier-CA in either regulatory proceedings in other states and federal court, or on the internet. Pursuant to Rule 13.9 of the Commission's Rules of Practice and Procedure, "Official notice may be taken of such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450 et seq."

Evidence Code § 452(a) states that judicial notice may be taken of the "decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state." Pursuant to Rule 13.9 and Evidence Code § 452 (a), this decision takes official notice of the following decision:

- *Notice of Decision*, dated January 6, 2015, from the Taxi & Limousine Tribunal, A Division of the Office of Administrative Trials and Hearings, City of New York, in the matter of *Taxi and*

*Limousine Commission against Weiter LLC*, Summons Number FC0000332 (*Notice of Decision, Weiter*).

Evidence Code § 452 (d) states that judicial notice may be taken of the "Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." Pursuant to Rule 13.9 andEvidence Code § 452(d), this decision takes official notice of the following pleadings, documents, and rulings from *National Federation of the Blind of California v. Uber Technologies, Inc.*, (N.D.Cal. 2014), Case No. 3:14-cv-4086:

- The Complaint and First Amended Complaint, filed September 9, 2014, and November 12, 2014, respectively (Complaint, *National*; First Amended Complaint, *National*)
- Proof of Service on Uber Technologies, Inc., filed September 25, 2014 (Proof of Service, *National*);
- Stipulation to Extend Time for Defendant Uber Technologies, Inc. to File a Responsive Pleading, filed October 9, 2014 (Stipulation, *National*);
- Defendant Uber Technologies, Inc.'s Notice of Motion and Motion to Dismiss; Memorandum of Points and Authorities in Support Thereof, filed October 22, 2014 (Uber's Motion to Dismiss, *National*);
- Declaration of Michael Colman in Support of Defendant Uber Technologies, Inc.'s Motion to Dismiss, filed October 22, 2014 (Colman Decl., *National*);
- Order Denying Motion to Dismiss, filed April 17, 2015 (Order, *National*); and
- Defendants' Answer to Plaintiffs' First Amended Complaint, filed May 1, 2015 (Defendants' Answer, *National*).

Pursuant to Rule 13.9 and Evidence Code Section 452(d), this decision also takes official notice of the following pleadings, documents, and rulings from *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2013), Case No. 13-03826-EMC:

- Defendant Uber Technologies, Inc.'s Answer to Plaintiffs' Class Action Complaint, filed December 19, 2013 (Uber's Answer, *O'Connor*);
- Order Granting Defendant's Motion for Judgment on the Pleadings, filed September 4, 2014 (Order Granting, *O'Connor*);
- Declaration of Michael Colman in Support of Defendant's Motion for Summary Judgment, filed December 4, 2014 (Colman Decl., *O'Connor*); and
- Order Denying Defendant Uber Technologies, Inc.'s Motion for Summary Judgment, filed March 11, 2015 (Order Denying, *O'Connor*).

Evidence Code § 452(h) states that judicial notice may be taken of "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Pursuant to Rule 13.9 and Evidence Code § 452(h), this decision takes official notice of information from Uber's website regarding its operations, particularly the following blogs:

- *4 YEARS IN*, dated June 6, 2014, and posted by Travis Kalanick; and
- *Driving Solutions To Build Smarter Cities*, dated January 13, 2015, and posted by Justin Kintz.

Prior to taking officiall notice, the parties were notified pursuant to Evidence Code Section 455(a) which states:

> If the trial court has been requested to take or has taken or proposes to take judicial notice of such matter, the court shall afford each party reasonable opportunity, before the jury is instructed or before the cause is submitted for decision by the court, to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed.

Rasier-CA and SED were given until June 23, 2015, to present their positions on the propriety of taking official notice, as well as the tenor of the matter to be noticed. Their comments have been received and analyzed, and nothing contained therein causes this decision to refrain from its determination to take official notice of those matters identified above.[12]

In making this determination to take official notice, this decision acknowledges that there is a split of authority in California regarding taking official notice of pleadings, findings of fact, and conclusions of law in other proceedings. There are some California decisions that have recognized that it is appropriate to take official notice of the findings of fact and conclusions of law, but not hearsay allegations from other proceedings. (*See Boyce v. T.D. Service Co.* (2015) 235 Cal.App.4th 429, 434; *Weiner v. Mitchell, Silberberg & Knupp* (1980) 114 Cal.App.3d 39, 45-46; *Day v. Sharp* (1975) 50 Cal.App.3d 904, 914; and *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604-605. Other California decisions have taken a contrary view and have reasoned that it is not appropriate to take judicial notice of the findings of fact and conclusions of law in other proceedings since the findings and conclusions may have been reasonably subject to dispute and, therefore, the findings and conclusions may not necessarily be correct. (*See Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 148; *Lockley v. Law Office of Cantrell, Green Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882; and *Sosinsky v. Grant* (1992) 6 Cal.App. 4th 1548, 1565 and 1568.)

[12] By separate ruling, we instruct our Docket Office to accept the Rasier-CA and SED comments on the judicial notice question for filing so that they are part of the record.

We have examined these decisions, as well as the decisions rendered pursuant to Federal Rule of Evidence 201(b),[13] the federal counterpart to Evidence Code § 452 (h).[14] Without having to resolve the split of authority, we adopt the following approach for purposes of this decision: first, we will take official notice of the existence of pleadings, findings of fact, and conclusions of law in other proceedings. Second, with the exception noted below, we will not take official notice of the truth of the matters asserted or found in the pleadings, findings of fact, and conclusions of law if they were matters that were reasonably subject to dispute in the other proceedings. Third, we will take official notice of the truth of certain matters asserted by Uber in other proceedings (*e.g.* through the Uber's pleadings and declarations) which are undisputed, and certain findings of fact and conclusions of law that are based on matters asserted by Uber, put into evidence by Uber, stipulated to by Uber, or where the matter is not reasonably subject to dispute. We believe this third guiding principle is consistent with Evidence Code § 452 (h) and Federal Rule of Evidence 201(b). (*See Taylor v. Charter Medical Corp*. (5th Cir. 1998) 162 F.3d 827, 830 [Some courts have not taken a *per se* rule against taking judicial notice of an adjudicative fact since it is "conceivable that a finding of fact may satisfy the indisputability

[13] The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or
(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

[14] Judicial notice may be taken of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

requirement of Fed.R.Evid. 201(b)[,]" quoting from *General Electric Capital Corp. v. Lease Resolution Corp.* (7th Cir. 1997) 128 F.3d 1074, 1082, footnote 6.].)

With respect to taking official notice as to matters on a website, courts have taken judicial notice if it is the website of a party,[15] a government agency,[16] or if the website is a reference center.[17] Although there have been some instances where courts have declined to take judicial notice of a website,[18] we find these decisions to be distinguishable as the information from Uber's website is not something that is subject to interpretation. Instead, the blogs from Uber's website are from Uber's CEO and Director of Northern California Operations, and concern Uber's assessment of its operations, growth, revenue, and interactions with government agencies.

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[15] *See Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1573-1574 [plaintiff's website]; and *O'Toole v. Northrop Grumman Corp.* (10th Cir. 2007) 499 F.3d 1218, 1224-1225 [company posted retirement earnings on website].

[16] *See People v. Kelly* (2013) 215 Cal.App.4th 297, 304, footnote 4 [Criminal Justice Realignment Resource Center website]; *Caldwell v. Caldwell* (N.D. Cal. 2006) 420 F.Supp.2d 1102, 1105, footnote 3, *aff'd* (9th Cir. 2008) 545 F.3d 1126 [national agency websites]; *Wible v. Aetna Life Ins. Co.* (C.D. Cal. 2005) 375 F.Supp.2d 956, 965-966 [Administrative opinion letter from California Department of Insurance; webpage information]; *United States ex rel. Dingle v. Bioport* (W.D. Mich. 2003) 270 F.Supp.2d 968, 971-972 [public records of government documents].

[17] *See In re Gilbert R.* (2012) 211 Cal.App.4th 514, 519, footnote 1 [reference material from The American Knife and Tool Institute].

[18] *See Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 193-194 [website and blogs from the Los Angeles Times and Orange County Register were subject to interpretation and for that reason were not subject to judicial notice] ; and *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1141, footnote 6 [truth of content of newspaper article not proper for judicial notice and the circumstances under which the articles were published were deemed irrelevant to the Court's discussion].

### 2.1.1. Admissibility v. Substantiality When Hearsay is Offered to Resolve a Disputed Fact

In *The Utility Reform Network v. Public Utilities Commission* (*TURN*) (2014) 223 Cal.App.4th 945, the Court performed a thorough analysis to guide the Commission, and those parties appearing before the Commission, regarding the admissibility and value of hearsay evidence when offered to resolve a disputed fact. TURN drew this distinction in recognition of the fact that "admissibility and substantiality of hearsay evidence are different issues." (223 Cal.App.4th at 960, quoting *Gregory v. State Bd. Of Control* (1999) 73 Cal.App.4th 584, 597, and citing *Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532, 538, footnote 3.)

#### 2.1.1.1. Admissibility

*TURN* first addressed the subject of admissibility of hearsay as to a disputed fact and set forth the following:

| Admissibility Rules | Authority |
|---|---|
| Technical rules of evidence need not be applied to Commission proceedings. | 223 Cal.App.4th at 959, citing to Pub. Util. Code § 1701(a) and Rule 13.6(a). |
| Hearsay evidence is admissible in Commission proceedings if a responsible person would rely upon it in the conduct of serious affairs. | 223 Cal.App.4th at 960, citing to Decision 05-06-033 (2005 Cal.P.U.C. Lexis 221 at *81[*Clear World Communications*) and *Re Landmark Communications, Inc.* (1999) 84 Cal.P.U.C.2d 698 at 701. |
| The Commission may rely to some extent on unverified prepared testimony when it is submitted in anticipation of sworn oral testimony, and when due consideration is given to the fact that the sponsor has not been subjected to cross examination. | 223 Cal.App.4th at 960, citing *Re American Telephone & Telegraph Co.* (1994) 54 Cal.P.U.C.2d 43 at 49. |

#### 2.1.1.2. Substantiality

*TURN* then moved to the subject of substantiality of hearsay evidence to support a disputed finding of fact and set forth the following:

| Substantiality Rules | Authority |
|---|---|
| Mere admissibility does not equal sufficiency to support a disputed finding absent other competent evidence. | 223 Cal.App.4th at 960, citing to *Daniels*, *supra*, 33 Cal.3d at 538, footnote 3. |
| There must be substantial evidence to support a finding and hearsay, unless specifically permitted by statute, is not competent evidence to that end. | 223 Cal.App.4th at 960. |

**We acknowledge and discuss this distinction in Section 10.4 of this decision.**

### 2.2. Authorized Admissions and Party Admissions

Finally, statements made by Uber's CEO, Travis Kalanick, Uber's Head of Policy for North America, Justin Kintz, and a member of Uber's policy and communications team, Matthew Wing, are also admitted as authorized admissions pursuant to Evidence Code § 1222, which provides:

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:
>
> (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement;
>
> (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

These three individuals are certainly authorized to speak for Uber regarding those matters in their respective fields of expertise. It is only those statements that we admit under Evidence Code § 1222.

Furthermore, these statements would be admissible as the admissions of a party opponent. Pursuant to Evidence Code § 1220:

> Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

In *People v. Horing* (2004) 34 Cal.4th 871, 898, footnote 5, the California Supreme Court clarified the expansive scope of § 1220: "The exception to the hearsay rule for statements of a party is sometimes referred to as the exception for admissions of a party. However, Evidence Code [§] 1220 covers all statements of a party, whether or not they might be otherwise be characterized as admissions." As the statements we admit were those made by representatives of Rasier-CA's parent, Uber, they constitute an admission equally applicable to Rasier-CA.

## 3. Conclusions Regarding Rasier-CA's Compliance and Non Compliance

### 3.1. Reporting Requirement g (Report on Accessibility)

Rasier-CA asserts that it did not fail to comply with Reporting Requirement g (Report on Disability) because it did not have an accessible-vehicle feature on its Uber App during the reporting period.[19] At the evidentiary hearing, the SED representative acknowledged that since Rasier-CA would not have this feature on its app until October of 2014, there would be no information to report in response to Reporting Requirement g. (RT at 312:17-21.)

But the fact that Rasier-CA may not have had an accessible-vehicle feature on its app does not lead to the conclusion that it lacked any information responsive to Reporting Requirement g. As of September 9, 2014, Uber,

[19] Rasier-CA's Reply Brief at 3.

Rasier, LLC, and Rasier-CA, LLC had been sued by the National Federation of the Blind of California for discrimination against blind individuals who use service dogs.[20] The complaint alleges multiple instances, all before Rasier-CA's September 19, 2014 reporting date, where blind customers with service dogs claimed they were denied service by UberX drivers.[21] The Complaint also alleges that some of these customers complained to Uber about their treatment.[22]

On September 24, 2014, Uber was served with the complaint.[23]

On October 9, 2014, Uber entered into a stipulation with plaintiffs for additional time to file a responsive pleading.[24]

On October 22, 2014, Uber filed a Motion to Dismiss National Federation of the Blind of California's complaint.

What the above pleadings demonstrate is that as of September 24, 2014, Uber, Rasier-CA's parent company, was aware of allegations of complaints by persons with disabilities regarding their claimed inability to take advantage of the TNC service provided by UberX. As such, Rasier-CA, as Uber's wholly owned subsidiary, should have supplemented its September 19, 2014, report regarding Reporting Requirement g to include the above allegations.

In reaching this conclusion, we take a more expansive view of the concept of accessible vehicles than Rasier-CA. The Americans with Disabilities Act (ADA) prohibits discrimination against persons with disabilities as to matters of

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[20] (Complaint, *National*.)

[21] *Id*. at ¶¶ 35, 36, 37, 39, 40, 41, 42, and 43.

[22] *Id*. at ¶¶ 41 and 43.

[23] Proof of Service, *National*.

[24] Stipulation, *National*.

public accommodation, specified public transportation service, and travel service.[25] The TNC service Rasier-CA provides can fit, at a minimum, within these definitions.[26] Persons with vision impairment are included within the ADA's definition of disability.[27] California law affords similar protections to persons with vision impairment.[28] Thus, and as the Center for Accessible Technology points out, those passengers in need of accessible vehicles can include blind persons traveling with service animals.[29]

### 3.2. Reporting Requirement j (Report on Providing Service by Zip Code)

Rasier-CA's declarants (Ting and Juvvadi) assert on February 5, 2015, Rasier-CA produced to SED individual trip-level information, including requested and accepted rides, requested but not accepted rides, and revised

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[25] 42 U.S.C. §§ 12182(b), 12184, and 12181(7).

[26] Order Denying [Uber's] Motion to Dismiss at 12-13, *National*.

[27] An individual with a disability is defined by the ADA as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. (42 U.S.C.A. § 12102(2).) A blind or visually impaired person falls within the disability definition. (*See* 29 C.F.R. § 1630.2(h)(1).)

[28] Civil Code §54.1 states:

> (a) (1) Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, medical facilities, including hospitals, clinics, and physicians' offices, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motorbuses, streetcars, boats, or any other public conveyances or modes of transportation (whether private, public, franchised, licensed, contracted, or otherwise provided), telephone facilities, adoption agencies, private schools, hotels, lodging places, places of public accommodation, amusement, or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.

[29] Center for Accessible Technology's Opening Comments on OIR at 7-8, filed January 28, 2013.

annual reports. (Exhibit 11-A at ¶ 3; Exhibit 11-B at ¶ 3.) SED acknowledges that Rasier-CA did produce this information *albeit* 139 days late.[30]

Nevertheless, SED claims that even with this late production, Rasier-CA still remains out of compliance with Reporting Requirement j since the production did not include information on the concomitant date, time and zip code of each ride that was subsequently accepted or not accepted (*i.e.,* of the driver at the time they accept or decline a ride request), as well as fare information.[31]

Rasier-CA asserts that SED's interpretation of Reporting Requirement j as requiring the concomitant date, time, and zip code information regarding the driver (in addition to that of the passenger) for requested and accepted, and requested but not accepted rides, was an unwritten interpretation of Reporting Requirement j.[32] Rasier-CA also asserts that since it is not a traditional public utility, and that the Commission did not initiate the instant rulemaking to establish financial controls, the Commission cannot compel Rasier-CA to disclose fare information.[33]

Yet, SED notified all the TNCs via deficiency letters that this information was required by Reporting Requirement j. (Exhibit 2, Attachment C [SED's letter to Rasier-CA dated October 6, 2014.]) In response to the deficiency letters, the other TNCs provided this information. Thus, Rasier-CA remains out of compliance as to these remaining requirements.

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[30] SED's Reply at 5.

[31] *Id.* at 4.

[32] Rasier-CA's Reply at 3.

[33] Rasier-CA's Petition to Modify D.13-09-045 at 14-17.

We also reject Rasier-CA's position that it need not produce fare information. First, Rasier-CA's claims that fare information is confidential and trade secret are factually unsupported.[34] When the Uber operation began, the fares were posted on its website:

| **Pricing** |  |  |  |
|---|---|---|---|
| **Base Fare**<br>Start with this fare | $3.50 | $7.00 | $15.00 |
| **Per Mile**<br>Speed over 11mph | $2.75 | $4.00 | $5.00 |
| **Per Minute**<br>Speed at or below 11mph | $0.55 | $1.05 | $1.35 |
| **Minimum Fare** | $8.00 | $15.00 | $25.00 |
| **Cancellation fee** | $5.00 | $10.00 | $10.00 |
| | | | |
| **Flat Rates** |  |  |  |
| SFO Airport and San Francisco<br>Between San Francisco International Airport and the City of San Francisco. | $50 | $65 | $85 |
| OAK Airport and San Francisco<br>Between Oakland International Airport and the City of San Francisco. | $65 | $85 | $110 |
| San Francisco and Palo Alto<br>Between the City of San Francisco and Palo Alto. | n/a | $115 | $150 |
| SFO Airport and Palo Alto<br>Between San Francisco International Airport and Palo Alto. | n/a | $80 | $105 |
| SJC Airport and Palo Alto<br>Between San Jose International Airport and Palo Alto. | n/a | $75 | $100 |

[34] Rasier-CA's Reply Brief at 5, footnote 4.

Uber has since updated its website so that a passenger can enter a pick-up and destination location and get an estimated fare.[35]

In addition, Uber's Terms and Conditions has a paragraph entitled "Payment Terms" which provides:

> Any fees that the Company [Uber] may charge you for the Application or Service, are due immediately and are non-refundable. This no refund policy shall apply at all times regardless of your decision to terminate your usage, our decision to terminate your usage, disruption caused to our Application or Service either planned, accidental or intentional, or any reason whatsoever. The Company reserves the right to determine final prevailing pricing—Please note the pricing information published on the website may not reflect the prevailing pricing.[36]

Thus, as Uber has published its rates and has disclosed how it calculates prices, we do not see how divulging to the Commission the actual fares charged would be in violation of any confidential or trade secret information.

Second, we reject the argument that, since the Commission stated in footnote 6 in D.97-07-063,[37] that TCPs are not public utilities, that finding

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[35] www.uber.com/pricing

[36] Exhibit B at 44, to the Workshop Brief, filed on April 3, 2013 by Taxicab Paratransit Association of California (TPAC).

[37] Order Instituting Rulemaking re the Specialized Transportation of Unaccompanied Infants & Children. Yet we also note that the California Constitution, Article XII, Section 3 states that providers of transportation of people are considered public utilities:

> Private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public, and common carriers, are public utilities subject to control by the Legislature. The Legislature may prescribe that additional classes of private corporations or other persons are public utilities.

*Footnote continued on next page*

somehow divests the Commission with authority to demand that TNCs provide information regarding actual fares charged. Nothing in the decision or the Passenger Charter-Party Carriers' Act prevents the Commission from requiring a TCP from producing fare information to the Commission. To the contrary, pursuant to Pub. Util. Code § 5381, the Commission "may supervise and regulate every charter party carrier of passengers in the State and may do all things, whether specifically designated in this part, or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." More specifically, pursuant to Pub. Util. Code § 5389, the Commission may have access at any time to a TCP's operations and "may inspect the accounts, books, papers, and documents of the carrier." The breadth of such authority certainly includes the power to require TNCs to provide information regarding fare information, a fact not lost on the other TNCs that provided this information to the Commission.

### 3.6. Reporting Requirement k (Report on Problems with Drivers)

We agree with Rasier-CA that, since it does not have access to amounts paid, if any, by any party other than the TNC's insurance, it was not in violation of D.13-09-045. But Rasier-CA is still out of compliance with Reporting Requirement k since Rasier-CA has not provided information on the cause of each incident.[38]

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Regardless of whether TCPs are, in fact, public utilities, the result we reach in this decision as to the Commission's ability to regulate and fine a TCP such as Rasier-CA is the same.

[38] *Id*. at 1-3 and 5.

We are unpersuaded by Rasier-CA's assertion that information regarding the cause of each incident "is not readily available because Rasier-CA did not previously assign a specific cause to each incident." (Exhibit 10 at 13.) Rasier-CA further asserts that the task would entail "stitching together multiple databases and could be misleading and inaccurate." (*Id.* at 14.) Yet not assigning a cause does not mean that Rasier-CA does not know—or could not determine--the cause of each incident. While the task may require some effort to retrieve, the fact that the other TNCs have complied with Reporting Requirement k leads us to conclude that the task may not be as Herculean as Rasier-CA makes it out to be.

### 3.4. Summary of Rasier-CA's Failure to Comply with D.13-09-045's Reporting Requirements as of the Time the OSC was Initiated

| Reporting Requirement | Title | Information Outstanding |
|---|---|---|
| g | Report on Accessibility | The number and percentage of customers who requested accessible vehicles.<br><br>How often the TNC was able to comply with requests for accessible vehicles. |
| j | Report on Providing Service by Zip Code | The concomitant date, time, and zip code of each ride that was subsequently accepted or not accepted.<br><br>Amounts paid/donated. |
| k | Report on Problems with Drivers | The cause of each incident. |

## 4. Contempt

### 4.1. Contempt and the Appropriate Burden of Proof

Pursuant to Pub. Util. Code § 2113:

> Every public utility, corporation, or person which fails to comply with any part of any order, decision, rule, regulation, direction, demand, or requirement of the commission or any commissioner is in contempt of the commission, and is punishable by the commission for contempt in the same manner and to the same extent as contempt is punished by courts of record. The remedy prescribed in this section does not bar or affect any other remedy prescribed in this part, but is cumulative and in addition thereto.

While Pub. Util. Code § 2113 does not set forth the precise criteria for a contempt finding, the Commission has articulated such a standard. In *Re Facilities-based Cellular Carriers and Their Practices, Operations and Conduct in connection with Their Siting of Towers*, D.94-11-018, 57 CPUC2d 176, 190, the Commission stated that a contempt proceeding "is quasi-criminal in nature, and therefore the procedural and evidentiary requirements are the most rigorous and exacting of all matters handled by the Commission." (Quoting from 6 CPUC2d 336, 339, and citing to 5 CPUC2d 648, 649, and *Ross v. Superior Court of Sacramento County* (1977) 19 Cal.3d 899, 913.) In view of this heightened evidentiary standard, this Commission has required that in order to find a respondent in contempt:

- The person's conduct must have been willful in the sense that the conduct was inexcusable; or
- That the person accused of the contempt had an indifferent disregard of the duty to comply; and

- Proof must be established beyond a reasonable doubt.[39]

A review of the record demonstrates that the factors for a finding of contempt against Rasier-CA have been established beyond a reasonable doubt.

### 4.2. Rasier-CA's Conduct was Willful (*i.e,*. Inexcusable)

#### 4.2.1. Rasier-CA had Knowledge of D.13-09-045's Reporting Requirements

Rasier-CA was fully aware of the September 14, 2014 reporting deadline. ,By its own admission, Rasier-CA's parent, Uber, objected on August 23, 2013 to these reporting requirements when they first appeared in the July 30, 2013 Proposed Decision of Commissioner Peevey. (Exhibit 10 at 6, footnote 10.) These reporting requirements were then made part of D.13-09-045 that was issued on September 23, 2013. Tellingly, Rasier-CA's parent, Uber, chose not to raise any concerns with the reporting requirements when it filed an Application for Rehearing of D.13-09-045 on October 23, 2013. Nor did either Rasier-CA or Uber file a Petition for Modification of D.13-09-045 within the time frame specified in Rule 16.4 of the Commission's Rules of Practice and Procedure.[40] Instead,

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[39] 57 CPUC2d at 205, citing *Little v. Superior Court of Los Angeles County* (1968) 260 Cal.App.2d 311, 317; *In re Burns* (1958) 161 Cal.App.2d 137, 141-142; 68 CPUC 245; 63 CPUC 76; 80 CPUC 318; and D.87-10-059.

[40] 16.4(d) states:

> (d) Except as provided in this subsection, a petition for modification must be filed and served within one year of the effective date of the decision proposed to be modified. If more than one year has elapsed, the petition must also explain why the petition could not have been presented within one year of the effective date of the decision. If the Commission determines that the late submission has not been justified, it may on that ground issue a summary denial of the petition.

Neither Rasier-CA nor Uber met the one-year deadline.

Rasier-CA filed a Petition to Modify D.13-09-045 on December 4, 2014, less than one month after the OSC was issued, in an obvious attempt to delay the OSC proceeding.

On September 14, 2014, SED sent out a courtesy reminder e-mail to all TNC representatives. (Exhibit 1 at 3.) SED and Rasier-CA representatives met face-to-face on September 11, 2014, and Rasier-CA "explained it could provide the SED with more user-friendly, relevant, and meaningful information, and it could do so in a way that would avoid disclosing confidential and proprietary business information and trade secrets, such as by providing certain information in the aggregate." (Exhibit 10 at 6-7.)

Rasier-CA was well aware of D.13-09-045's reporting requirements.

#### 4.2.2. Rasier-CA had the Ability to Comply with D.13-09-045's Remaining Reporting Requirements

As the above exchange between Rasier-CA and SED makes clear, Rasier-CA had the ability to comply with D.13-09-045's remaining reporting requirements. As for Reporting Requirement g, since Rasier-CA's parent had been sued by the National Federation of the Blind and had been served with the lawsuit, it was aware of allegations, as of September 24, 2014, that persons with disabilities made requests for accessible vehicles and should have produced this information in compliance with Reporting Requirement g.

With respect to Reporting Requirement j, Rasier-CA admits in its Verified Statement that it has the individual trip data ordered by Reporting Requirement j but has not yet produced it. (Verified Statement at 3 ["the detailed, individual trip data sought in request j—the only data requested in the TNC Decision that Rasier-CA possesses and has not produced."].) Instead, Rasier-CA tried to

negotiate with SED to produce the information in a format contrary to what was required by D.13-09-045.

Rasier-CA is able to comply with Reporting Requirement j (trip information by zip code) because its parent company, Uber, has provided this information in other jurisdictions. After Massachusetts enacted rules in January 2015 to recognize TNCs, Uber worked out a deal with Boston Mayor Martin J. Walsh to provide trip data such as ride duration and distance traveled with users' zip codes on a quarterly basis.[41]

Similarly, in New York, the Taxi and Limousine Commission sought trip data (*e.g.*,date of trip, time of trip, pick-up location, and license numbers) which Uber refused to produce citing reasons similar to those articulated in this proceeding.[42] An evidentiary hearing was held before New York City's Taxi & Limousine Tribunal, and after Hearing Officer Ann Macadangdang found that the respondents (company operations all owned by Uber) were guilty and ordered their operating authority suspended until compliance was met,[43] Uber produced the trip data under protest.[44]

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[41] "*Driving Solutions To Build Smarter Cities*." Posted on January 13, 2015 by Justin Kintz, Uber' Head of Policy for North America. Mr. Kintz is also quoted in "Uber Agrees to Share Trip Data in Boston While Refusing to do so in New York." Ainsley O'Connell. Fast Feed. January 13, 2015. http://www.fastcompany.con/3040861/fast-feed/uber-agrees-to-share-trip-data; and "Uber Offers Tip Data to Cities, Starting with Boston." Douglas MacMillan. Wall Street Journal. January 13, 2014. http://blogs.wsj.com/digits/2015/01/13/uber-offers-trip-data-to-cities-starting-in-boston.

[42] *Notice of Decision, NLC v. Weiter.*

[43] *Id*.

[44] Matthew Wing, member of Uber's policy and communications team, quoted in "Uber backs down in data fight with NYC." Ben Fisher. *New York Business Journal*. January 30, 2015, updated January 31, 2015.

*Footnote continued on next page*

What these two instances demonstrate is that Rasier-CA, through the actions of its parent, Uber, has demonstrated an ability to comply with the remaining requirements of Reporting Requirement j.

Finally, as for Reporting Requirement k, Rasier-CA has the ability to provide the Commission with information regarding the cause of driver incidents.

### 4.3. Rasier-CA Disobeyed D.13-09-045's Reporting Requirements by Asserting Unsubstantiated Legal Arguments

While Rasier-CA submitted files by September 19, 2014, SED reviewed them and determined that Rasier-CA "had failed to provide a significant portion of the information required by D.13-09-045." (Exhibit 1 at 3.) Specifically, Rasier-CA did not produce the report on accessibility (Requirement g), report on providing service by zip code (Requirement j), and report on causes of incidents (Requirement k). (*Id*. at 4-5.) There is no dispute that Rasier-CA did not comply with D.13-09-045's reporting requirements by the September 19, 2014 deadline.

#### 4.3.1. Rasier-CA Wrongfully Characterizes this OSC Proceeding as a Discovery Dispute with SED

Rasier-CA argues that it had several communications with SED regarding the scope of the reporting requirements, and sought an explanation as to how the Commission and SED intended to use individual trip-level information to protect the public's safety or prevent redlining, or how they intend to use this data at all. (Exhibit 10 at 7; Exhibit 3 at 3 [Request 1-1].) In advancing this argument,

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http://www.bizjournals.com/newyork/blog/techflash/2015/01/uber-backs-down-in-data-fight.

however, Rasier-CA wrongly attempts to transmogrify a Commission order to a discovery dispute, and attempts to shift the burden onto the Commission to justify the need for the information and in the format required. (Exhibit 4 at 1-2.) The Commission's orders are not party invitations where the Respondent may *R.S.V.P.* as it sees fit. Pursuant to Pub. Util. Code § 702, compliance is mandatory:

> Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees.

TCPs, which would include TNCs such as Rasier-CA, are also obligated to comply with Commission orders pursuant to Pub. Util. Code § 5381:

> 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 designated in this part, or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

Part of the Commission's supervisorial and regulatory power includes the issuance of orders to which TCPs and thus TNCs must comply. This is a power that the Commission exercised when it issued D.13-09-045 and ordered the TNCs to comply with the reporting requirements contained therein. Compliance with a Commission order may not be excused because a Respondent questions why the information is needed or how the required information may be used.

Additionally, we question Rasier-CA's sincerity in asserting this line of argument. Rasier-CA is well-aware that D.13-09-045 announced the

Commission's intention to hold a workshop to discuss "the impacts of this new mode of transportation and accompanying regulations." (74, OP 10.) As such, full compliance with the reporting requirements is important so that the Commission has sufficient information to enable it to determine if any of the TNC regulations should be modified. For example, the data can help the Commission evaluate if changes should be made to improve safety of passengers, and ensure equal access to TNC vehicles, especially for passengers with special accessibility needs. The data can also shed light on the impact of TNCs on either increasing or reducing traffic congestion. (Exhibit 4 at 8.[45]) In agreeing to provide trip data in Boston, Justin Kintz, Uber's Head of Policy, stated that the data could help city officials determine where to build new roads or offer other transportation options based on daily commute patterns.[46]

To evaluate these and other transportation impacts, the Commission would certainly need the TNCs to comply with the reporting requirements in order to give the Commission the most exhaustive data possible on the TNC operations. Such an exercise would be in accordance with the Commission's authority to examine records of all entities subject to its jurisdiction,[47] and that

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[45] Similarly, in *Notice of Decision*, *supra*, Hearing Officer Macadangdang reasoned that Uber's refusal to produce trip data conflicted with the government's ability to regulate the TNC industry, citing to *Carniol v. New York City Taxi & Limousine Comm'n* (Sup. Ct. 2013) 975 N.Y.S.2d 842 for the proposition that the "government's interest in generating information to improve service to passengers is both 'legitimate and substantial.'"

[46] *See* discussion, *supra*.

[47] California Constitution, Article XII, Section 6 states: "The Commission may fix rates, establish rules, examine records, issue subpoenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction." See also Pub. Util. Code § 314(a) which gives the Commission, each Commissioner, and each officer and person employed by the Commission the power to "inspect the accounts, books, papers, and documents of any public utility."

services are provided in accordance with Pub. Util. Code § 451 which requires that "every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service…as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public." A similar sentiment is found in Pub. Util. Code § 5352 regarding TCPs:

> The use of the public highways for the transportation of passengers for compensation is a business affected with a public interest. It is the purpose of this chapter to preserve for the public full benefit and use of public highways consistent with the needs of commerce without unnecessary congestion or wear and tear upon the highways; to secure to the people adequate and dependable transportation by carriers operating upon the highways; to secure full and unrestricted flow of traffic by motor carriers over the highways which will adequately meet reasonable public demands by providing for the regulation of all transportation agencies with respect to accident indemnity so that adequate and dependable service by all necessary transportation agencies shall be maintained and the full use of the highways preserved to the public; and to promote carrier and public safety through its safety enforcement regulations.

Moreover, the "integrity of the regulatory process relies on the accurate and prompt reporting of information."[48] As this Commission has stated:

> Utility compliance with Commission rules is absolutely necessary to the proper functioning of the regulatory process. Disregarding a statutory or Commission directive, regardless of the effects on the public, merits a high level of scrutiny as it undermines the integrity of the regulatory process.[49]

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[48] D.15-04-008 at 2. (*Decision Imposing Sanctions for Violation of Rule 1.1 of the Commission's Rules of Practice and Procedure*.)

[49] *Id*. at 6.

The Legislature enacted Pub. Util. Code §§ 702 and 5381 to ensure regulated utilities obey every Commission decision, order, direction, or rule. Without such mandatory compliance with Pub. Util. Code §§ 702 and 5381, the Commission would be hampered in its ability to fulfill its duty to obtain and analyze data from regulated utilities in order to establish rules for their regulation.

#### 4.3.2. Rasier-CA Fails to Substantiate its Claims that the Data Ordered by Reporting Requirements j and k are Unduly Burdensome, Cumulative, and Overly Broad.

Even if we were dealing with a discovery dispute between parties rather than a Commission decision, the Courts have determined that the objecting party must make a factually particularized showing of hardship to sustain such objections. There must be a specific showing that the ultimate effect of the burden is incommensurate with the result sought. (*See Mead Reinsurance Co. v. Superior Court* (1986) 188 Cal.App.3d 313, 318 [demand for inspection of insurer's files deemed oppressive where uncontradicted declaration showed over 13, 000 claims would have to be reviewed and requiring five claims adjusters to work full time for six weeks each]; and *West Pico Furniture Co. v. Superior Court* (1961) 56 Cal.2d 407, 417-418 [trial court denied a motion to compel documents that would have required the answering party to search 78 of its branch offices. Yet even with this showing the California Supreme Court reversed, reasoning that while there was an indication that "some burden would be imposed on the respondent, Pacific Finance Loans, to answer the interrogatory, the extent thereof was not specifically set forth." The declaration also failed to indicate "any evidence of oppression," which "must not be equated with burden."].)

Rasier-CA has failed to carry its burden. Without any factual substantiation, Rasier-CA asserts that the trip data ordered by Reporting Requirement j is "unduly burdensome, cumulative, and overly broad." (Exhibit 10 at 3.) Such a statement is similar to Rasier-CA's earlier unsubstantiated claims that it lacked the information technology and trained staff to extract the required data within the specified timeframe. (Exhibit 1 at 4.) Rasier-CA's claims are suspect when one realizes that other TNCs regulated by this Commission had no difficulty meeting the reporting deadline (Exhibit 1 at 4, footnote 7), and Lyft has now complied with Reporting Requirement j.[50] SED continued to press Rasier-CA on this topic, and in response to SED's follow up data request as to why Rasier-CA did not use the on-line template for complying with Reporting Requirement j, Rasier-CA said that "the voluminous amount of data produced by Rasier-CA simply would not fit on the templates provided." (Exhibit 2, Attachment C [Rasier-CA's Response to SED's Data Request, Question 11].) Putting aside the fact that the templates were available on the Commission's website as of February 12, 2014 (Exhibit 1 at 6), which should have given Rasier-CA ample time to determine if it could utilize the template, Rasier-CA did have the option of supplying the Reporting Requirement j data with a different template as long as it provided the information required by D.13-09-045. (Exhibit 4 at 6 ["SED confirmed during the September 11, 2014 meeting that Rasier-CA may submit the required data in a different format if Rasier-CA could not, for whatever reason, use the reporting templates, consistent with the format discussion contained in D.13-09-045"].)

[50] *See* Joint Motion of the California Public Utilities Commission's Safety and Enforcement Division and Lyft, Inc. for Commission Approval of Settlement Agreement at 2.

Rasier-CA's position is not only unsubstantiated, but it is undermined by its claim that it "offered to pay for SED to select and retain an independent third party to audit the information it produced, and to give the SED full access to Rasier-CA's electronic data at a third-party location for inspection." (Exhibit 10 at 19.) If Rasier-CA has the ability to hire an independent third party, it is not clear why Rasier-CA cannot instruct that third party to organize and supply the trip data in the manner required by the Reporting Requirement j template.

Rasier-CA fares no better with its objections to Reporting Requirement k. It asserts that providing the cause narrative for each incident would impose "a tremendous burden," and would be "unduly burdensome and cumulative." (Exhibit 10 at 14.) Rasier-CA fails to establish, in the detail required by *Mead* and *Pico*, how much effort would be required to comply. By failing to meet that evidentiary showing, Rasier-CA's objections are nothing more than unsubstantiated conclusions.

In sum, Rasier-CA's arguments are nothing more than an elaborate obfuscation designed to hide the fact that it does not want to—rather than cannot—comply with Reporting Requirements j and k in D.13-09-045.

#### 4.3.3. Rasier-CA Fails to Substantiate its Claim that Strict Compliance with Reporting Requirements j Violates the Fourth Amendment

Rasier-CA argues that, because Reporting Requirement j is essentially unbounded in scope, requiring strict compliance would violate the unreasonable search and seizure prohibition set forth in the Fourth Amendment to the United States Constitution. (Exhibit 10 at 22-23, which also references the arguments in Rasier-CA's Petition to Modify D.13-09-045 at 17-18.) Rasier-CA asserts the trip

data lacks any connection to a legitimate regulatory purpose such as securing public safety or equal access to TNC services. (*Id*.)

> The Fourth Amendment to the United States Constitution provides:
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In *Patel v. City of Los Angeles* (9th Cir. 2013) 738 F.3d 1058, 1064, aff'd – U.S.-,135 5.Ct.2443(2015), the Court stated that the government may require a business to maintain records and to make them available for inspection "when necessary to further a legitimate regulatory interest," and the inspection must be specific in directive so that compliance is not "unreasonably burdensome."

We reject Rasier-CA's attempt to rely on the Fourth Amendment to excuse compliance with Reporting Requirement j. First, in D.13-09-045, the Commission stated it would conduct a further analysis of the TNC industry as a whole "to consider the impacts of this new mode of transportation and accompanying regulations."[51] The Commission has been tasked by the Legislature to regulate certain aspects of the transportation industry, and that includes TCPs, of which TNCs are a subset.[52] Since the Commission was regulating a new industry, it wanted to have the opportunity to evaluate the impact of its regulations on the industry and the public.[53] Thus, it required the regulated TNCs to comply with

[51] D.13-09-045 at 74, OP 10.

[52] *Id*. at 21-24.

[53] *Id*. at 74, OP 10.

the reporting requirements within a year after the issuance of the decision.[54] The reporting requirements are part of the adopted regulations, and the Commission needs each regulated TNC to comply in full so that the Commission acquires the fullest possible picture of the impact that TNCs are having on California passengers wishing to avail themselves of this TNC service.

Accordingly, we find that the Commission's reporting requirements do further a legitimate regulatory interest. We also find that the instant case is similar to *California Bankers Association v. Shultz* (1974) 416 U.S. 21, 66-67 wherein the Supreme Court held that the Secretary of State's requirement that banks file reports dealing with particular phases of their activities did not violate the Fourth Amendment. The banks were not mere strangers or bystanders with respect to the transactions that they were required to report. To the contrary, the banks are parties to the transactions and earn portions of their income from conducting such transactions and may have kept reports of these transactions for their own purposes. Similarly, the TNCs such as Rasier-CA are in the business of making transportation services available to customers and are undoubtedly keeping trip data information on these rides. Finally, as we noted, *supra*, Rasier-CA's parent, Uber, is providing similar trip data to Boston and New York City regulatory agencies so Rasier-CA, too, understands the value of that information.

We note that transportation entities have had their Fourth Amendment challenges rejected in other jurisdictions and have been required to produce trip data. In *Carniol*, which was cited in *Notice of Decision, supra,* where Uber's

[54] *Id*. at 30-33.

challenges to providing trip data were rejected, the Court cited to *Minnesota v. Carter* (1998) 525 U.S. 83, 88 for the proposition that a party may not prevail on a Fourth Amendment claim unless he can show that the search and seizure by the state infringed on a legitimate expectation of privacy. Where a government entity is vested with broad authority to promulgate and implement a regulatory program for the regulated transportation industry, those participating "have a diminished expectation of privacy, particularly in information related to the goals of the industry regulation." (*Buliga v. New York City Taxi Limousine Comm'n* (2007) WL 4547738 *2, *affd sub nom. Buliga v. New York City Taxi & Limousine Comm'n* 324 Fed Appx 82 (2d Cir. 2009); and *Statharos v. New York City Taxi & Limousine Comm'n* (2d Cir. 1999) 198 F.3d 317, 325.) This is true even beyond the transportation industry since the key is whether the industry is closely regulated. The United States Supreme Court recognized that the greater the regulation the more those subject to the regulation can expect intrusions upon their privacy as it pertains to their work. (*Vernonia Sch. Dist. 47J v. Acton* (1995) 515 U.S. 646, 657.)

Such is the case with the Commission's jurisdiction over its regulated transportation providers. As provided in Article XII of the California Constitution and the Charter-party Carriers' Act (Pub. Util. Code § 5351 *et seq.*), the Commission has for decades been vested with a broad grant of authority to regulate TCPs. For example, Pub. Util. Code § 5381 states:

> 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 designated in this part, or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

This Commission found in D.13-09-045 that TNCs were TCPs subject to the Commission's existing jurisdiction.[55] Pursuant to General Order 157-D, Section 3.01, providers of prearranged transportation are required to maintain waybills which must include, at a minimum, points of origination and destination. Pursuant to General Order 157-D, Section 6.01, every TCP is required to maintain a set of records which reflect information as to the services performed, including the waybills described in Section 3.01. The Commission also found that it would expand on its regulations regarding TCPs and utilize its broad powers under Pub. Util. Code § 701 to develop new categories of regulation when a new technology is introduced into an existing industry.[56] Given this expansive authority, TNCs would certainly have reason to expect intrusions upon their privacy as it relates to the provision of TNC services.

Second, the reporting requirement cannot be deemed burdensome or oppressive since every other regulated TNC except for Rasier-CA has already complied.

In sum, Rasier-CA's Fourth Amendment challenge is rejected.

#### 4.3.4. Rasier-CA Fails to Substantiate its Claim that the Data Ordered by Requirement j is Trade Secret Commercial Information

Pursuant to Civil Code § 3426.1, a trade-secret is "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic

[55] At 23.

[56] *Id*.

value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Rasier-CA fails to meet this two-part definition. First, the type of consumer data compilations that have been accorded trade secret status are ones that contain client names, addresses and phone numbers that have been acquired by lengthy and expensive efforts. (*See MAI Sys. Corp. v. Peak Computer, Inc.* (9th Cir. 1993) 991 F.2d 511, 521, *cert. denied*, 510 U.S. 1033; *Courtesy Temp. Serv. v. Camacho* (1990) 222 Cal.App.3d 1278, 1288.) In other words, the party seeking trade-secret protection has, on its own initiative, developed some product or process for its own private economic benefit. In contrast, it is the Commission that has ordered the TNCs to respond, in template format, with the trip data by zip code. The compilation is being put together at the behest of the Commission, rather than by Rasier-CA for some competitive advantage over its competitors.

Second, Rasier-CA could not have any expectation that the trip data ordered by the Commission would be kept secret from the Commission. A trade secret claim cannot be used as a shield to deny access to the very regulatory agency that has ordered the information's creation and compilation. Indeed, given Rasier-CA's voluntary preparation and submittal of trip data in Boston, and the submittal of trip data in New York so that its license suspension could be lifted, Rasier-CA does not have a reasonable expectation that all trip data would meet the definition of a trade secret. As the Supreme Court noted in *Ruckelshaus v. Monsanto Company* (1984) 467 U.S. 986, 1002: "if an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publically discloses the secret, his property right is extinguished."

Third, Rasier-CA's assertion of a trade secret also stems from the apparent fear that, if the information it provides to the Commission is released to the public, its competitors may obtain some economic value from the disclosure. (Exhibit 10 at 23-24.) Yet Rasier-CA fails to make a credible argument as to how its competitors can obtain economic value from the information's disclosure. All TNC drivers are competing for the same pool of potential passengers. All TNC drivers know where the zip codes and neighborhoods are that have the greater chances of securing rides for the day, so any release of Rasier-CA's trip data isn't going to provide the competition with information that they don't already possess.

Finally, even if the data were subject to a trade-secret privilege, steps can be made to maintain the secrecy of the information. As Rasier-CA acknowledges, SED utilized aggregate information at the Commission's *en banc* regarding driver work hours. (Exhibit 10 at 21.) Such a disclosure is permissible as a means of protecting alleged trade secret information.[57] Rasier-CA fails to advance a plausible argument regarding how the release of this aggregate information compromised any alleged trade secret. When SED moved exhibits into evidence at the evidentiary hearing, it submitted both a public version of its staff report and a confidential version of its staff report in recognition of Rasier-CA's claims of confidentiality. (Exhibits 1 and 2, respectively.) Thus, Commission staff has undertaken steps to protect the alleged proprietary nature of Rasier-CA's data.

[57] For example, Pub. Util. Code § 398.5(b) provides that information provided to the Energy Commission "shall not be released except in an aggregated form such that trade secrets cannot be discerned."

#### 4.3.5. Rasier-CA Fails to Substantiate its Claim that the Disclosure of Trip Data Would Amount to an Unconstitutional Taking of a Trade Secret

The Takings Clause, which is deemed applicable to the states *via* the Fourteenth Amendment,[58] is found in the Fifth Amendment of the U.S. Constitution and provides that "nor shall private property be taken for public use, without just compensation." The purpose behind the clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States* (1960) 364 U.S. 40, 49.) While takings law had its genesis in real property disputes, over time the United States Supreme Court expanded the constitutional protection of property beyond the concepts of title and possession and sought to protect the value of investments against governmental use or regulation. (*See Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415 ["while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."])[59] In *Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528, 538, the United States Supreme Court recognized two categories of regulatory takings for Fifth Amendment purposes: first, where government requires an owner to suffer a permanent physical invasion of the property; and second,

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[58] *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 617 ("The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897), prohibits the government from taking private property for public use without just compensation.")

[59] California law also has a takings clause. Article I, Section 19 of the California Constitution provides in part: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner."

where the government regulation completely deprives an owner of all economically beneficial use of the property.[60]

These two categories of regulatory taking must be weighed against the deference that must be accorded to the decisional authority of state regulatory bodies. In *Duquesne Light Co. v. Barasch* (1989) 488 U.S. 299, 313-314, the Supreme Court discussed the deference that should be given to both state legislative bodies, as well as state public utilities commissions that are an extension of the legislature:

> It cannot seriously be contended that the Constitution prevents state legislatures from giving specific instructions to their utility commissions. We have never doubted that state legislatures are competent bodies to set utility rates. And the Pennsylvania PUC is essentially an administrative arm of the legislature [citations omitted.] We stated in *Permian Basin* that the commission "must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests."…

As such, other courts have also recognized that "every statute promulgated by the Legislature is fortified with a strong presumption of regularity and constitutionality." (*Keystone Insurance Co. v. Foster*, 732 F. Supp. 36 (E.D. Pa. 1990); *Illinois v. Krull*, (1987) 480 U.S. 340, 351 ( ["Indeed, by according laws a presumption of constitutional validity, courts presume that legislatures act in a

[60] *See* also *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1027-1028, where the Supreme Court recognized that by reason of the State's traditionally high degree of control over commercial dealings, regulations can constitutionally render personal property economically worthless. To be an unconstitutional taking, the property right has to have been "extinguished." (*Ruckelhaus v. Monsanto Co.* (1984) 467 U.S. 986, 1002.)

constitutional manner. (*See e.g., McDonald* v. *Board of Election Comm'rs of Chicago* (1969) 394 U.S. 802, 808-809.)

The concern for respecting state legislative action is certainly applicable to the Commission's regulatory activities. It derives some of its powers from Article XII of the California Constitution and by powers granted from the Legislature. (*People v. Western Air Lines, Inc.*(1954) 42 Cal.2d, 621, 634 ["The Commission is therefore a regulatory body of constitutional origin, deriving certain of its powers by direct grant from the Constitution which created it. (*Pacific Tel. & Tel. Co.* v. *Eshleman* (1913), 166 Cal. 640 [137 P. 1119, Ann.Cas. 1915C 822, 50 L.R.A.N.S. 652]; *Morel* v. *Railroad Com*. (1938), 11 Cal.2d 488 [81 P.2d 144].) The Legislature is given plenary power to confer other powers upon the Commission. Art. XII, §§ 22 and 23.)"].)

In *Penn Central Transportation Co v. New York City* (1978) 438 U.S. 104, 124, the Supreme Court acknowledged that it has been unable to develop any set formula for determining when government action has gone beyond regulation and constitutes a taking. Nevertheless, *Penn Central* set forth several factors that have particular significance:

- The economic impact of the regulation on the claimant;
- The extent to which the regulation has interfered with distinct investment-backed expectations that the integrity of the trade secret will be maintained; and
- The character of the governmental action.

While written in the conjunctive rather than the disjunctive, some decisions suggest that a reviewing court "may dispose of a takings claim on the basis of one or two of these factors." (*Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1277; *Bronco Wine v. Jolly*(2005) 129 Cal. App.4th 988, 1035 ["The court may dispose of a takings claim on the basis of one or two of these

factors. (*Maritrans Inc. v. United States* (Fed. Cir. 2003) 342 F.3d 1344, 1359 [where the nature of the governmental action and the economic impact of the regulation did not establish a taking, the court need not consider investment-backed expectations]; *Ruckelshaus v. Monsanto Co., supra*, 467 U.S. 986, 1009 ] [disposing of takings claim relating to trade secrets on absence of reasonable investment-backed expectations prior to the effective date of the 1972 amendments to the Federal Insecticide, Fungicide, and Rodenticide Act ].) But for completeness sake, we will evaluate Rasier-CA's takings argument against all of the criteria set forth, *supra*, in both *Lingle* and in *Penn Central*.

Rasier-CA fails to establish that providing trip data meets either definition of a regulatory taking set forth in *Lingle*. First, there is no permanent physical invasion into Rasier-CA's property. Instead, the trip data is information that the Commission has ordered all TNCs to maintain and report upon in the manner required by D.13-09-045. What is involved is the electronic transfer of information that will be analyzed and evaluated by the Commission as part of its regulatory responsibility over the TNC industry. Second, compliance with Reporting Requirement j does not deprive Rasier-CA of all economically beneficial use of its property. Rasier-CA is free to continue analyzing trip data in order to refine or adjust its transportation business model for the TNC drivers that subscribe to the Uber App.

Rasier-CA's regulatory takings argument also fails under the *Penn Central* factors. With respect to the character-of-the-governmental- action prong, a takings claim is less likely to be found "when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." (*Penn Central*, *supra*, 438 U.S. at 124.) Here, the reason for requiring the trip data in raw form is for the Commission to continue reviewing

its regulations over the TNC industry in order to evaluate the impact on the riding public. Determining who is being served, what areas are being served, and the volume can assist the Commission in deciding if this new mode of transportation is being made available to all customers utilizing the Uber app for service. Equal access to a regulated transportation service is the common good that is one of the prime goals of the Commission's regulatory authority over the transportation industry.

Rasier-CA's argument also fails under the economic-impact prong. Here the inquiry is whether the regulation impairs the value or use of the property according to the owners' general use of their property. (*Phillip Morris v. Reilly* (2002) 312 F.3d 24, 41, citing *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74, 83.) In contrast to *Phillip Morris*, where Massachusetts required tobacco companies to submit their lists of all ingredients used in manufacturing tobacco products so that this information could be disclosed to the public, the Commission has ordered Rasier-CA to submit the trip data to just the Commission for internal analysis as part of its regulatory authority over the TNC industry. In sum, even if Rasier-CA's trip data were a trade secret, neither the value of the property, nor the use to the property, has been impaired or extinguished simply by providing the information to the Commission.

Finally, Rasier-CA's argument fails under the investment-backed-privacy-expectation standard. As the Supreme Court explained in *Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980) 449 U.S. 155, 161, property interests, and the privacy expectations attendant thereto, "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Here, there is no state law that recognizes trip data as inherently private or that the

creation of same invests it with some sense of privacy. Indeed, Rasier-CA was aware that the Commission ordered all TNCs to create the trip data report so that the Commission could determine how its regulations were working and if any adjustments would be needed. In other words, Rasier-CA's claim of a privacy expectation is subject to the Commission's power to regulate TNCs for the public good. Moreover, even if there was a distinct investment-backed expectation, "a taking through an exercise of the police power occurs only when the regulation 'has nearly the same effect as the complete destruction of [the property] rights' of the owner." (*Pace Resources, Inc. v. Shrewsbury Tp.* (3rd Cir. 1987) 808 F.2d 1023, 1033, quoting *Keystone Bituminous Coal Association v. Duncan* (3d Cir. 1985) 771 F.2d 707, 716, *aff'd* (1987) 480 U.S. 470.) There is no complete destruction of Rasier-CA's property as it can utilize its trip data for whatever legitimate business purposes it deems appropriate.

In sum, Rasier-CA fails to substantiate its unconstitutional-taking argument.

### 4.4. Rasier-CA's Claim of Substantial Compliance is Factually Erroneous

#### 4.4.1. Burden of Proof

Rasier-CA cites to numerous Commission decisions (and appends approximately 47 Commission decisions to its appendix of authorities) where the concept of substantial compliance is utilized but a precise and uniform definition has not been articulated.[61] In the Commission decision upon which Rasier-CA places principal reliance in its Verified Statement, *Butrica v. Beasley, dba*

[61] Exhibit 10 at 15-19; and Rasier-CA's Post-Hearing Opening Brief at 9-10.

*Phillipsville Water Company (Beasley)*,[62] we glean that substantial compliance can be established if there has been some significant effort to comply with the Commission's orders.[63] This standard, if it can truly be called that, is similar to the one articulated by the California Supreme Court in *Western States Petroleum Association v. Board of Equalization* (2013) 57 Cal.4th 401, 426: "substantial compliance, as the phrase is used in the decisions, means actual compliance in respect to the substance essential to every reasonable objective of the statute. … Where there is compliance as to all matters of substance technical deviations are not to be given the stature of noncompliance. … Substance prevails over form."

#### 4.4.2. Rasier-CA has not Substantially Complied with Reporting Requirement j (Report on Providing Service by Zip Code)

Reporting Requirement j requires all TNCs to produce both raw trip data by zip code as well as information aggregated by zip code. In response, Rasier-CA produced two tables:

- The "Share of Activity by ZIP Code Tabulation Area Out of All California"; and
- "Percent Completed Out of Requested Within ZIP Code Tabulation Area."

(Exhibit 10 at 15.) Rasier-CA argues that the Commission and SED can "derive from these tables all the information needed to assess and determine the zip codes in which Rasier-CA most frequently operates, and the zip codes from which rides are most frequently accepted." (*Id*.) According to Rasier-CA, by

[62] Decision No. 88933 (June 13, 1978), Case No. 10129, filed June 23, 1976.

[63] *Id*. at 7-9.

reviewing what Rasier-CA terms "voluminous responsive data,"[64] the Commission and SED will be able to fulfill the policy objectives of Reporting Requirement j.

We reject Rasier-CA's argument that it has substantially complied with Reporting Requirement j. Data presented in table form and the specific trip data organized by zip code in the suggested template are neither identical nor substantially similar concepts, and presenting one does not comply (substantially or otherwise) with Reporting Requirement j. This salient fact distinguishes *Beasley* from the instant action in that in *Beasley*, defendants were endeavoring to provide the information required by OP 1 and 4, rather than by providing tables and expecting Commission staff to ferret through them for the applicable data and then populate the template. Thus, presenting data from which the required reporting data may be derived does not satisfy the actual reporting requirement. The other TNCs understood these separate requirements and provided the Commission with the information as required in Reporting Requirement j.

Rasier-CA's efforts are more akin to discovery dumps of thousands of documents on an adversary, a practice that is disfavored in California. For example, in *Kayne v. Grande Holdings Ltd.* (2011) 198 Cal.App.4th 1470, 1476, Grande produced 90,600 pages of documents, and plaintiffs had to hire three attorneys to organize the documents by category and date. Plaintiffs filed a motion to recover $74,809 in fees and costs which the court granted as compensation for Grande's willful abuse of the discovery procedure and for failing to comply with Code of Civil Procedure § 2023.010. We find the *Kayne*

[64] Rasier-CA's Post-Hearing Opening Brief at 10.

decision instructive. Neither the Commission nor SED should have to sort through the voluminous data to find the information responsive to Reporting Requirement j.

Similarly, in *Person v. Farmers Insurance Group of Companies* (1997) 52 Cal.App.4th 813, 818, in which the trial court sanctioned a health care practitioner who failed to comply with the terms of a deposition subpoena, the Court upheld the sanctions, reasoning:

> However, the health care provider may not avoid the mandate of court process by not preparing such a record when the raw data is available to do so. When billing records or "itemized statements" are requested they should be produced if: (1) the raw data which would support such a statement exist; (2) all that is required to produce the billing statement is a compilation of existing data; and (3) preparation of the compilation would not be unduly burdensome or oppressive.

Here, there is no question that Rasier-CA has the raw data regarding service by zip code that the Commission has ordered. Rasier-CA can manipulate the raw data to provide the Commission with the categories of information required by Reporting Requirement j in the reporting template that SED posted online for all TNCs to comply with. And Rasier-CA has not established that the completion of such a task would be unduly burdensome or oppressive.

Rasier-CA's suggestion that Commission staff simply review the voluminous documents also runs afoul of the California Discovery Act's prohibition – which we use as a guide - against referring to a set of documents or testimony without identifying, specifically, how and which documents are responsive to the production demand. (*See Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 293-294; and *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 783-784 ["Answers must be complete and responsive. Thus, it is not proper to answer by

stating, 'See my deposition,' 'See my pleading,' or 'See the financial statement.'"]) The Commission expects a regulated utility to be as equally forthcoming in responding to a Commission order as it would when faced with a discovery request in a superior court proceeding where the requirements of the California Discovery Act apply.

But before leaving the issue of substantial compliance, we must also address Rasier-CA's subsequent February 5, 2015, production of zip code information to determine if the totality of Reporting Requirement j has been substantially complied with. We answer this question in the negative as to the remaining separate requirement that each TNC provide information on the concomitant date, time and zip code of each ride that was subsequently accepted or not accepted (*i.e.* of the driver at the time it accepts or declines a ride request). As SED points out, this is a separate reporting requirement in Reporting Requirement j. (Exhibit 2, Attachment C [SED's deficiency letter dated October 6, 2014]; SED's Response to Rasier-CA's Motion to Set Aside Submission and Reopen the Record in Order to Show Cause in Rulemaking 12-12-011 at 3.) As such, compliance with one portion of a reporting requirement does not amount to substantial compliance—or any compliance for that matter—with a separate reporting requirement (*i.e.*, concomitant dates, times, and zip codes of each ride subsequently accepted or not accepted by the driver; and the amounts paid or donated per trip).

### 4.5. Contempt and Determination of Fine

In conclusion, we find, beyond a reasonable doubt, that Rasier-CA has failed and refused to comply with the remaining requirements in Reporting Requirements g, j, and k, as identified above. As a result, Rasier-CA is in contempt for violating the reporting requirements set forth in D.13-09-045.

We further find that none of the defenses that Rasier-CA advanced are legally sound and they do not cause us to reconsider the finding of contempt. Rasier-CA shall pay $1,000.00 pursuant to Pub. Util. Code § 2113, which states that a finding of contempt: "is punishable by the Commission for contempt in the same manner and to the same extent as contempt is punished by a court of record." In superior court, pursuant to Code of Civil Procedure § 1219(a), the maximum monetary civil penalty for a single act of contempt is $1,000.00.

But the Commission is not limited to fining Rasier-CA $1,000.00. Pub. Util. Code § 2113 states that the remedy allowed "does not bar or affect any other remedy prescribed in this part, but is cumulative and in addition there." In other words, the findings made here for Rasier-CA's contempt, can also be utilized by the Commission to impose additional fines for violating Rule 1.1. We therefore discuss the legal propriety of imposing additional fines on Rasier-CA.

## 5. By Disobeying D.13-09-045's Reporting Requirements, Rasier-CA Violated Rule 1.1 of the Commission's Rules of Practice and Procedure.

Rule 1.1 of the Commission's Rules of Practice and Procedure states:

> Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission or its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law.

### 5.1. Burden of Proof

The burden of proof for establishing a Rule 1.1 violation is not as stringent as the burden of proof for establishing contempt. The Commission has determined that a person subject to the Commission's jurisdiction can violate Rule 1.1 without the Commission having to find that the person intended to

disobey a Commission Rule, Order, or Decision. Instead, in D.01-08-019, the Commission ruled that intent to violate Rule 1.1 was not a prerequisite but that "the question of intent to deceive merely goes to the question of how much weight to assign to any penalty that may be assessed. The lack of direct intent to deceive does not necessarily, however, avoid a Rule 1 violation." Thus, as the Commission later reasoned in D.13-12-053, where there has been a "lack of candor, withholding of information, or failure to correct information or respond fully to data requests," the Commission can and has found a Rule 1.1 violation.[65] This standard was recently affirmed in *Pacific Gas and Electric Company v. Public Utilities Commission* (2015) Cal.App.LEXIS 512. The party claiming the violation must establish that fact "by a preponderance of the evidence."[66]

### 5.2. Rasier-CA Violated Rule 1.1

As we have established, *supra*, in Section 3 of this decision, Rasier-CA failed to comply with the remaining requirements in Reporting Requirements g,

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[65] *Final Decision Imposing Sanctions for Violation of Rule 1.1 of the Commission's Rules of Practice and Procedure* at 21. *See* also D.09-04-009 at 32, Finding Of Fact 24 [Utility was "subject to a fine for its violations, including noncompliance with Rule 1.1, even if the violations were inadvertent…"; D.01-08-019 at 21 Conclusion Of Law 2 ["The actions of Sprint PCS in not disclosing relevant information concerning NXX codes in its possession in the Culver City and Inglewood rate centers caused the Commission staff to be misled, and thereby constitutes a violation of Rule 1."]; D.94-11-018, (1994) 57 CPUC 2d, at 204 ["A violation of Rule 1 can result from a reckless or grossly negligent act."] ; D.93-05-020, (1993) 49 CPUC 2d 241, 243 [citing to Rule 1 and Pub. Util. Code § 315 for the proposition that "all public utilities subject to our jurisdiction…are under a legal obligation to provide the Commission with an accurate report of each accident[.]…Withholding of such information or lack of complete candor with the Commission regarding accidents would of course result in severe consequences for any public utility."]; and D.92-07-084, (1992) 45 CPUC 2d 241, 242 ["Therefore, by failing to provide the correct information in its report, and in not informing the Commission of the actual assignment, Southern California Gas & Electric Company (SoCalGas) misrepresented and misled the Commission….By behaving in such a manner, SoCalGas violated Rule 1."].

[66] 49 CPUC2d at 190, citing to D.90-07-029 at 3-4.

j, and k. First, Rasier-CA was aware of information responsive to Reporting Requirement g but tried to argue that its app had not yet been updated to track requests for accessible vehicles. Second, Rasier-CA elected to withhold trip-data information in violation of Reporting Requirement j by not providing it in the form required by D.13-09-045. Rasier-CA also violated Reporting Requirement j by not providing trip-fare information. Third, Rasier-CA has failed to provide the remaining information required by Reporting Requirement k. By doing so, Rasier-CA failed to comply with the laws of this state and further misled this Commission by an artifice or false statement of law by asserting multiple legal defenses that were unsound. Such conduct warrants the imposition of penalties or fines.[67]

### 6. By Disobeying D.13-09-045's Remaining Reporting Requirements in Violation of Rule 1.1, Rasier-CA is Subject to Penalties and/or Fines Pursuant to Pub. Util. Code §§ 2107 and 5411.

Pub. Util. Code § 2107 states:

> Any public utility that violates or fails to comply with any provision of the Constitution of this state or of this part, or that fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500), nor more than fifty thousand dollars ($50,000) for each offense.

[67] Similarly, in a superior court action, we note that it is appropriate for a court to impose sanctions where the losing party's objections to discovery are without substantial justification, making the discovery responses evasive. (*Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1281, and 1285-1292 [trial court imposed $6,632.50 for interposing objections that were lacking in legal merit and were without justification].)

Similarly, with respect to TCPs, Pub. Util. Code § 5411 provides that a TCP that violates a Commission order is subject to a fine:

> Every charter-party carrier of passengers and every officer, director, agent, or employee of any charter-party carrier of passengers who violates or who fails to comply with, or who procures, aids, or abets any violation by any charter-party carrier of passengers of any provision of this chapter, or who fails to obey, observe, or comply with any order, decision, rule, regulation, direction, demand, or requirement of the commission, or of any operating permit or certificate issued to any charter-party carrier of passengers, or who procures, aids, or abets any charter-party carrier of passengers in its failure to obey, observe, or comply with any such order, decision, rule, regulation, direction, demand, requirement, or operating permit or certificate, is guilty of a misdemeanor and is punishable by a fine of not less than one thousand dollars ($1,000) and not more than five thousand dollars ($5,000) or by imprisonment in a county jail for not more than three months, or by both that fine and imprisonment.

The Commission has broad authority to impose fines and penalties on persons subject to the Commission's jurisdiction. In *Pacific Bell Wireless, LLC v. Public Utilities Commission of the State of California* (2006) 140 Cal.App.4th 718, 736. The Court, citing the California Supreme Court's decision of *Consumers Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 905-906, spoke to the Commission's broad powers:

> The Commission is a state agency of constitutional origin with far-reaching duties, functions and powers. The Constitution confers broad authority on the commission to regulate utilities, including the power to fix rates, establish rules, hold various types of hearings, award reparation, and establish its own procedures. The Commission's powers, however, are not restricted to those expressly mentioned in the Constitution: The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article,

> to confer additional authority and jurisdiction upon the commission.

As part of the expansive authority, the courts have recognized that the Commission has the authority to impose fines directly on public utilities without the need to first commence an action in Superior Court. (140 Cal.App.4th, at 736.) Instead, the Commission has determined that it need only commence an action in superior court to collect unpaid fees. (*Id*., citing to *Order Denying Rehearing of Decision* 99-11-044 (Mar. 2, 2000) Dec. No. 00-03-023 [2004 Cal.P.U.C. Lexis 127, *6-7]; *Re Communications TeleSystems International* (1997) 76 Cal.P.U.C.2d 214, 219-220, 224, fn. 7; *Toward Utility Rate Normalization (TURN) v. Pacific Bell* (1994) 54 Cal.P.U.C.2d 122, 124.) The Commission's interpretation of its own statutory authority should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language." (140 Cal.App.4th, at 736, citing *PG&E Corporation v. Public Utilities Commission* (2004) 118 Cal.App.4th 1174, 1194.)

We need not decide if the Commission is limited to the monetary penalty limit of $50,000 per offense provided by Pub. Util. Code § 2107, or the monetary fine limit of $5,000 per offense provided by Pub. Util. Code § 5411, when a TCP violates Rule 1.1, since we are electing to impose the maximum fine amount of $5,000 per offense. We do, however, consider the criteria that have been articulated for Pub. Util. Code § 2107 as they are helpful in assessing the severity of the fine to impose on a TCP such as Rasier-CA. (*See* Resolution ALJ-261 at 6, wherein the Commission, in affirming, in part, a fine against the TCP, Surf City Shuttle, stated: "In determining whether to impose a fine and, if so, at what level, the Commission historically considers five factors, namely, the severity of the offense, the carrier's conduct, the financial resources of the carrier, the role of

precedent, and the totality of circumstances in furtherance of the public interest.")

### 6.1. Burden of Proof

When there is a Rule 1.1 violation, a fine "can be imposed under § 2107." (*See* 57 CPUC 2d at 205.) Thus, the same preponderance of the evidence standard necessarily applies.

That lesser standard is easily met. It is beyond dispute that Rasier-CA failed to comply with D.13-09-045 when it failed to produce the remaining information required for Reporting Requirements g, j, and k. That failure violated Rule 1.1 which, in turn, has triggered the Commission's authority to issue fines and penalties.

Further, Pub. Util. Code § 2108 states:

> Every violation of the provisions of this part or of any part of any order, decision, decree, rule, direction, demand, or requirement of the Commission, by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense.

Similarly, pursuant to Pub. Util. Code § 5415:

> Every violation of the provisions of this chapter or of any order, decision, decree, rule, direction, demand, or requirement of the commission by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof is a separate and distinct offense.

The Commission has relied on these statutory provisions to assess fines for each day that a utility is in violation of a Commission order or law.[68] Without

[68] *See*, *e.g.*, Resolution ALJ-261 at 5-6 (discussing Pub. Util. Code § 5414.5 and 5415, noting that "with each day of a continuing violation constituting a separate violation;" and Carey, D.98-12-076, 84 CPUC2d 196, OP 1 (1998); D.98-12-075, 1998 Cal. PUC LEXIS 1016, *56

*Footnote continued on next page*

question, the Commission's ability to impose penalties and fines on public utilities and TCPs is supported by the plain reading of Pub. Util. Code §§ 2107 and 5411.

### 6.2. Criteria for the Assessment of the Size of a Rule 1.1 and Pub. Util. Code § 2107 Fine

D.98-12-075 and Public Utilities Code Sections 2107-2108 provide guidance on the application of fines.[69] As stated in D.98-12-075, two general factors are considered in setting fines: (1) the severity of the offense and (2) the conduct of the utility. In addition, the Commission considers the financial resources of the utility, the totality of the circumstances in furtherance of the public interest, and the role of precedent. (D.98-12-075, mimeo at 34-39.[70]) We discuss the specific criteria and determine below its applicability to Rasier-CA's conduct.

#### 6.2.1. Criterion 1: Severity of the Offense

In D.98-12-075, the Commission held that the size of a fine should be proportionate to the severity of the offense. To determine the severity of the offense, the Commission stated that it would consider the following factors.[71]

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(discussion of the policy behind daily fines and affirming that "[f]or a "continuing offense," Public Utilities Code Section 2108 counts each day as a separate offense.").

[69] D.98-12-075 indicates that the principles therein distill the essence of numerous Commission decisions concerning penalties in a wide range of cases, and the Commission expects to look to these principles as precedent in determining the level of penalty in a full range of Commission enforcement proceedings. (*Mimeo* at 34-35.)

[70] In deciding the amount of a penalty, the Commission also considers the sophistication, experience and size of the utility; the number of victims and economic benefit received from the unlawful acts; and the continuing nature of the offense. (*See* D.98-12-076, *mimeo* at 20-21.) These principles are distilled into those identified in D.98-12-075.

[71] 1998 Cal. PUC LEXIS 1016 at 71-73.

- **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.

Rasier-CA's violation of Rule 1.1 harmed the regulatory process by failing to produce the required information to the Commission which, in turn, frustrates the Commission's ability to access the available data to evaluate the impact of the TNC industry on California passengers. As this Commission stated in D.98-12-075, "such compliance is absolutely necessary to the proper functioning of the regulatory process. For this reason, disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity."[72]

[72] 84 CPUC2d 155, 188; *See* also Resolution ALJ-277 Affirming Citation No. ALJ-274 2012-01-001 Issued to Pacific Gas and Electric Company for Violations of General Order 112-E at 8 (April 20, 2012).

### 6.2.2. Criterion 2: Conduct of the Utility

In D.98-12-075, the Commission held that the size of a fine should reflect the conduct of the utility. When assessing the conduct of the utility, the Commission stated that it would consider the following factors:[73]

- **The Utility's Actions to Prevent a Violation**: Utilities are expected to take reasonable steps to ensure compliance with applicable laws and regulations. The utility's past record of compliance may be considered in assessing any penalty.
- **The Utility's Actions to Detect a Violation**: Utilities are expected to diligently monitor their activities. Deliberate, as opposed to inadvertent wrongdoing, will be considered 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.

Here, Rasier-CA had the ability all along to comply with D.13-09-045's Reporting Requirements g, j, and k yet declined to do so by interposing a series of unsound legal arguments and objections.

### 6.2.3. Criterion 3: Financial Resources of the Utility

In D.98-12-075, the Commission held that the size of a fine should reflect the financial resources of the utility. When assessing the financial resources of the utility, the Commission stated that it would consider the following factors:[74]

[73] 1998 Cal. PUC LEXIS 1016 at 73-75.

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

As we will explain, Rasier-CA has the financial wherewithal to pay a substantial fine.

While Rasier-CA is the licensed TNC, Uber is also subject to the Commission's jurisdiction as it is helping to facilitate the TNC services for Rasier-CA.[75] This raises the question of whether a parent (Uber) is responsible for the actions of its subsidiary (Rasier-CA) and, if so, is it appropriate to look at Uber's revenues as a whole and not just Rasier-CA's revenues in order to calculate an appropriate penalty.

We answer this question in the affirmative based on the legal theories of parent/subsidiary and alter-ego liability. Such a result was affirmed in *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, wherein Ernest Hahn, Inc., a nationwide developer of regional shopping centers, was found to be the alter ego of its wholly owned subsidiary, Hahn Devcorp, a developer of community and neighborhood shopping centers. Both entities were

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[74] 1998 Cal. PUC LEXIS 1016 at 75-76.

[75] Uber is also subject to the Commission's jurisdiction and has been required to demonstrate that it carries commercial liability insurance. (D.13-09-045 at 74, OP 13.) The nature of Uber's operations and its relationship with its subsidiaries has been designated as part of the scope of Phase II of this proceeding, and Uber has been ordered to answer questions and produce documents related to this subject matter (Assigned Commissioner and Assigned Administrative Law Judge's Ruling dated June 3, 2015 at 2-5).

sued for breach of contract and fraud, and the jury heard evidence that the parent and subsidiary companies had net values of $497 million and $4.1 million respectively. The Court of Appeal affirmed the finding that Hahn and Devcorp had formed a single enterprise, thus making it appropriate for finding that Devcorp was the alter ego of Hahn for purposes of establishing liability and determining damages.[76]

What these decisions demonstrate is that if the subsidiary is a mere agency or instrumentality of the parent, then the parent is responsible for the actions of the subsidiary. (*Northern Natural Gas Co. v. Superior Court* (1976) 64 Cal.App.3d 983, 994.) A persuasive factor in this determination is if there is relatively complete management and control by the parent of the subsidiary. (*See Marr v. Postal Union Life Insurance Company* (1940) 40 Cal.App.2d 673, 681.) Other factors for deciding if a subsidiary is the alter ego or conduit of the parent include: (1) is the subsidiary engaged in no independent business; (2) does the same attorney represent both the parent and the subsidiary; (3) the uses of common offices; and (4) admission of an agency relationship between the parent and subsidiary. (*Marr*, *supra*, 40 Cal.App.2d at 682.) While the claims usually arise out of contract or tort claims, we find the principles applicable here as the actions of Uber and Rasier-CA are interchangeable, persuading us that it is appropriate to consider the revenues of Uber in assessing the penalty. Some background regarding the Uber corporate model is in order to explain why it is appropriate to consider both the value of Rasier-CA and Uber in determining an appropriate penalty.

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[76] *See* also *Pan Pacific Sash & Door Co v. Greendale Park, Inc.* (1958) 166 Cal.App.2d 652, 658-659 (Court of Appeal ruled that "the trial court was warranted in concluding, as it did, that each corporation was but an instrumentality or conduit of the other in the prosecution of a single venture[.]")

#### 6.2.3.1. The Corporate Relationship Between Uber, Rasier, LLC, and Rasier-CA

From a macro perspective, the corporate structure seems straightforward—there is Uber, Rasier, LLC, and Rasier-CA, the latter two entities being subsidiaries of Uber.[77] If a California transportation provider (either TCPs or TNCs) wishes to collaborate with Uber to provide transportation service, it must execute the Rasier Software Sublicense & Online Services Agreement with Rasier-CA.[78] Non-California transportation providers execute the Rasier Software Sublicense & Online Services Agreement with Rasier, LLC.[79]

When one delves into how Uber began its operations in San Francisco, California in 2009,[80] and when we analyze the relationship between Uber and its subsidiaries, the interconnection between Uber and Rasier-CA becomes clear, making it appropriate as a matter of law to treat Uber and Rasier-CA as one and the same for purposes of assessing fines and penalties.[81] Without any regulatory permission, Uber began offering rides in California to individuals in need of vehicular transportation who had subscribed to Uber's Terms of Service.[82] These passengers could then log in to the Uber software application on their

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[77] Colman Decl. ¶ 7 (*O'Connor*); and Exhibit 10 at 6 ("Rasier [CA]'s parent, Uber Technologies, Inc.")

[78] Colman Decl. ¶ 6, Exhibit A (*National*); Order Granting at 2, footnote 2 (*O'Connor*).

[79] Colman Decl. ¶ 6, Exhibit A (*National*).

[80] Colman Decl. ¶ 3 (*O'Connor*).

[81] We note in *O'Connor,* Judge Chen states: "Uber never materially distinguishes between itself and Rasier or argues that Rasier's separate corporate status is relevant to this litigation." (Order Denying, at 3, footnote 4.)

[82] *See* Citation for Violation of PUC dated November 13, 2012, addressed to Uber; Colman Decl. ¶ 8, Exhibit B (*National*).

smartphone, request a ride, and be matched with an available Uber driver.[83] The cost of the ride is charged to the passenger's credit card which is on file with Uber.[84] Uber reserves the right to determine the ultimate price of the ride.[85]

Once the Commission became aware of these unauthorized operations, on November 13, 2012, the Commission's Consumer Protection and Safety Division (CPSD, now known as SED) issued a citation to Uber for violation of Public Utilities Code.[86] As an interim solution while the Commission resolved the instant rulemaking proceeding, Uber's operations were permitted in California pursuant to a settlement agreement with SED.[87]

On September 22, 2013, this Commission issued D.13-09-045, in which the Commission distinguished between Uber and UberX, stating that the former "is the means by which the transportation service is arranged, and performs essentially the same function as a limousine or shuttle dispatch office."[88]

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[83] Colman Decl. ¶ 4 (*O'Connor*).

[84] *Id*. ¶ 5 ("As part of that process, passengers place a credit card number on file with Uber, which eliminates the need for cash payments and permits Uber to satisfy its obligation to manage passengers' payments to transportation providers.")

[85] Colman Decl. Exhibit B ("Payment Terms" states that "The Company reserves the right to determine final prevailing pricing[.] (*National*); Colman Decl. at ¶ 11 ("Uber incentivizes use of the Uber App during periods of peak demand by increasing rates ("surge pricing"). The idea is that additional drivers will choose to log in to the Uber App due to the increased earnings potential from higher fares[.]" (*O'Connor*.)

[86] D.13-09-045 at 4, footnote 4.

[87] *Id*. (Term Sheet for Settlement Between the Safety and Enforcement Division of the California Public Utilities Commission and Uber Technologies, Inc. RE Case PSG-3018, Citation F-5195, executed by SED and Uber on January 24, 2013 and January 30, 2013, respectively.

[88] *Id*. at 12.

Rasier-CA's Certificate of Formation was filed with the Delaware Secretary of State on September 6, 2013.[89] On September 19, 2013, Rasier-CA filed an Application to Register a Foreign Limited Liability Company with the California Secretary of State.[90] Travis Kalanick is listed on Rasier-CA's Statement of Information filed with the California Secretary of State as the sole managing partner, and as Uber's CEO on the California Secretary of State database.[91] Without deciding whether Uber Technologies, Inc., should be classified as a TCP, the Commission nevertheless reasoned that "Uber is not exempt from the Commission's jurisdiction over charter-party carriers."[92]

Additionally, the Commission found that UberX was a charter party carrier of passengers and was subject to the Commission's jurisdiction as a TNC.[93] Uber disputed this conclusion that UberX was a transportation provider. Instead, it argued that UberX "does not designate a specific transportation service, but rather it is one of the several classes of car that users of the Uber App may request. A car on the UberX platform can be driven by either a TCP holder providing a regulated TCP transportation service or a non-TCP holder providing peer-to-peer prearranged transportation service."[94] Uber claimed that its subsidiary, Rasier, LLC "contracts with non-TCP holders who use the Uber App to receive requests from users and provide peer-to-peer prearranged

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[89] State of Delaware Limited Liability Company Certificate of Formation.

[90] State of California Secretary of State Certificate of Registration, dated September 20, 2013.

[91] www.sos.ca.gov (Corp # C3318029).

[92] D.13-09-045 at 12.

[93] *Id*. at 75, OP 14 ("UberX meets the Transportation Network Company [TNC] definition and must apply for a TNC license.") *See* also Finding of Fact 29.

[94] Application of Uber Technologies, Inc. for Rehearing of Decision 13-09-045, 4, footnote 11.

transportation service. Accordingly, Uber asserted that the Commission should regulate Rasier, LLC as a TNC, but only if and when Rasier, LLC applies to the Commission to become a TNC."[95]

Uber's words were prophetic since in January 2014, Rasier-CA, rather than UberX, submitted an application for TNC authority.[96] The e-mail address on the application is rasier-ca@uber.com.[97] Control of Rasier-CA, is held by Rasier, LLC.[98] Rasier-CA states it is affiliated with Rasier, LLC and Uber.[99] The proof of insurance that was provided identifies the named insured as Rasier, LLC, Rasier-CA, Rasier-DC, LLC, and Rasier-PA, LLC.[100]

On April 7, 2014, the Commission issued Permit No. TCP0032512-P to Rasier-CA. Rasier-CA has identified itself as Uber's subsidiary.[101]

Nearly all pleadings in this proceeding on behalf of Uber, Rasier LLC and Rasier-CA have been filed by the same law firm—Davis Wright Tremaine LLP.

#### 6.2.3.2. Uber's Financial Viability is Dependent on Rasier-CA

Despite Uber's attempt to distinguish itself from the transportation services by recasting itself as a technology company or a wireless service, the

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[95] *Id*.

[96] *See* Public Utilities Commission of the State of California Application for Transportation Network Company Authority, PSG 32512.

[97] *Id*.

[98] *Id*.

[99] *Id*.

[100] James River Insurance, 12/21/2014 to 03/01/2016, policy number CA 436100CA-0.

[101] Verified Statement of Rasier-CA, Responding to Order to Show Cause in Rulemaking 12-12-011, 6 ("Rasier's parent, Uber Technologies, Inc.") *See* also Comments of Uber Technologies, Inc. on Proposed Decision Modifying Decision 13-09-045 at 3 ("Uber Technologies, Inc., on behalf of its TNC subsidiary, Rasier[.]")

facts are unrefuted, and this Commission has found that Uber is providing a transportation service as a facilitator. Even Uber's own advertisements and actions undercut its argument that it is not a transportation company. A review of its website and advertising materials reveals that Uber has referred to itself as an "On-Demand Car Service" and utilizes the tagline "Everyone's Private Driver."[102] Uber even owns a U.S. trademark on "Everyone's Private Driver."[103]

In fact, revenues derived from the transportation services provided by Uber's subsidiaries, such as Rasier-CA, are the lifeblood of Uber's operations and its continued financial viability. On its website, Uber claims that it "has grown to millions of trips per day in nearly 300 cities in 55 countries."[104] As discussed above, at the conclusion of the trip, the rider's credit card is charged and the payment from the rider is split between the driver and Uber.[105] Each ride, then, results in increased revenues to Uber. In contrast, Uber does not make money off its Uber App as it is not a software that is sold "in the manner of a typical distributor."[106] Uber itself has referred to its software as a "free, easy-to-use smartphone application."[107] In sum, Uber only makes money if the drivers signing up with Rasier-CA actually transport passengers.

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[102] Order Denying at 4 (*O'Connor)*.

[103] *Id*.

[104] http://blog.uber.com

[105] Uber's Comments on OIR at 2-3 ("At the completion of the ride, as the agent of the Partner/Driver, Uber processes payment (via use of a third party credit card payment processing company) for the transportation service provided. The User immediately receives a receipt from Uber via email. Uber forwards the fare, less Uber's commission, to the Partner.Driver."); Colman Decl. Exhibit A at 4 ("Service Fees") (*National Federal of the Blind*). Order Denying at 11 (O'Connor).

[106] Order Denying at 5 (*O'Connor*).

[107] Uber's Comments on OIR at 2.

#### 6.2.3.3. Uber's Control of Rasier-CA's Transportation Operations

Uber's control over the transportation services provided by Rasier-CA is extensive. The evidence is undisputed that:

- TNC drivers who want to obtain passengers from Uber must enter into a Software License and Online Services Agreement with Uber or a Transportation Provider Service Agreement with Rasier, LLC, an Uber subsidiary;[108]
- Any passenger wishing transportation service with Rasier-CA via the Uber App must download the passenger version of the Uber App to a smartphone and create an account with Uber;[109]
- Uber ensured that "its TNC subsidiary Rasier LLC (together with Rasier-CA, LLC) procured a commercial insurance policy with $1 million in coverage per incident;"[110]
- Wayne Ting, Uber's General Manager, verified Rasier-CA's Verified Statement;[111]
- Uber sets the fares it charges riders unilaterally;[112]
- Uber bills its riders directly for the entire amount of the fare charged;[113]

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[108] Colman Decl. at ¶ 7 (*O'Connor*).

[109] *Id*. at ¶ 5.

[110] Uber's Comments on ACR at 1, dated April 7, 2014.

[111] Exhibit 10.

[112] Colman Decl. Exhibit 1 thereto ("Payment Terms") (*O'Connor*).

[113] *Id*.

- Uber claims a proprietary interest in its riders, and prohibits its drivers from answering rider queries about booking future rides outside the Uber app, or otherwise soliciting rides from Uber riders;[114]
- Uber exercises control over the qualification and selection of its drivers;[115]
- Uber terminates the accounts of drivers who do not perform up to Uber standards; and[116]
- Uber deactivates accounts of passengers for low ratings or inappropriate conduct.[117]

In sum, we conclude that Uber's control over Rasier-CA's operations are so pervasive that Rasier-CA should be deemed as the mere agent or instrumentality of Uber, making it appropriate for the Commission to consider both companies' revenues for penalty purposes.[118]

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[114] Colman Decl. Exhibit 1 thereto (License Grant & Restrictions, and Intellectual Property Ownership (*O'Connor*); Colman Decl. Exhibit A ("You understand that you shall not during the term of this Agreement use your relationship with the Company…to divert or attempt to divest any business from the Company that provides lead generation services in competition with the Company or Uber." (*National*.)

[115] Colman Decl. Exhibit A (Performance of Transportation Services (*National Federation of the Blind*).

[116] Colman Decl. at ¶ 9 (*O'Connor*).

[117] *Id*.

[118] Such a conclusion is also supported by Commission precedent in instances where an alter-ego finding was not expressly made. (*See e.g.* D.04-12-058, *Order Modifying and Denying Rehearing of Decision (D.) 04-09-062* at 18 ["The record in this proceeding also reflected that Cingular reported corporate revenues of $14.746 billion for year-end 2002, that Cingular had approximately 22 million customers at that time, and that Cingular's three million California customers constituted 14% of Cingular's customer base, and likely 14% of Cingular's revenues as well."]; Decision 02-12-059, *Opinion Finding Violations and Imposing Sanctions* at 56 ["Thus, an approximate $38 million fine is reasonable in this case when Qwest had total revenues for the year 2000 of $11 billion, and its California residential long distance revenue for 2000 was about $92 million.]; and Decision 04-09-023 *Opinion Authorizing Transfer of Control and Imposing a Fine* at 10, footnote 12 ["The Commission has previously considered the finances of utility parent

*Footnote continued on next page*

#### 6.2.3.4. Rasier-CA's Revenues

Rasier-CA's reported gross revenues for 2014 were in excess of $40 million.[119]

#### 6.2.3.5. Uber's Revenues

Since Uber is not a publically traded company, we do not have access to filings that we normally would be available for a publically traded company that would give us national revenue numbers from a source from which we may take official notice. Yet we can glean some useful information from the comments Uber's CEO, Travis Kalanick, has made on the company's website. In a June 6, 2014 post entitled "*4 YEARS IN*," Mr. Kalanick states that Uber has raised "$1.2 billion of primary capital at a $17 billion pre-money valuation."[120] Mr. Kalanick continued and commented on the growth of the company:

> It's remarkable that it was only four years ago this week Uber started operations in SF, connecting residents with the safest, most reliable way to get around a city. Today, we are operating in 128 cities in 37 countries around the world with hundreds of thousands of transportation providers and millions of consumers connecting to our platform.[121]

In a more recent blog, Mr. Kalanick states that Uber has "grown to millions of trips per day in nearly 300 cities in 55 countries."[122] If we were to assume that each ride costs $10, Uber's gross annual revenue would be $3.6 billion. (1 million

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companies, affiliates, and other non-regulated entities when setting fines, provided that such information is cognate, and germane to the fine. (D.04-04-017, *mimeo*., p. 9; D.04-04-016, *mimeo*., p. 19; D.03-08-058, *mimeo*., p. 12; and D.03-05-033, *mimeo*., p. 10."].)

[119] Public Utilities Commission Transportation Reimbursement Account Revenue Detail.

[120] http://blog.uber.com/4years.

[121] *Id*.

[122] http://blog.uber.com.

rides per day × $10 = $10 million × 30 days = $300 million × 12 months = $3.6 billion.) We also know that Uber takes a share of the cost of each ride the TNC driver agrees to provide. In the Rasier Software Sublicense & Online Services Agreement, there is a section entitled "Rasier's Fee" which states: "In exchange for your access to and use of the Software and Service, including the right to receive the Requests, you agree to pay to the Company a fee for each Request accepted as indicated in the Service Fee Schedule."[123] While we do not know the precise fee, other TNCs take approximately 20% of the ride fare charged to the passenger's credit card on file.[124] Assuming Uber utilizes a similar 80/20 fare split, Uber's 20% share of the $3.6 billion in gross revenues would be $720 million annually.

### 6.2.4. Criterion 4: Totality of the Circumstances

In D.98-12-075, the Commission held that a fine should be tailored to the unique facts of each case. When assessing the unique facts of each case, the Commission stated that it would consider the following factors:[125]

- **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.

Rasier-CA's actions impeded the Commission's staff from exercising its obligations to analyze the required data so it could advise the Commission if the regulations imposed on the TNC industry were protecting the public interest.

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[123] Colman Decl., Exhibit A (*National*).

[124] *See* Exhibit C, 52, and Exhibit E, 83, to the Workshop Brief filed on April 3, 2013 by TPAC.

[125] 1998 Cal. PUC LEXIS 1016, 76.

Since Rasier-CA has a sizeable market share of the TNC operations in California, the absence of Respondent's data created a significant hole in SED's impact analysis. In considering the totality of circumstances and degree of wrongdoing in this case, we conclude that a fine for the entirety of the time, discussed *infra*, that Rasier-CA violated D.13-09-045 is appropriate.

#### 6.2.5. Criterion 5: The Role of Precedent in Setting the Fine or Penalty

In D.98-12-075, the Commission held that any decision that imposes a fine or penalty should: (1) address previous decisions that involve reasonably comparable factual circumstances, and (2) explain any substantial differences in outcome.[126]

##### 6.2.5.1. Calculating the Fine or Penalty Based on a Continuing Offense

As precedent for considering the level of fines against Rasier-CA, we consider past Commission decisions involving Rule 1 violations that occurred over multiple days:

- *Cingular Investigation*, D.04-09-062 at 62 ("Section 2108 provides, in relevant part, that 'in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense. Both violations constitute continuing offenses during the relevant time periods. Considering the record as a whole, we find that the penalty for each violation should be calculated on a daily basis."); and Conclusion of Law (COL) 4 ("Pursuant to §§ 2107 and 2108 and Commission precedent, for the violations of law for the period January 1, 2000 to April 30, 2002 (849 days), Cingular

[126] 1998 Cal. PUC LEXIS 1016, 77.

should pay a penalty of $10,000 per day, or $8,490,000.");

- *Qwest*, D.02-10-059 at 43, n. 43 ("Sections 2107 and 2108 address fines. According to § 2107, *Qwest* is liable for a fine of $500 to $20,000 for every violation of the Public Utilities Code or a Commission decision. Pub. Util. Code § 2108 provides that every violation is a separate and distinct offense, and in case of a continuing violation each day's continuance constitutes a separate and distinct offense."); and
- *SCE's Performance-Based Ratemaking OII*, D.08-09-038 at 111 ("Finally, a fine of $30 million is reasonable when viewed as an ongoing violation that should be subject to a daily penalty, as recommended by CPSD and used by the Commission in the case that was upheld in *Pacific Bell Wireless, LLC v. Pub. Util. Comm'n.* If SCE's violations are viewed as daily violations that continued for seven years, then a $30 million dollar fine equates to a daily penalty of just less than $12,000 ($30 million/7 years/365 days).")

#### 6.2.5.2. Calculating the Fine or Penalty by Considering National and California Revenues

An additional precedent we consider are past Commission decisions where a fine or penalty was imposed based on the revenues or equity of both a company's national revenues and the California revenues:

- D.04-12-058, *Order Modifying and Denying Rehearing of Decision (D.) 04-09-062* at 18 ["The record in this proceeding also reflected that Cingular reported corporate revenues of $14.746 billion for year-end 2002, that Cingular had approximately 22 million customers at that time, and that Cingular's three million California customers constituted 14% of Cingular's customer base, and likely 14% of Cingular's revenues as well."]; and
- D.02-12-059, *Opinion Finding Violations and Imposing Sanctions* at 56 ["Thus, an approximate $38 million fine is reasonable in this

case when Qwest had total revenues for the year 2000 of $11 billion, and its California residential long distance revenue for 2000 was about $92 million."].)

#### 6.2.5.3. Calculating the Fine or Penalty by Considering Revenues of both Parent and Subsidiary Companies

The final precedents are those Commission decisions where fines or penalties were based on the revenues of both the parent and the subsidiary companies. (*See e.g.,* D.04-09-023 *Opinion Authorizing Transfer of Control and Imposing a Fine* at 10, footnote 12 ["The commission has previously considered the finances of utility parent companies, affiliates, and other non-regulated entities when setting fines, provided that such information is cognate, and germane to the fine. (D.04-04-017, *mimeo*., p. 9;[127] D.04-04-016, *mimeo*., at 19; D.03-08-058, *mimeo*., at 12;[128] and D.03-05-033, *mimeo*., at 10."[129]].)

### 6.6. Calculation of the Fine or Penalty

#### 6.6.1. Rasier-CA's Position

Rasier-CA claims that since it substantially complied with Reporting Requirement j, and complied with Reporting Requirements g and k, no fine should be imposed.

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[127] "From this information, we conclude that WLN, through its parent new WCG, has the financial resources to pay a fine in the range normally applied by the Commission for violation of § 854(a). We will weigh this information accordingly when setting the amount of the fine."

[128] "[W]hile Applicants' California operations and revenues may be minimal, the parent companies involved with this indirect transfer of control have substantial financial resources to pay a fine for their violation of § 854(a)."

[129] "The Applicants have incurred significant losses in 2001, but their financial statements indicate health amounts of equity."

### 6.6.2. SED's Position

As of February 5, 2015, SED claims Rasier-CA has been out of compliance for 139 days. Multiplied by the recommended daily penalty of $2,000 a day, the total recommended penalty is currently $278,000.[130] SED also notes that if the Commission were to treat each of the fifteen failures to comply as a separate penalizing offense, the penalty could be $3.72 million.[131]

### 6.6.3. Discussion

In view of Rasier-CA's conduct and the specious legal arguments it raised that we have addressed above, we believe that a fine much greater than the one proposed by SED should be imposed in order to deter such conduct. We treat each of the remaining five failures to comply as separate offenses for which a fine should be imposed, and we increase the daily rate to $5,000 for each offense.

Based on the above precedents, we calculate Rasier-CA's fine as follows:

| Reporting Requirement | What Remains Outstanding | Days Out of Compliance | Daily Fine Amount | Recommended Fine |
|---|---|---|---|---|
| g (Report on Accessibility) | The number and percentage of customers who requested accessible vehicles | 323 (from September 24, 2014 to August 13, 2015) | $5,000 | $1,615,000 |

[130] SED's Opening Brief at 13-14.

[131] *Id.* at 15.

| | | | | |
|---|---|---|---|---|
| g (Report on Accessibility) | How often the TNC was able to comply with requests for accessible vehicles | 323 (from September 24, 2014 to August 13, 2015) | $5,000 | $1,615,000 |
| j (Report on Providing Service by Zip Code) | The concomitant date, time, and zip code of each ride that was subsequently accepted or not accepted | 168 (from September 19, 2014 to March 6, 2015) | $5,000 | $,840,000 |
| k (Report on Problems with Drivers) | The cause of each incident | 328 (from September 19, 2014 to August 13, 2015) | $5,000 | $1,640,000 |
| j (Report on Providing Service by Zip Code) | The amount paid or donated | 328 (from September 19, 2014 to August 13, 2015) | $5,000 | $1,640,000 |
| **Subtotal** | | | | **$7,350,000** |

We must also add to this subtotal the 138 days past the reporting deadline it took Rasier-CA to comply with Reporting Requirement j's demand for information by zip code in which each ride ended and the distance travelled and the date, time, and zip code of each request, both completed and not completed. We assess this fine determination at a daily rate of $2,000, resulting in a fine of **$276,000.**

**Total fine: $7,626,000.**

## 7. Suspension of Rasier-CA's Authority to Operate as a TNC

Rasier-CA's authority to operate as a TNC shall be suspended 30 days after the issuance of this decision. The authority shall remain suspended until the assessed fines have been paid.

## 8. Rasier-CA's Appeal

On August 14, 2015, Rasier-CA filed its appeal of the Presiding Officer's Decision (POD) and set forth six arguments:

- The POD improperly judicially noticed documents outside of the record and by doing so deprived Rasier-CA of due process;
- The POD's determinations regarding Rasier-CA's compliance and noncompliance are erroneous;
- Raiser-CA should not be held in contempt;
- Rasier-CA did not violate Rule 1.1;
- The fines and penalties are unsupported by the record and law; and
- The proceedings failed to accord Rasier-CA with due process.

Finally, Rasier-CA asserts that the POD overlooks the fact that the concomitant data required by Reporting Requirement j was produced on March 6, 2015. Rasier-CA also claims that as of August 13, 2015, it has produced the balance of the information required by Reporting Requirements g, j, and k.

## 9. SED's Response

After receiving an extension of time, on September 14, 2015, SED filed its response to Rasier-CA's appeal and addressed each of the above six arguments. SED argued that making the determination that Rasier-CA should be found in contempt is a straightforward process. The evidence established, beyond a reasonable doubt, that:

- Rasier-CA had knowledge of the reporting requirements;

- Rasier-CA had the ability to comply with the remaining reporting requirements; and
- It was inexcusable for Rasier-CA not to have complied with the remaining portions from Reporting Requirements g, j, and k since the multiple legal arguments it asserted were unsound.

With one exception, SED agrees with Rasier-CA's representations regarding when the additional documents required by Reporting Requirement's g, j, and k were produced. The exception is for Reporting Requirement k's instruction to provide information on the cause of each incident. While Rasier-CA has provided some information, SED found the explanations that Rasier-CA provided to be inadequate for identifying the cause of the incident. SED suggests that the fine imposed for this violation continue until August 26, 2015, the date which Rasier-CA provided a second submission. As for Reporting Requirement g, SED asserts that the fine should accrue until August 13, 2015.

## 10. Discussion of Appeal Issues

### 10.1. Due Process in Administrative Proceedings

In *Pacific Gas & Electric Company v. Public Utilities Commission* 2015 Cal.App. LEXIS 512, the Court explained the concept of due process as it applies to an administrative agency such as the Commission:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314. Four years later, our Supreme Court ruled on the application of this principle to the PUC: "Due process as to the commission's…action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made." (*People v. Western Air Lines Inc.*, *supra*, 42 Cal.2d 621, 632.) (*51)

In *Pacific Gas and Electric Company,* the Court explained that notice is a fluid concept with no hard and fast rules as to the form the notice must take:

> To begin with, due process does not require any particular form of notice. *(Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 990 [4 Cal. Rptr. 2d 837, 824 P.2d 643]; Drummey v. State Bd. of Funeral Directors (1939) 13 Cal.2d 75, 80 [87 P.2d 848]; see Litchfield v. County of Marin (1955) 130 Cal.App.2d 806, 813 [280 P.2d 117*] ["there is no constitutional mandate…which makes specific how … notice is to be given or which form it must take"].) The details can be flexible, "depend[ing] on [the] circumstances … var[ying] with the subject matter and the necessities of the situation." *(Sokol v. Public Utilities Commission (1966) 65 Cal.2d 247, 254 [53 Cal. Rptr. 673, 418 P.2d 265]; see Haas v. County of San Bernardino (2002) 27 Cal.4th 1017, 1037 [119 Cal. Rptr. 2d 341, 45 P.3d 280]* ["The requirements of due process are flexible, especially where administrative procedure is concerned … ."].) All that is required is that the notice be reasonable. *(Jonathan Neil & Assoc., Inc. v. Jones (2004) 33 Cal.4th 917, 936, fn. 7 [16 Cal. Rptr. 3d 849, 94 P.3d 1055]; Drummey v. State Bd. of Funeral Directors, supra, at 80–81.)*
> (*52)

In addition, *Pacific Gas and Electric Company* noted that the Commission is not bound by strict rules of pleading:

> Administrative proceedings "'are not bound by strict rules of pleading … . So long as the respondent is informed of the substance of the charge and afforded the basic, appropriate elements of procedural due process, he cannot complain of a variance between administrative pleadings and proof.'" *(Smith v. State Bd. of Pharmacy (1995) 37 Cal.App.4th 229, 241 [43 Cal. Rptr. 2d 532],* quoting *Stearns v. Fair Employment Practice Com. (1971) 6 Cal.3d 205, 213 [98 Cal. Rptr. 467, 490 P.2d 1155].)* In other words, "'[a] variance between the allegations of a pleading and the proof will not be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense on the merits, and a variance may be disregarded when the action [*99] has been as fully and fairly tried on the merits as though the variance had not existed.' [Citations.]" *(Cooper v. Board of Medical Examiners (1975) 49 Cal.App.3d 931, 942 [123 Cal. Rptr. 563],* italics added.) (*55)

Variances in pleadings will be deemed immaterial if the complaining party suffered no prejudice. (*55.)

### 10.2. Rasier-CA was Accorded Due Process in Presenting its Defenses of Good Faith and Substantial Complaince

#### 10.2.1. Good Faith and Substantial Complaince

Before the September 19, 2014 reporting deadline, Rasier-CA claims it informed SED that the Commission had ordered the TNCs to produce information that Rasier-CA believed was both confidential and trade secret. As a result, Rasier-CA suggests it was acting in good faith when it offered to produce data responsive to Reporting Requirement j (trip data) in an aggregate format rather than in the manner specified by the spread sheets that SED placed on line. There are two flaws to Rasier-CA's argument: first, whether information is confidential and trade secret is a legal determination that the Commission must decide rather than Rasier-CA. And as we have demonstrated, *supra*, Rasier-CA's claims of confidentiality and trade secret are not legally sound. Second, it is the Commission that must ultimately determine if producing responsive data in aggregate form is appropriate, and in order to secure such approval, it would have been necessary for Raiser-CA to have filed a motion for modification of D.13-09-045 before the September 19, 2014 reporting deadline.

#### 10.2.2. Rasier-CA may not use Commission Staff to Confirm Substantial Compliance since this is an issue the Commissioners Must Determine

Rasier-CA errs in its presumed legal conclusion that SED had the authority to broker compromises concerning the interpretation of the Reporting Requirements. The opinion of a staffer cannot bind the Commission since the question of what is required by either a Reporting Requirement or an Ordering Paragraph is a discretionary determination that lies within the province of the

five Commissioners to decide. In the *Order Modifying Resolution ROSB-002 and Denying Rehearing of Resolution, as Modified*,[132] the Commission explained that it must approve any ministerial act delegated to staff:

> Generally, the commission has stated that powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of a public trust and cannot be surrendered or delegated to subordinates in the absence of statutory authorization. (*Bagley v. City of Manhattan Beach* (1976) 18 Cal. 3d 22, 24; *California School Employees Association v. Personnel Commission* (1970) 3 Cal. 3d 139, 144; *Schecter v. County of Los Angeles* (1968) 258 Cal.App.2d 391, 396.) Public agencies, however, may delegate the performance of ministerial tasks, including the investigation and determination of facts preliminary to agency action (*California School Employees*, *supra*, at p. 144), functions relating to the application of standards (*Bagley*, *supra*, at 25), and the making of preliminary recommendations and draft orders (*Schecter*, *supra*, at 397.) Moreover, an agency's subsequent approval or ratification of an act delegated to a subordinate validates the act, which becomes the act of the agency itself." P.*3-4.

Thus, the opinion of a staffer would not become binding on the Commission unless and until the Commission approves or ratifies the opinion.

Similarly, as to whether or not a staffer's opinion could be binding on the Commission, the Commission has answered this question in the negative in a number of different factual scenarios. For example, in *Moores v. PG&E Co*. [D.92-04-022] (1992) 43 Cal.P.U.C.2d 629 [not published in full], 1992 Cal. PUC LEXIS 345, at pages*18-19, the Commission explained:

> We are of the opinion that the prior determination of the Commission staff is not binding on this Commission simply because

[132] Application of Union Pacific Railroad Company and BNSF Railway Company for Rehearing of Resolution ROSB-002, D. 09-05-020; A. 08-12-004; 2009 Cal. PUC LEXIS 250 (May 7, 2009).

> it was a staff determination and not a Commission determination. No formal proceedings were undertaken, no evidentiary hearings were held, no witnesses were examined and subjected to cross-examination, and no decision was issued by this Commission.

Even beyond the context of a complaint proceeding, the Commission has emphatically advised that regulated entities must not rely on staff to offer legal opinions or interpretations when there has been an order from the Commission requiring compliance. For example, in *Universal Marine Corporation v. San Pedro Marin*, [D.90334, at 17 (*slip op.*)] (1979) 1 Cal. P.U.C.2d 404 [not published in full], the Commission offered the following pronouncement after a staff member told an applicant that a certificate of public convenience and necessity was necessary before a certificate could be issued:

> The record shows that San Pedro commenced the transportation…under the color of authority from its prior attorney and a member of the Commission's staff. While advice given by the staff to the public is intended to be helpful, it does not bind the Commission, nor can it be considered as Commission action or policy since the Commission can only act as a body and in a formal manner.[133]

#### 10.2.3. Because it is Up to the Commission to Interpret D.13-09-045 and Determine if Rasier-CA Complied with the Reporting Requirements, Raiser-CA was not Denied Due Process for Not Being Able to Continue its Cross-Examination of Staff

Rasier-CA asserts it was denied due process in that it was not permitted to fully cross examine SED's witnesses on the issue of Rasier-CA's claimed

[133] *See* also Resolution G-3372, wherein after the Commission's Consumer Affairs Branch had advised customer that Pacific Gas and Electric Company (PG&E) bills were not inconsistent with its tariffs, the Commission stated that "[s]uch informal advice provided by staff is not binding upon the Commission which issues formal opinions only through its decisions and resolutions." (At 10, fn. 1.)

substantial compliance with D.13-09-045's Reporting Requirements. It offers the following portion of the Reporter's Transcript (RT) from the Evidentiary Hearing:

> I appreciate that very much, your Honor. I certainly don't want to irritate your Honor by going down roads that you think are improper, but I am concerned that substantial compliance is not just a legal issue. It is a factual issue where it's important to have a factual record of what was done, why it was done, and whether it in fact substantially complied. That's been my concern. But if your Honor's direction is don't go there, I'll do my best to honor that. I just would like that to be clear.[134]

What prefaced this statement from Rasier-CA's counsel was the comment from the Presiding Officer (ALJ Mason) who stated that the evidence regarding substantial compliance had been placed in the record so there was no need to continue with this line of questioning:

> What I'm telling you is you've already gone there. We've already talked about the reports that Rasier has provided. We've gone through them. We've gone through the Excel files. We've gone through the heat map. We've gone through the data. I think that's all spelled out in your verified statement, and we've certainly been talking about it this morning. I don't know that we need to go in any further with respect to the witness on that point. I think you've made your point, and it is on the record and it's in the briefing that's been served and filed in the proceeding.[135]

As substantial compliance is a legal determination for the Commission to make, it did not make sense to permit Rasier-CA to continue questioning SED's witnesses on this point.

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[134] Appeal at 72; RT: 349:18-350:2.

[135] RT: 333-334.

### 10.3. Rasier-CA was Accorded Due Process to Respond to the Presiding Officer's taking of Official Notice of Other Pleadings, Evidence, and Blogs.

Rasier-CA does not and cannot dispute that a Presiding Officer or the Commission may take official notice pursuant to Rule 13.9 of those matters that may be judicially noticed pursuant to Evidence Code § 450 *et seq*. Instead, Rasier-CA first questions the timing of the official notice.[136] But there is nothing in the Rule 13.9 that sets a statute of limitations on when official notice may be taken, and there is nothing prohibiting official notice after the completion of evidentiary hearings and post-hearing briefing. As we explained, *supra*, at Section 2.1 of this decision, Evidence Code § 455 permits a court to take judicial notice (and by extension this Commission may take official notice) of matters that are outside the record provided that certain preliminary procedural steps are followed. The key inquiry is whether the objecting party was accorded due process.

In this instance, we find that the due process standards were followed in accordance with the standards set forth in Evidence Code § 455. On June 9, 2015, the Presiding Officer notified Rasier-CA and SED that it was considering taking official notice of certain documents that were specifically identified in the notice.[137] The parties were given until June 23, 2015 to present their positions on the propriety of taking official notice, as well as the tenor of the matters to be noticed.[138] Rasier-CA faults the notice of intent to take official notice on the grounds it did not indicate the portions of the documents that the Presiding

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[136] Appeal at 12.

[137] *See* POD at Section 2.1.

[138] *Id*.

Officer believed were relevant to the proceeding, and that this absence somehow amounted to a denial of due process.[139] Rasier-CA errs on both counts because it is adding additional requirements that do not exist in the plain language of Evidence Code § 455(a). When a party opposing a court's taking of judicial notice is aware of the particular matter of which the court ultimately took judicial notice of and has been given an opportunity to object, the due process rights of the parties have been observed. (*See Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616, 623 [since plaintiff's counsel had knowledge of the matters which the court took judicial notice and had opportunity to object, any failure by the court to comply with Evidence Code §§ 453 and 455 did not constitute a "miscarriage of justice" as provided in Ca. Const., art. VI, § 13].) The law does not require that the court initially specify the exact portions of documents and explain how they will be officially noticed, and to accept Rasier-CA's position would have this Commission run afoul of the first settled rule of statutory interpretation, i.e., that a statute be interpreted by resorting to its plain language,[140] rather than be rewritten by a party.[141] Rasier-CA has been given an opportunity to be heard twice—once before official notice was taken, and in the

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[139] *Id*. at 12-13.

[140] *Dyna-Med, Inc. v. Fair Employment & Housing Com*. (1987) 43 Cal.3d 1379, 1386-1387 ("a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose.).

[141] *See e.g. In re Hoddinott* (1996) 12 Cal.4th 992, 1002, quoting *Napa Valley Wine Train, Inc. v. Public Utilities Commission* (1990) 50 Cal.3d 370, 381 ("However, in construing the statutory provisions a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language.".)

instant appeal where it has presented multiple arguments as to why the documents that were officially noticed are inconsequential or irrelevant.

Even a failure to comply with Evidence Code § 455(a) is not fatal if the challenging party cannot change the facts that the court has noticed. (*See People v. Carnesi* (1971) 16 Cal.App.3d 863, 867 ["The court's failure to so comply with the Evidence Code is but a cosmetic defect. Had it done so there would have been nothing the defendant could have done to change the unchallengeable fact that the ordinance existed and that it read as copied by us in footnote 2 above."].) Here all the matters were either pleadings from proceedings that Rasier-CA and/or its parent, Uber, were parties, or were internet postings from Uber's officers and directors. As Rasier-CA cannot change these facts, assuming there was any alleged failure—which there was not—the record of what Uber has said, what allegations were contained in pleadings, and what rulings were made in other proceedings, would not change.

Apparently aware that the Presiding Officer and the POD complied with Evidence Code § 455(a), Rasier-CA switches tactics and cites to the requirements of the California Administrative Procedures Act (APA) to bolster its denial of due process claim.[142] Yet as Rasier-CA acknowledges, the APA is "not binding on the Commission,"[143] a fact confirmed in *Pacific Gas and Electric Company, supra:* "[In]conducting an adjudicatory hearing, the PUC is not governed by the Administrative Procedure Act (Government Code § 11340 *et seq*), but is allowed to establish its own procedures ([Pub. Util. Code] §§ 1701, 1701.2), subject, of course, to the constitutional obligation to satisfy due process." (* 51.) Even if it

[142] Appeal at 15-17.

[143] *Id.* at 15.

were applicable, APA § 11515's requirement that a party be given a reasonable opportunity to refute the officially noticed matters has been complied with since Rasier-CA has been given such an opportunity by the filing of its appeal.

#### 10.3.1. Reporting Requirement g (Report on Accessibility)

Rasier-CA claims it was improper to take official notice of the allegations in the *National Federation of the Blind of California* lawsuit because the POD assumes the allegations are true.[144] Rasier-CA is incorrect. What the POD said was that "as of September 24, 2013, Uber, Rasier-CA's parent company, was aware of *allegations* of complaints by persons with disability regarding their *claimed* inability to take advantage of the TNC service provided by UberX."[145] The POD never assumed that the allegations were true but nevertheless concluded that the allegations were responsive to Reporting Requirement g and should have been reported once Rasier-CA became aware of them.

#### 10.3.2. Reporting Requirement j (Report on Service by Zip Code)

Oddly, Rasier-CA argues that had the Presiding Officer informed Raiser-CA before the POD was issued of the purpose for which the POD intended to take official notice of the trip data that Uber produced in New York and Boston, it would have presented testimony explaining the differences with the regulatory scheme and the reporting requirements. Rasier-CA further argues that these important differences would have supported Rasier-CA's view that D.13-09-045's Reporting Requirement j was burdensome, overbroad, and

[144] Appeal at 19.

[145] POD at 24, italics added.

unnecessary to accomplish the Commission's regulatory objectives.[146] As we will explain, infra, at Section 10.6.2.4., the information is sufficiently similar to make the taking of official notice appropriate from a due process standpoint.

### 10.3.3. Piercing the Corporate Veil

Rasier-CA alleges that the POD officially notices documents for the truth of the matter asserted in order to pierce the corporate veil and treat Rasier-CA as Uber's alter ego.[147] In reaching this conclusion, the POD relied, in part, on the ruling in *O'Connor* which stated that "Uber never materially distinguishes between itself and Rasier or argues that Rasier's separate corporate status is relevant to this litigation."[148] Rasier-CA then goes on to argue that it is erroneous for the POD to assume Rasier-CA would not reasonably dispute an effort to pierce the corporate veil or assess alter-ego liability.

But what Rasier-CA overlooks is that the ruling in *O'Conno*r and the POD also relied on declarations that Uber submitted in the *O'Connor* lawsuit that described the corporate relationship between Rasier-CA and Uber. (*See* Colman Declaration, cited, *supra*, at footnotes 77-80 and 83-84.) Uber cannot, and does not, dispute the information supplied by its own declarant regarding the relationship between the two entities. Other information regarding the relationship between Rasier-CA and Uber was contained from filings that Uber made with the Delaware Secretary of State, the California Secretary of State, and this Commission.[149]

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[146] *Id.* at 16.

[147] *Id.* at 18.

[148] *Id.* at 19.

[149] POD, footnotes 87-91.

Nor can Rasier-CA credibly dispute the evidence relied on by the POD to establish the level of control exerted by Uber over Rasier-CA in order to justify piercing the corporate veil in order to consider Uber's earnings to properly assess a fine or penalty against Rasier-CA since the information came from Uber's declarant, Uber's Comments, and Rasier-CA Exhibit 10 from the evidentiary hearing.[150]

Finally, Rasier-CA cannot dispute the fact that Uber's revenues are dependent upon passengers availing themselves of its TNC services such as the one provided by Rasier-CA. This information came from Uber's Comments in the instant Rulemaking.[151]

#### 10.3.4. Blog Posts

Rasier-CA claims it was improper to take official notice of "blogs" without acknowledging that the blogs were posted by Uber's CEO, Travis Kalanick, and Uber's Head of Policy for North America, Justin Kintz, regarding the company's earnings and the size of its operations because the POD assumes these statements from Mr. Kalancik and Mr. Kintz to be true.[152] Based on the information in the blogs, the POD then estimated the cost of an Uber ride to determine an estimate of the annual gross revenues.[153] While Raiser-Ca claims that the assumption is "erroneous,"[154] it makes no offer of proof as to the correct ride costs, revenues per day, and revenues per year. Tellingly, Rasier-CA does

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150 *Id*. footnotes 84, 85, and 108-118.

151 *Id*. footnotes 105 and 107.

152 Appeal at 19.

153 POD at 77.

154 Appeal at 20.

not claim that the information provided in the posts by its CEO and Head of Policy is incorrect, nor does Rasier-CA say what information it would have provided had it been made aware of its blogs at the time of the evidentiary hearing.

### 10.4. Raiser-CA does not address the fact that the blogs from Uber's CEO and Head of Policy for North America are Admissible Under Exceptions to the Hearsay Rule for Admissions of Party Opponents and Authorized Admissions

Rasier-CA fails to address the fact that the POD found that the blog posts were admissible as authorized admissions pursuant to Evidence Code § 1222, and as admissions of a party opponent pursuant to Evidence Code § 1220.[155] Rasier-CA submitted a declaration from Uber's attorney with its Appeal but did not attack or challenge the statements made by its CEO and Head of Northern California operations. What it did, in effect, was to raise technical errors regarding admissibility of judicially noticed statements. The Court in *Veg-Mix, Inc. v. U.S. Dept. of Agriculture* (D.C. Cir. 1997) 832 F.2d. 601, 606, dispensed with such speculative attacks:

> Veg-Mix stresses the agency's purported technical error, rather than the truthfulness of the invoices. (Cite omitted.) In the absence of a serious, nonspeculative argument that the records were something other than they appeared to be, the practical standards applicable to administrative proceedings are not offended….Veg-Mix makes a similarly technical objection with regard to the ALJ's taking official notice of Veg-Mix's bankruptcy petition….whatever merit the claim might have in a more formal civil litigation context, it has none in informal administrative proceedings.

[155] MOD POD at 21-22.

In admitting the statements from Uber's CEO, who is also Rasier-CA's manager and has signed documents filed with the Commission on Rasier-CA's behalf, and Uber's Head of Policy for North America, the POD is consistent with the standards for the use of alleged hearsay evidence in a Commission proceeding to support a finding of disputed fact. These standards were articulated and discussed in *The Utility Reform Network v. Public Utilities Commission ("TURN")* (2014) 223 Cal.App.4th 945 and are distilled as follows: First, administrative agencies like the Commission are given more latitude to consider hearsay testimony than are courts, in part because the fact finders in administrative proceedings are more sophisticated than a lay jury. (223 Cal.App.4th at 960.) The Commission may consider hearsay evidence if a responsible person would rely upon it in the conduct of its affairs. (*Id*.) Second, the mere admissibility of hearsay evidence does not necessarily confer the status of sufficiency to support a finding absent other competent evidence. (*Id*.) There must be substantial evidence to support a ruling and hearsay "***unless specially permitted by statute***, is not competent evidence to that end." (*Id*., quoting *Walker v. City of San Gabriel* (1942) 20 Cal.2d 879, 881, overruled on another ground in *Strumsky v. San Diego County Employees Retirement Assn*. (1974) 11 Cal.3d 28, 37, 44.) (Emphasis added.) In setting forth this standard, *TURN* said California decisions adhere to the "residuum rule," under which "hearsay evidence shall not be sufficient in itself to support a finding ***unless it would be admissible over objection in civil actions***." (*Id*., quoting Gov. Code § 11513 (d).) (Emphasis added.)

We have emphasized the phrases "unless specially permitted by statute" and "unless it would be admissible over objection in civil actions" as they go to the heart of the Commission's ability to rely on out of court statements. *TURN*

notes that "[s]ince the Commission's own precedent holds that uncorroborated hearsay is insufficient to support a finding of disputed fact, it ***does not appear*** to claim it possesses such specific statutory authorization." (223 Cal.App.4th at 962, footnote 10.)(Emphasis added.) *TURN* goes further and says that the "California Supreme Court has required very explicit statutory authorization before permitting an agency's reliance on uncorroborated hearsay." (*Id.*) *TURN* seems to suggest, based on the record before it, that the Commission lacks an expressed statutory authorization to rely on uncorroborated hearsay as substantial evidence to resolve a disputed fact.

But what *TURN* did not address—and it does not appear to have been raised in the briefings -- are two exceptions to the hearsay rule that are relevant to this proceeding: admissions of party opponents and authorized admissions. The Commission is permitted to rely on such evidence as it is recognized by statute as exceptions to the hearsay rule. It would be redundant to read the phrase "unless specially permitted by statute" to mean that there has to be a provision in the Pub. Util. Code permitting the admission of admissions of party opponents and authorized admissions since these are recognized by Evidence Code §§ 1220 and 1222, respectively, since such statements are recognized as exceptions to the hearsay rule. In fact, the recognition of the exception to the hearsay rule can be found at Evidence Code § 1201:

> A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such statement is hearsay evidence if such hearsay evidence consists of one or more statements each of which meets the requirements of an exception to the hearsay rule.

### 10.5. Rasier-CA's Contempt for Non Compliance with Reporting Requirements g, j, and k is established beyond a reasonable doubt

#### 10.5.1. Reporting Requirement g (Report on Accessibility)

It is undisputed that Rasier-CA did not comply with Reporting Requirement g by the deadline or at the time of the evidentiary hearing. Rasier-CA claims it produced the information on August 13, 2015. In its response, SED states this latest report included a second tab which listed the date, alleged, issue, and resolution of each complaint regarding refusal of service relating to wheelchairs or service animals.[156] While we appreciate SED's confirmation, the finding of contempt shall remain, and the amount of the fine shall be increased, per day, from July 1, 2015, through August 13, 2015.

Rasier-CA challenges the POD's finding that it violated Reporting Requirement g by not reporting the allegations made in the *National Federation of the Blind* on several grounds. First, it claims that SED never requested this information or referred to any "expanded" interpretation.[157] Rasier-CA supplements its argument by stating that the ADA regulations regarding accessible vehicles do not include, in their definitions, anything about an accessible vehicle being defined as one that can transport service animals. But the types of allegations made in the *National Federation of the Blind* lawsuit that vision impaired passengers with service dogs were allegedly being denied service by Rasier-CA drivers is precisely the type of information called for by Reporting Requirement g.

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[156] SED's Response at 39.

[157] Appeal at 20.

Second, as Rasier-CA acknowledges, Center for Accessible Technology identified three areas of concern regarding accessibility of TNC services, one of which was the need to allow service animals to accompany disabled TNC customers. Yet Rasier-CA dismisses its duty to include reporting on visually impaired passengers with service animals who requested rides from Rasier-CA. In taking this position, Rasier-CA proffers an argument that would require this Commission to adopt an unnecessarily restrictive definition of an accessible vehicle. Rasier-CA draws a distinction between its duty to report on requests for accessible vehicles, which it takes to mean vehicles with wheelchair accessibility and related mobility aids, and a vehicle able and willing to transport a disabled passenger with a service animal, the latter being a category not covered by Reporting Requirement g.[158]

We do not, however, believe it is required to draw such an artificial distinction in Reporting Requirement g. The language required each TNC to report on the number and percentages of customers "who requested accessible vehicles, and how often the TNC was able to comply with requests for accessible vehicles." Since Reporting Requirement g did not draw the distinction that Rasier-CA did by limiting the requirement to wheelchair accessible vehicles, we see no reason to adopt the limited reading of accessible vehicles that Rasier-CA advocates. How difficult would it have been for Rasier-CA to report on the customers identified in the *National Federation of the Blind* lawsuit who claimed that they requested rides from TNC drivers and their requests were rejected? Regardless of whether Rasier-CA had an accessibility plan in place at the due

[158] *Id.* at 23-24.

date for submitting its reports to the Commission, it had the ability to report on the complaint allegations as the evidence is undisputed that Rasier-CA's parent had been served with the *National Federation of the Blind* lawsuit as of September 24, 2014, and could have extracted the information from the complaint in order to submit a report to the Commission's SED.

Furthermore, even without a protocol in place to track requests from passengers with service animals, Rasier-CA, as well as any other person in the transportation business is subject to the laws requiring accessibility for passengers with service animals. As the Center for Accessibility Technology pointed out in their comments, the U.S. Department of Justice, Civil Rights Division, Disability Rights Section, issued a guidance documents which states, in part: "Under the ADA, State and local governments, businesses, and nonprofit organizations that serve the public generally must allow service animals to accompany people with disabilities in all areas of the facility where the public is normally to go….[A]llergies and fear of dogs are not valid reasons for denying ***access*** or refusing service to people using service animals."[159] Clearly accessibility is not a topic that is limited to persons requiring vehicles that are wheelchair accessible. As Rasier-CA is deemed to be aware of this federal requirement, it would not be unreasonable to expect it to be able to search its records for any requests for transportation from persons with service animals, and how many times the request was or wasn't accommodated.

[159] Center for Accessible Technology Comments at 11, footnote 22. (Bold and italics added.)

### 10.5.2. Reporting Requirement j (Reporting on Providing Service by Zip Code)

It is undisputed that Rasier-CA did not comply with Reporting Requirement j by the deadline or at the time of the evidentiary hearing. Yet Rasier-CA claims it did provide the concomitant data required by Reporting Requirement j on March 6, 2015. After reviewing Rasier-CA's March 6, 2015 submission, its appeal, and SED's response, we agree with Rasier-CA that it has produced the concomitant data required by Reporting Requirement j as of March 6, 2015. We will reduce that portion of the fine of $1,420,000 by $580,000 (116 [days between March 6, 2015 to June 30, 2015] x $5,000= $580,000) which leaves a fine of $840,000. However, Rasier-CA is still in contempt for failing to produce the concomitant data until March 6, 2015. Furthermore, the remaining portions of the fine ($276,000 for the untimely production of trip-level information) shall remain the same.

### 10.5.3. Reporting Requirement j (Reporting on Providing Service by Zip Code - Fare Information)

It is undisputed that Rasier-CA did not comply with Reporting Requirement j by the deadline or at the time of the evidentiary hearing. Rasier-CA claims it finally provided this information on August 13, 2015. While SED has now confirmed that production, the finding of contempt is confirmed, and the calculated fine shall be adjusted to add fines from July 1, 2015, to August 13, 2015.

### 10.5.4. Reporting Requirement k (Report on Problems with Drivers)

The evidence is also undisputed that Rasier-CA did not comply with Reporting Requirement k by the deadline or at the time of the evidentiary hearing. Yet Rasier-CA claims that it finally produced the information on

August 13, 2015. While SED has now confirmed that some information has been produced, it questions the usefulness of the information and believes that the fine should continue to accumulate until August 26, 2015, which is the date of Rasier-CA's second submission. We elect to use the August 13, 2015 date in which to curtail the daily fine.

### 10.6. Rasier-CA's Defenses are Unsound and Insufficient to Defeat the Finding of Contempt

#### 10.6.1. Good Faith is Not a Defense

Good Faith is not a defense to a finding of contempt but might be relevant in determining the amount of the fine to impose on Rasier-CA. (*See Conn v. Superior Court* (1987) 196 Cal.App.3d 774, 788 ["While petitioners' defense of 'good faith' is not a defense to the charge of contempt, it must be considered in determining the appropriateness of requiring petitioner to accumulate an enormous fine while awaiting adjudication of the contempt."].)

#### 10.6.2. Trip Level Information is Not a Trade Secret

Since Rasier-CA has placed great stock in this argument, we shall expand on our discussion of trade secret law in order to explain why Rasier-CA failed to carry its burden of proving that the trip data required by Reporting Requirement j was a protected trade secret.

##### 10.6.2.1. Trade Secret Elements and Cause of Action

In 1984, California adopted, without significant change, the Uniform Trade Secrets ACT (UTSA). (Civil Code §§ 3426 through 3426.11. *DVD Copy Control Assn., Inc. v. Bunner (2003 ) 31 Cal. 4th 864, 874*; *Cadence Design Systems, Inc. v. Avant! Corp.* (2002) 29 Cal.4th 215, 221.) A trade secret has three basic elements:

- Information such as a formula, pattern, compilation, program, device, method, technique, or process;

- That derives independent economic value (actual or potential) from not being generally known to the public or to other persons who can obtain economic value; and
- Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

#### 10.6.2.2. The Burden of Proof

Meeting that burden is a critical first step as it is not axiomatic that a claim of trade secret is accepted as a fact. In private litigation, if the party asserting the trade privilege claim fails to carry its burden, courts have granted dispositive motions in favor of the defense.[160]

#### 10.6.2.3. The Nature of the Information

Civil Code § 3426.1 refers to information and includes, as examples, formulas, patterns, compilations, programs, devices, methods, techniques, or processes. While it is true that the word "information" has a broad meaning,[161] trade secrets usually fall within one of the following two broader classifications: first, technical information (such as plans, designs, patterns, processes and formulas, techniques for manufacturing, negative information, and computer software); and second, business information (such as financial information, cost and pricing, manufacturing information, internal market analysis, customer lists, marketing and advertising plans, and personnel information). The common thread going through these varying types of information is that it is something

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[160] *See IMAX Corp. v. Cinema Tech., Inc.* (9th Cir. 1998) 152 F.3d 1161, 1167-1168; *Callaway Golf Co. v. Dunlop Slazenger Group Am., Inc.* (D. Del. 2004) 318 F. Supp. 2d 205, 215-216 (applying California law). Other jurisdictions have reached similar results. (*See VFD Consulting, Inc. v. 21st Serv.* (N.D. Cal. 2006) 425 F. Supp. 2d 1037, 1048-1049 [Minnesota law); *Bradbury Co. v. Teissier-Ducros* (D. Kan. 2006) 413 F. Supp.2d 1209, 1222-1224; and *Julie Research Lab., Inc. v. Select Photographic Eng'g* (S.D.N.Y. 1992) 810 F.Supp. 513, 520, aff'd, 998 F.2d 65 (2d Cir. 1993).

[161] *Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 53.

that the party claiming a trade secret has created, on its own, to further its business interests.

But the same cannot be said for those instances, such as here, where the Commission first ordered all TNCs to prepare and report information as a condition of doing business in California. The Commission was clear when it authorized the TNC industry to operate in California, it did so pursuant to certain regulatory and a reporting parameters, one of which being the requirement for all TNCs to prepare, maintain, and submit trip data to the Commission within one year after D.13-09-045 was issued. The Commission has the authority granted to it by the Legislature to regulate the TCP industry (which include TNCs such as Rasier-CA, and to require those entities to prepare and submit reports regarding the nature of their operations. (Pub. Util. Code §§ 314(a), 5381, and California Constitution, Article XII, Section 6, discussed, *supra*, at Section 4.3.1.) The United States Supreme Court has recognized the authority of the government to required regulated businesses to maintain records and make them available when necessary to further a legitimate regulatory interest. (*See California Bankers Ass'n v. Shultz* (1974) 416 U.S. 21, 45-46.) When the government exercises this authority, it is not a question of whether the government's action violates a trade secret, but whether or not the government's exercise of authority is consistent with the Fourth Amendment's prohibition against unreasonable searches and seizures. (*See Patel*, *supra*, 738 F.3d at 1064.)

A second problem with Rasier-CA's trade secret claim is that it is asserted too broadly. It seeks to protect both the algorithm it has developed to guide its drivers to particular locations, (which Reporting Requirement j does not require a TNC to produce) as well as the dates, times, and locations where ride matches

are made. The federal courts have had occasion to address similarly broad claims in resolving requests made to the Federal Government under the Freedom of Information Act and there is a legal question as to whether the requested information is a trade secret. In *Center For Auto Safety v. National Highway Traffic Safety Administration* (D.C. Cir. 2001) 244 F.3d 144, the Center sought access to information provided to the National Highway Transportation Safety (NHTS) Administration by nine airbag manufacturers and importers. The Court agreed with the Center that the information that the NHTS withheld did not qualify as trade secrets as the information sought only related to "the end product—what features an airbag has and how it performs—rather than to the production process, how an airbag is made." (*Id*. at 151.) Similarly, in *Northwest Coalition for Alternatives to Pesticides v. Browner* (D.D.C. 1996) 941 F.Supp. 197, 202, the Court found that the claim of trade secret was not adequately supported in its entirety since while it was true that each pesticide's formula was a trade secret, the same could not be said for "the common name and [Chemical Abstract System] numbers of inert ingredients," which the American Crop Protection Association acknowledged that the release "of general identifying information about inert ingredients does not reveal formulas." A like result is dictated by the facts in this proceeding. Requiring Rasier-CA to produce its trip data will not reveal the underlying formulas that it relies on to direct its drivers to particular zip codes. As such, we do not find that Rasier-CA has met its burden of establishing that compliance with Reporting Requirement j will result in the disclosure of trade secret information.

#### 10.6.2.4. Efforts to Maintain Confidentiality

Even if we were to find that the information sought is protected as a trade secret—which it is not—one of the requirements for a claim of trade secrets to be

established is that the objecting party has made reasonable efforts to maintain the secrecy of the information. The POD found that such an effort had not been made since similar trip information had been produced in New York and Boston. Rasier-CA challenges this conclusion because, in contrast to what the POD said, Rasier-CA did not produce trip data in Boston or New York, voluntarily or otherwise.[162] Rasier-CA is correct. The POD should not have identified Rasier-CA. Instead, it was other Uber subsidiaries that produced the trip data. But the fact remains that trip data similar to what Rasier-CA had initially refused to produce to SED has been produced by Rasier-CA affiliates in other jurisdictions to administrative agencies. And, regardless of the "100 distinct legal entities under the Uber brand, operating in disparate geographic markets around the world,"[163] the fact remains that the companies that operate are Uber subsidiaries. As Uber's business model makes clear, a TNC wishing to operate in California or other jurisdictions must execute the Software License and Online Services Agreement in order to have access to the Uber App.[164] Ultimately, it is Uber that makes the decision, on behalf of its subsidiary, to produce the requested information, and has done so in other jurisdictions just as the POD correctly noted.[165]

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[162] Appeal at 40.

[163] *Id.* at footnote 172.

[164] Colman Decl. ¶ 6 and Exhibit A thereto. (*National*)

[165] This conclusion is not affected by Rasier-CA's assertion that in New York, the Uber subsidiary operated as a commercial livery service, and not as a TNC like Rasier-CA. (Appeal at 40, footnote 171. We find this distinction to be immaterial since in each case the parent, Uber, made the ultimate decision to produce the trip data.

Rasier-CA also claims that it is factually incorrect to find that there has not been a reasonable effort to maintain secrecy since the information produced in New York and Boston is distinguishable from what Reporting Requirement j requires. As proof, Rasier-CA attempts to distinguish the two situations as follows:

> The New York Decision refers to "the date of trip, time of trip, pick up location, and license numbers . . . ." *Notice of Decision, NLC v. Weiter* at 3. In comparison, the TNC Decision's Reporting Requirement j seeks the number of rides requested and accepted by TNC drivers within each zip code where the TNC operates; the number of rides that were requested but not accepted by TNC drivers within each zip code where the TNC operates; the date, time, and zip code of each ride request, the concomitant date, zip of each zip code of each ride that was subsequently accepted or not accepted; columns that display the zip code of where each ride that was requested began, ended, the miles travelled, the amount paid/donated; and information aggregated by zip code and a statewide total of the number of rides requested and accepted by TNC drivers within each zip code where the TNC operates and the number of rides that were requested but not accepted by TNC drivers; and the concomitant date, time, and zip code of the driver in addition to that of the passenger.[166]

But what is apparent is that in both New York and California, an Uber subsidiary has been ordered to produce information relating to the date of a trip, time of a trip, and trip location. Similar data that Uber has categorized under the acronym ZCTA (*i.e.* Zip Code Tabulation Area) has also been produced voluntarily by Uber to Boston's regulatory officials.[167] As to the date and time of trips, and trip

[166] Appeal at 16, footnote 77.

[167] POD at 24, footnote 41.

locations, Rasier-CA's parent, Uber, has not attempted to maintain the privacy of the information.

This critical fact distinguishes the instant proceeding from the one in *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, upon which Rasier-CA relies, since the Court was concerned about whether a customer list has a value that is derived from its secrecy. In finding that the customer list was entitled to secrecy, the Court noted:

> In applying this distinction to the facts before us, the critical factual issue is whether it is generally known that the businesses on the plaintiff's customer list are consumers of rubber rollers. If that fact is known to competing suppliers of rubber rollers, then the fact that those businesses are customers of the plaintiff is not a trade secret. However, if it is not known that those businesses use rubber rollers, then their identity as plaintiff's customers is a trade secret.[168]

Similarly, it is generally known what are the zip codes where the TNCs are competing with each other to secure passengers for transportation, and each TNC has been ordered to provide trip data by zip code. There is, in effect, an equal disclosure as to how many rides have been obtained by zip code so that fact alone cannot derive independent economic value. The fact intensive analysis that the Court in *SkinMedica, Inc. v. Histogen Inc*. (S.D. Cal. 2012) said is required in California before a trade secret determination can be made has been performed in this instance, and we conclude that Rasier-CA has not met its burden.

#### 10.6.2.5. The UTSA may not be used as a shield to prevent the Commission from obtaining

[168] 235 Cal.App.3d at 20.

**allegedly trade secret information in order to to perform its regulatory duty**

Even if we were to assume that Rasier-CA has established that Reporting Requirement j requires the disclosure of trade secrets, that would not be a successful defense to this OSC proceeding and the finding of contempt. The UTSA creates a statutory cause of action for misappropriation of a trade secret, which requires proof that a person (1) acquires another's trade secret with knowledge or reason to know that the trade secret was acquired by improper means; (2) discloses or uses, without consent, another's trade secret that the person used improper means to acquire knowledge of; (3) discloses or uses, without consent, another's trade secret that the person knew or had reason to know it was a trade secret; or (4) discloses or uses, without consent, another's trade secret when the person knew or had reason to know that the trade secret had been acquired by mistake. (*DVD Copy Control Assn.*, *supra*, 31 Cal.4th at 874; *Brescia v. Angelin* (2009) 172 Cal.App.4th 133, 143.) The UTSA creates a right of action against what the California Supreme Court in *DVD Copy Control* called " a misappropriator," a classification into which the Commission would not fit.

Moreover, the UTSA does not say that a person with an alleged trade secret can use the UTSA as a means to not comply with a regulatory body's order of production. Rasier-CA does not cite any California law that would permit it to engage in such a course of action and we, too, have not found any such authority that would permit a regulated company from refusing to submit allegedly trade secret information to the Commission.[169] About the closest body of law we have

[169] There appears to be little case law on the subject at the federal level as well. (*See* Elizabath A. Rowe. "Striking a Balance: When Should Trade-Secret Law Shield Disclosures to the

*Footnote continued on next page*

uncovered are those instances when a person has previously submitted trade secret information to the government and now wishes to enjoin the government from disclosing it publically pursuant to a statutory scheme or in response to a Freedom of Information Act (FOIA) request. (*See, e.g.*, *Ruckenshaus*, *supra*, 467 U.S. 986 [Monsanto sought an injunction to stop the EPA from utilizing the data-disclosure provision in the Federal Insecticide, Fungicide, and Rodenticide Act].) Similarly, if a FOIA request is presented to the Food and Drug Administration (FDA) and the FDA rejects the request that the information remain private, the alleged trade secret holder may seek judicial review pursuant to 21 C.F.R. § 2048 and 5 U.S.C. § 702. Finally, if a FOIA request is presented to the Securities and Exchange Commission (SEC) and the SEC rejects the request that the information remain private, the alleged trade secret holder may appeal to the SEC's General Counsel and then to the U.S. District Court pursuant to 17 C.F.R. § 200.83(e)(1). In each instance, there was an expressed statutory scheme that gave the alleged trade secret holder a remedy and a procedural process. Here, no such statutory scheme exists that would permit Rasier-CA to refuse to disclose required information on the grounds that it constitutes a trade secret.

#### 10.6.2.6. There can be no trade secret as to information the Commission first ordered all TNCs to Prepare and Report as a Condition of Doing Business in California

Rasier-CA's contention, that it was uncontested and undisputed throughout the entire course of the OSC proceeding that it was its position that trip-level information was confidential and a trade secret, does not dissolve

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Government?" 96 *Iowa Law Review* 791, 827 (2011) [the author notes that there is a "dearth of case law and other guidance specifically relevant to refusal-to-submit cases[.]".)

Rasier-CA of its burden of proof, nor does it have any impact on the Commission's duty to make the ultimate decision as to whether Rasier-CA's arguments are legally and factually sound.

We also correct Rasier-CA's assertion that the POD determined that trip-level information was neither confidential nor a trade secret because Rasier CA posted rate information, including a fare estimator, on its website.[170] That was only part of the POD's determination.[171] The POD later concluded that Rasier-CA failed to substantiate its claim that the data ordered by Reporting Requirement j constitutes trade secret commercial information.[172]

In response, Rasier-CA quotes from the Declaration of Krishna K. Juvvadi, Uber's attorney, in Support of Rasier-CA's Petition to Modify Decision 13-09-045, which states:

> This information is highly confidential. If provided, the information displays a complete picture of Rasier's business. The information would allow any person determine where and when Rasier's business is concentrated, which segments of its business are most remunerative, and in fact how much income Rasier grossed in California during the reporting period.
>
> Rasier does not disclose this information publicly because competitors could use the information to assess their relative market share or for purposes of business and financial modeling. In addition, they could use their relative market position to attempt to attract more customers and drivers, or could use it to help in their own fundraising efforts.[173]

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[170] Appeal at 30.

[171] MOD POD at 26-27.

[172] *Id.* at 45-47.

[173] Appeal at 30.

Yet Rasier-CA fails to submit any authority that either a complete picture of the business, where the business is concentrated, which segments are most remunerative, how much income is grossed, or whether the information is accessible by the public to help it determine Rasier-CA's relative market share, would be either a trade secret or confidential information.

This Commission has looked askance at such unsubstantiated claims of confidentiality. Even if such an initial showing could be made that the information in question is proprietary, in *Re Pacific Bell* (1986) 20 CPUC2d 237, 252, the Commission imposed the further requirement of a demonstration of imminent and direct harm of major consequence rather than a speculative claim of harm:

> [T]o make the assertion stick that there are valid reasons to take unusual procedural steps to keep data out of the public record…, there must be a demonstration of imminent and direct harm of major consequence, not a showing that there may be harm or that the harm is speculative and incidental.

The claims that Rasier-CA's competitors could use the information to assess their relative market share, develop business and financial modeling, and/or attract more customers and drivers are, at best, speculative and fail to meet the imminent and direct harm of major consequence standard that this Commission has imposed.

Reporting Requirement j does not call for the disclosure of an algorithm or Rasier-CA's "tracking software"[174] that directs TNC drivers where to travel to be in a position to secure the most rides. Instead, what Rasier-CA, and every other regulated TNC has been ordered to provide, is information on where its vehicles

[174] *Id.* at 31.

travel in order to pick up and drop off passengers. The information that Rasier-CA, as well as the other TNCs, has been ordered to provide is based on vehicles that are on public roads rather than in some secret location. Thus, unlike Rasier-CA's analogy to Coca-Cola being compelled to provide a list of the ingredients in each of its products,[175] Reporting Requirement j is not seeking a formula, pattern, compilation, program, device, method, technique, or process contemplated by the UTSA that is codified in Civil Code § 3426.1. Without making such a showing, Rasier-CA cannot have any legitimate expectations to the claimed confidentiality of such information. Rasier-CA is a highly regulated business, and as this Commission found in *Re Pacific Bell, supra,* 20 CPUC2d at 252, such businesses have to expect some intrusions into their operations as the price of being licensed to do business in California:

> PacBell, as a franchised monopoly, exists in a world of regulation. Information about its operations must be freely and openly exchanged in rate proceedings if the regulatory process is to have credibility. Its operations, as any utility's, must be on public view, since it serves the public trust.

We must also address Rasier-CA's apparent denial of due process claim. It asserts that there was no evidence or argument presented during the OSC proceedings that challenged Rasier-CA's trade secret claim.[176] Had it known that there was going to be a challenge, Rasier-CA claims it would have submitted the following further evidence to substantiate its positions that:

(1) Rasier-CA has invested substantial time and money in creating tracking software recording the details of every ride offered by its independent drivers and every ride accepted by riders;

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[175] *Id.* at 39.

[176] *Id.*

(2) Individual trip information is kept confidential, even within the company, by storing the information in a password-protected database available only on a need-to-know basis by select employees that are told the information is confidential and cannot be disclosed to anyone;

(3) Rasier-CA uses the information for many purposes, including to determine market trends and opportunities; and

(4) As the TNC with the most data, Rasier-CA's information would be very valuable to competitors by, among other things, allowing competitors to prioritize markets for expansion without having to conduct market research.[177]

In making this argument, Rasier-CA improperly conflates the concepts of due process and burden of proof. As the proponent of the trade-secret privilege argument, Rasier-CA bears the burden of proof. (*See Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, 1393; and *Costco Wholesale Corp v. superior Court* (2009) 47 Cal.4th 725, 733 ["The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise."].) Thus, it was incumbent upon Rasier-CA to submit all pertinent facts and evidence to justify its privilege claim.

That burden was not excused or lessened in any way by the fact there may not have been a challenge to the trade-secret claim from SED. Pursuant to Rule 14.1, it is the Presiding Officer that must draft a decision that resolves the legal and disputed factual issues following a hearing in an adjudicatory proceeding in which an evidentiary hearing has been conducted. Following the issuance of the POD, and if there is an appeal, pursuant to Rule 15.5, the Commission will ultimately decide if it should affirm the legal and factual conclusions determined. As the burden remained with Rasier-CA, it cannot

[177] *Id.*

claim surprise or that its right to present a complete case was in any way compromised by the lack of a prior challenge to its legal defense.

Rasier-CA also fails in its argument that it need not produce information responsive to the Reporting Requirements unless the Commission guarantees permanent confidential treatment.[178] Apparently it is not enough for Rasier-CA that D.13-09-045 ordered the TNCs to file their reports confidentially unless in Phase II the Commission required public reporting. In fact, what the Commission has done is no different than what federal agencies have done where companies have been allowed to submit confidential information but that the particular government agency, in response to a future FOIA request, would determine if the information would be made public. None of the authorities that Rasier-CA cites stand for the proposition that unless a trade secret holder can secure a promise of permanent confidentiality, it may withhold its documents from the government.[179]

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[178] Appeal at 42.

[179] *Id*. *Monsanto* only acknowledged that prior to 1972, the Trade Secrets Act was not a guarantee of confidentiality to submitters of data, and the Environmental Protection Agency had not made a determination on whether to disclose data regarding pesticides and whether the disclosure would be in the public interest. In *Phillip Morris, Inc. v. Reilly* (1st Cir. 2002) 312 F.3d 24, the issue was whether Massachusetts could force tobacco companies to cede their trade secrets. Mass. Gen. Laws ch. 94, § 307(B) (2002) required tobacco companies to submit to Massachusetts the ingredient lists for all cigarettes, snuff, and chewing tobacco sold in the state, and the law further permitted public disclosure whenever such disclosure could reduce risks to public health. The tobacco companies brought suit and asserted that the law created an unconstitutional taking. While the decision noted that the Massachusetts only generally protects trade secrets and expressly disclaimed any long-term confidentiality, it also noted that: "As the concurrence correctly notes, the tobacco companies are hardly in a position to force the Massachusetts legislature to guarantee confidentiality to submitted trade secrets." (312 F.3d at 39, footnote 11.) Rasier-CA is in no position here to extract such an everlasting guarantee as a condition precedent to complying with a Commission order. And Rasier-CA never sought to challenge the Commission's reporting requirement in either state or federal court before the reporting deadline lapsed.

### 10.6.3. The Commission has the authority to require entities subject to its jurisdiction to produce fare information

We reject Rasier-CA's syllogistic reasoning that because a TCP is not a public utility and because the Commission does not have the power to control rates charged, that the Commission is without authority to require Rasier-CA, or any other TNC that is a subset of the TCP class, to produce fare information.[180] Rasier-CA's argument is not supported by the decisional law that it cites.[181] Neither D.96-08-034 nor *Patel v. City of Los Angeles* (9th Cir. 2013) 748 F.3d 1058, 1064, aff'd 576U.S.___, 135 S. Ct. 2443 (2015), stand for the proposition that a limit on a government entity's jurisdictional authority is the equivalent to a limit on that same government entity's ability to obtain information. The only limitations that *Patel* places on the government's ability to compel the inspections of records pursuant to the Los Angeles Municipal Code § 41.49 is that the demand must be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance with not be unreasonably burdensome. *Patel* does not add the additional limitation, advocated by Rasier-CA, that the government must have the authority to set rates in order to obtain rate information.

Finally, it is worth noting that *Patel* does include a discussion of notice that undermines Rasier-CA's reliance on this authority. *Patel* found that a demand for inspection must be given with enough lead time to afford hotel operators an opportunity to challenge the reasonableness of the inspect demand in court before penalties for non-compliance are imposed. Sufficient notice was certainly given in the instant proceeding as all TNCs were given a years' notice to comply

[180] Appeal at 32.

[181] *Id.* at 33.

with D.13-09-045's reporting requirements, giving every TNC sufficient time to challenge the reporting requirements before the production deadline. As Rasier-CA chose not to seek that protection before the production date, the Commission will not now entertain its untimely complaints about the perceived unfairness of having to comply with Reporting Requirement j.

As the fare information demanded is necessary to ensure customers in different zip codes are treated evenhandedly, this proceeding is distinguishable from Resolution TL-19004 wherein the Commission waived the requirement that PSCs file annual financial reports as the information was not necessary to administer the PSC regulatory program.[182] Tellingly, the Commission made the decision to dispense with the annual financial reports for additional reasons that Rasier-CA fails to discuss. First, the Commission noted that Commission oversight of fares had been lessened through the availability of the zone of rate freedom:

> The competitive environment in which PSCs now operate has been accompanied by reduced Commission oversight of PSC fares through the availability of the zone of rate freedom (ZORF). Under Public Utilities Code § 454.2, the Commission may establish a ZORF for any PSC that is competing with other passenger transportation service of any means if the competition together with the authorized [ZORF] will result in reasonable rates and charges. The ZORF allows the carrier to file tariff fare changes within a range authorized by the Commission. A substantial number of PSCs have been granted ZORFs. As a consequence, the Commission receives few PSC fare increase applications. Also rare are complaints regarding the reasonableness of PSC fares.[183]

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[182] *Id.* at 33-34.

[183] Resolution TL-19004 at 2.

As the PSCs were filing their tariff fare changes, it was unnecessary to also require the annual financial reports. Second, Resolution TL-19004 also noted that complaints about the reasonableness of the PSC fare were rare.

In contrast to the established PSC industry, here, the Commission is only two years into the regulation of the TNC industry and it is still gathering information regarding fares in order to gauge their reasonableness, especially in view of sporadic complaints that some TNCs have engaged in surge pricing. Accordingly, we are not yet at the point in time where we can conclude, as we did with the PSC industry, whether to dispense with the annual financial reporting requirements.

#### 10.6.4. Raiser-CA had the ability to comply with Reporting Requirement k (Report on Problems with Drivers)

There does not appear to be any dispute that the only outstanding category of information is the cause of each reported incident with Rasier-CA TNC drivers. Where there seems to be a dispute is the credibility of Rasier-CA's explanations why it failed to comply. First, Rasier-CA speculates that since the SED reporting template for Reporting Requirement k did not include a field for cause, that cause information was a "low priority."[184] We reject Rasier-CA's supposition since, once again, it has chosen to take its apparent direction from SED's actions or inactions, rather than seeking clarification from the Commission as to the correct nature of the reporting requirements. Second, Rasier-CA asserts that the word "cause," in connection with each incident, is an ambiguous term

[184] Appeal at 35.

that would require a legal determination of fault, and if it provided information regarding the cause if no legal determination had been made, the information would be unreliable and potentially misleading.[185]

Rasier-CA's argument is not credible. We are hard-pressed to accept the notion that but for a legal determination of causation, any information provided would have been misleading and, therefore, no information need be provided. Let us take a hypothetical situation where we believe information regarding cause could be gleaned and provided to SED in its report. If a Rasier-CA TNC driver is transporting a TNC passenger from point A to point B and while in transit strikes another vehicle or a pedestrian, a determination would have to be made who or what would be considered the cause (be it actual cause or cause in fact) of the incident. The determination of cause could be made by (a) the police officer arriving at the scene and preparing a police report where he or she determines the cause after conducting an investigation; (b) an insurance adjuster could make a determination as to cause after conducting an investigation into the incident; or (c) a judge or a jury if the incident results in a lawsuit being filed and the case proceeds to trial. Alternatively, if the incident is still under investigation, then the determination of cause is premature. Any of these options could be reported to SED on a modified reporting template. To the extent that SED or the Commission needs any additional information about the cause of an incident, a follow-up Assigned Commissioner's Ruling could be issued directing Rasier-CA, or any other TNC, to supplement its report.

[185] *Id.* at 36.

In sum, Rasier-CA could have supplied some information to SED regarding the cause of each incident. Its complete failure to do so demonstrates neither good faith nor substantial compliance.

#### 10.6.5. Raiser-CA had the data responsive to Reporting Requirement j (Report on Providing Service by Zip Code)

Rasier-CA does not dispute that it was aware of the reporting requirements and had the ability to create or provide most of the information.[186] It instead grounds its defense for noncompliance on whether its legal grounds were so baseless as to be contemptuous or violative of Rule 1.1; and whether the factual evidence demonstrates that Rasier-CA substantially complied with the reporting requirements.

We find some of Rasier-CA's arguments to be contradictory to the point that they undermine Rasier-CA's factual defense. On the one hand, Rasier-CA claims that the POD misunderstands its effort to learn why D.13-09-045 needed its information and how it would be used.[187] It claims this preliminary information is needed so it could satisfy the Commission's regulatory purposes through substantial compliance.[188] On the other hand, Rasier-CA claims that it offered SED full access to the data requested and offer to pay a third party auditor:

> Rasier-CA offered the SED full access to ***all*** data requested and offered to pay a third party auditor of the SED's selection to audit

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[186] Rasier-CA uses the phrase "technical ability" to create and provide most of the information. It is unclear what Rasier-CA means by "technical ability." It either had the information or it didn't.

[187] Appeal at 37.

[188] *Id.*

> the information Rasier-CA produced. Rasier-CA was not seeking to conceal information from the Commission or the SED and did not intend any disrespect to the regulatory process. In effect, the accommodation Rasier-CA requested was that the SED review the data without requiring Rasier-CA to relinquish control of the data.[189]

When we compare these two statements, it becomes clear that Raiser-CA's argument that it needed to know why the information was needed and how it would be used is a mere smoke screen. It had the information all along and was offering to provide the information to SED on Rasier-CA's terms. It simply did not want to physically produce the data to SED. Not producing the data to SED in conformity with D.13-09-045 and demanding to know why the information is needed and how it would be used do not lead Rasier-CA on the road to substantial compliance. To the contrary, it is no compliance.[190] If Raiser-CA had any uncertainty as to its obligations under D.13-09-045, it should have sought clarification from the Commission rather than engage in a protracted meet-and-confer process with SED.

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[189] *Id.* (Italics and bold in the original.)

[190] As such, it is unavailing for Rasier-CA to rely on the following authorities that discuss substantial compliance since it did not produce any of the data required by Reporting Requirement j until after the deadline, and what it initially produced did not comply with the specifics of Reporting Requirement j: *Butrica v. Beasley*, D.88933, *mimeo* at 7-9 (1978) (substantial compliance fulfilled goals and was justified); *Dart Indus., Inc.*, D.80958, 1973 Cal. PUC LEXIS 1262, at *8-9 (1973) (procedure for obtaining deviation substantially complied with intent of statute though did not strictly comply); *App'n of Sierra Pac. Power Co. for Approval of Its Proposals to Implement Direct Access Billing Options & Separate Costs for Revenue Cycle Servs.*, D.99-02-081, 1999 Cal. PUC LEXIS 86, at *8-10 (1999) (applicants substantially complied with decisions where, among other things, applicants "made some significant steps to satisfy [the] objective" and presented proposals "at least conceptually consistent" with the decision).

### 10.6.6. Rasier-CA's Fourth Amendment Argument is Unfounded

Rasier-CA attempts to utilize the Fourth Amendment to argue that the Commission is limited to making inspection demands to regulated businesses.[191] It bolds and italicizes the phrase "only through an inspection demand" in the Fourth Amendment:

> The government may ordinarily compel the inspection of business records ***only through an inspection demand*** sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.[192]

Rasier-CA then extends the argument and asserts that the Commission does not have the authority to demand the details of every transaction and record so that the Commission may acquire the fullest possible picture of Rasier-CA operations and impacts.

But Rasier-CA errs in three respects. First, the Fourth Amendment uses the phrase "The government may ordinarily compel the inspection of business records" before the phrase "only through an inspection demand." With the use of the word "ordinarily," the Constitution has made it clear that inspection demands are not the exclusive way in which the government may obtain information about a business's records. Second, the Commission is not limited to inspection demands. Its powers have been granted to it by the California Legislature, and those powers include the ability to order companies subject to the Commission's jurisdiction to produce their records. As such, despite Rasier-CA's effort to highlight that administrative agencies are subject to the

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[191] Appeal at 42.

[192] *Id.* at 42-43.

prohibition against excessive searches, that fact does not lead to the conclusion that an administrative agency is limited to issuing inspection demands when it wishes to review the records of entities that are subject to its jurisdiction. Third, Rasier-CA quotes only a portion of the POD's explanation regarding why it has ordered TNCs to create and submit certain data. The complete sentence reads as follows:

> The reporting requirements are part of the adopted regulations, and the Commission needs each regulated TNC to comply in full so that the Commission acquires the fullest possible picture of the impact that TNCs are having on California passengers wishing to avail themselves of this TNC service.[193]

Thus, when Rasier-CA's selected quote is placed into its proper context, we see that the reason the Commission needs the information is to evaluate the impact of TNC services on California passengers. Thus, Rasier-CA's argument is baseless that the Reporting Requirements violate the Fourth Amendment's prohibition against excessive requests.

#### 10.6.7. Rasier-CA's Fifth Amendment Argument is Unfounded

There is no disagreement with Rasier-CA that courts have examined and applied the Fifth Amendment's Takings Clause to government-ordered disclosures of information arguably protected by a trade secret. But Rasier-CA extends the legal concept too far by arguing that there is a governmental taking for which compensation is required when there is no guarantee that the information provided will be kept confidential.[194] Not even *Philip Morris*, which

[193] POD at 42-43.

[194] Appeal at 47.

Rasier-CA relies on in its appeal,[195] issued such a sweeping holding. And even if Rasier-CA is correct in its reading of *Philip Morris*, which it is not, its solution is not to withhold its records. Instead, it should have filed suit in either state or federal court before the deadline for producing its records expired.

We also address the assertion that when Rasier-CA invested in creating its data, there were no regulations that would have required the data's disclosure.[196] But Rasier-CA wasn't formed until September 6, 2013, in Delaware,[197] and filed its Certificate of Registration and Application to Register a Foreign Corporation with the California Secretary of State on September 19, 2013, which is three days before D.13-09-045 was issued. We therefore question how much time and effort could have been invested in that 72-hour time period. Furthermore, Raiser-CA did not submit its application for TNC authority until January 2014.[198] Rasier-CA received its permit on April 7, 2014.[199] Thus, Rasier-CA was aware at the time it received its permit that it was required to create the trip data and to produce it to the Commission in a year's time.

### 10.7. Rasier-CA's Violation of Rule 1.1 was Established

We note initially that Rasier-CA is incorrect as a matter of law about the legal grounds upon which a Rule 1.1 violation may be found. While Rasier-CA claims that a Rule 1.1 violation requires a false or misleading statement fact,

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[195] *Id.* at 48.

[196] *Id.* at 49.

[197] Certificate of Formation filed September 6, 2013 Delaware.

[198] POD at 72.

[199] *Id.*

rather than the assertion of legal argument, Rasier-CA's position is erroneous. Rule 1.1 admonishes all persons who appear before the Commission "never to mislead the Commission or its staff by an artifice or false statement of ***fact or law***." Thus, a false of statement of law that misleads the Commission can be just as actionable as a false statement of fact when Rule 1.1 is properly considered.

In reaching this conclusion, we reject Rasier-CA's attempt to rely on *Vinodrai Rawal, dba the Wharf Airporter vs. SFO Airporter*, D.96-09-083. SFO apparently took inconsistent positions on whether there was a need for scheduled service between the San Francisco International Airport and Fisherman's Wharf. Complainant alleged this inconsistency constituted a Rule 1 violation. But this Commission disagreed, stating that "on the facts before us we do not find that this conduct violated Rule." The Commission explained that "we cannot penalize a party for stating its position, no matter how displeased a competitor may be about acts of that party which may appear to be inconsistent to the point of deception. It is the Commission's job to sift and weigh the merits in each proceeding."[200] The Commission never said in *Vinodrai* that a party could not be found to have violated Rule 1.1 if it misled the Commission or staff by an artifice or false statement of law, or failed to comply with a Commission ordering paragraph by the designated deadline when it had the means to comply.

We also reject Rasier-CA's attempt to remove from consideration all the grounds the POD found for a Rule 1.1 violation. Rasier-CA states, in an incomplete fashion, the grounds that the Presiding Officer articulated for the finding of a Rule 1.1 violation. While Rasier-CA claims the finding was based on

[200] * 9-10.

its "multiple legal defenses that were unsound,"[201] the POD set forth additional grounds for finding the Rule 1.1 violation:

- Not providing information about accessibility ride requests in violation of Reporting Requirement g;
- Withholding trip-data information in violation of Reporting Requirement j;
- Failure to provide trip-fare information in violation of Reporting Requirement j; and
- Failure to provide causation information required by Reporting Requirement k.

The POD found that by doing so, Rasier-CA failed to comply with the laws of California and further misled the Commission by an artifice or false statement of law by asserting multiple legal defenses that were unsound.[202] Thus, we have clear and separate instances of Rasier-CA not disclosing relevant and required information , and not being candid with the Commission by trying to shift the burden to the Commission staff to explain why the information was needed. As we have found in prior decisions,[203] the failure to disclose is sufficient for a Rule 1.1 violation.

#### 10.7.1. Rasier-CA may not assert defenses that undermine the Commission's decision making authority

But there is a more fundamental problem with Rasier-CA's position that a party cannot violate Rule 1.1 if its presents a facially valid, if ultimately

[201] Appeal at 54, quoting the POD at 60.

[202] POD at 59-60.

[203] *Id.* at 59, footnote 65.

unsuccessful, legal arguments.[204] Rasier-CA is relying on the assumption that its legal arguments were "valid" when made. The arguments are not valid simply because it has found decisions that it maintains support is position. To accept this position would permit Raiser-CA to usurp the authority of the Commission and the courts to make the ultimate legal determination of the applicability and correctness of each legal argument advanced. Rasier-CA is not entitled to occupy both the role of Respondent to this proceeding and, in effect, the decider in law. As we noted earlier, in looking at the law Rasier-CA asserted on trade secrets, 4th amendment, and 5th amendment, courts, rather than the objecting litigants, made the ultimate legal determination regarding the validity of these legal arguments. Rasier-CA's take on the law, if accepted, could grind to a halt the Commission's ability to compel persons to comply with its orders set forth in its decisions, or any rulings or orders issued pursuant to Pub. Util. Code §§ 5381 and 5389.[205] Any party who is dissatisfied with an ordering paragraph, subpoena, or assigned Commissioner's ruling could simply interpose statutory and/or constitutional objections (as Rasier-CA has done here), and then lard its supporting brief with a plethora of legal citations that it hopes will support its objections. Rasier-CA would be allowed to play the role of decision maker by deciding that all legal arguments were presumptively valid, a result in Raiser's CA's assessment that would prevent the Commission from finding a Rule 1.1 violation. Such a result would be contrary to the Commission's enforcement authority that it must be able to deploy when a party, like Rasier-CA, has refused to comply with ordering paragraphs and has, instead, thrown legal arguments at

[204] Appeal at 54.

[205] *See* POD at 29.

the Commission like a pot of hot pasta noodles is thrown against a wall to see what will ultimately stick.

#### 10.7.2. The Analogy to General Order 167 is flawed

Finally, we reject Raiser-CA's argument that a party has a right to object to a Commission order as this argument in not supported by the authorities Rasier-CA cites. Rasier-CA relies on General Order (GO) 167, which only pertains to SED requests made to Generating Asset Owners (GAO) for information:

> 10.1 Provision of Information. Upon CPSD's request, a Generating Asset Owner shall provide information in writing concerning (a) a Generating Asset; (b) the operation or maintenance of the Generating Asset; (c) the, Initial Certification, Recertification, Corrective Plan, or Notice of Material Change pertaining to the Generating Asset; (d) any Maintenance, Operation, or Corrective Plans pertaining to the Generating Asset; (e) the design, performance, or history of a Generating Asset; (f) event or outage data concerning a Generating Asset including, but not limited to, unavailability reports or outage cause reports; g accounts, books, contracts, memoranda, papers, records, inspection reports of government agencies or other persons; and (h) any other documents or materials. These information requests shall be reasonably related to the requirements of this General Order. If CPSD has indicated when, where, and in what form the information is to be provided, the Generating Asset Owner will provide the information in that manner and will otherwise cooperate with CPSD in the provision of information. Except for an exigent circumstance, a minimum of five business days will be provided for the response. If CPSD determines the existence of an exigent circumstance, CPSD may establish a shorter response period for information reasonably required for CPSD to understand or respond to the exigent circumstance.

While Rasier-CA acknowledges this limitation, it discusses GO 167 in a way that one would think it should apply, by analogy, to all Commission ordering paragraphs.[206]

But when the Commission modified GO 167 in *Order Modifying and Denying Rehearing of Decisions 04-05-017 and 04-05-018*,[207] and clarified that a lawful and reasonable assertion of rights would not be used as a basis for finding a violation, the Commission was not referring to the situation before the Commission now, i.e., a party's failure to comply with a Commission's ordering paragraphs. Thus, while GO 167 may give a GAO the right to challenge an SED request, Rasier-CA cannot hope to extrapolate this GO to have this Commission conclude that a party may flout the Commission's authority with impunity by asserting a series of legal objections. None of Rasier-CA's authorities stand for such a sweeping proposition, and we decline to adopt such an approach for Rasier-CA's benefit.

Finally, GO 167 cannot support Rasier-CA's argument that it should not be found in violation of Rule 1.1 since its legal assertions were allegedly reasonable and grounded in Commission precedent.[208] As we have explained previously, the time for Rasier-CA to have asserted its legal objections was ***before*** the deadline for compliance of D.13-09-045's Ordering Paragraphs. Rasier-CA should either have filed a motion for modification with the Commission or a motion in federal court and asserted its constitutional challenges to the Commission's Reporting Requirements.

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[206] Appeal at 55.

[207] D.06-01-047.

[208] Appeal at 56.

### 10.8. The Fines and Penalties are Supported by the Record and the Law

#### 10.8.1. Pub. Util. Code § 2107 Applies to TNCs

Rasier-CA argues that Pub. Util. Code § 2107 cannot be utilized as authority to fine Rasier-CA since it only applies to public utilities, and TCPs such as Rasier-CA are not public utilities.[209] While an earlier Commission decision appears to support Raiser-CA's suggestion, Rasier-CA fails to acknowledge that our Constitution (Article XII, Section 3) states that providers of transportation services are public utilities.[210] Thus, it would be appropriate to justify the fine of $5,000 per day since Pub. Util. Code § 2107 permits the Commission to impose a penalty of up to $50,000 per day for each offense.

#### 10.8.2. The Commission has the Jurisdiction and and has applied Pub. Util. Code § 5411's Monetary Fine Component against TCPs

To prove that the Commission lacks jurisdiction to impose a fine under Pub. Util. Code § 5411, Rasier-CA does not cite any authority that has construed § 5411. Such a strategy may be deliberate in view of the fact that the Commission has determined fine amounts against TCPs, and has used Pub. Util. Code § 5411 as a guide. For example, in the Commission's Order Instituting Investigation (OII) into whether to revoke the operating authority issued to Felipa Garza Fuentes, an individual, doing business as Fuentes' Tours (TCP 7591P), Ms. Fuentes admitted, and the Commission concluded, that she violated Pub. Util. Code § 5411, amongst other provisions. (*See* D.99-01-040; 84 CPUC2d 720, and Conclusion of Law No. 1; and Decision 89729 at *66, Finding 10: "By not

[209] *Id*. at 57.

[210] POD at 28, footnote 37.

maintaining the set of records reflecting information on each charter performed as required under Part 13 of General Order No. 98-A, defendant Ratti has failed to comply with the requirements of this Commission imposed on charter-party carriers, thereby violating Section 5411 of the Public Utilities Code."].) Thus, we reject Rasier-CA's argument that Pub. Util. Code § 5411 is a criminal statute that is not within the Commission's jurisdiction to enforce or apply.

Instead of confronting Pub. Util. Code § 5411 directly, Rasier-CA attempts to reference, by analogy, what it terms a similar statute--Pub. Util. Code § 2114. The statute states:

> Any public utility on whose behalf any agent or officer thereof who, having taken an oath that he will testify, declare, depose or certify truly before the commission, willfully and contrary to such oath states or submits as true any material matter which he knows to be false, or who testifies, declares, deposes, or certifies under penalty of perjury and willfully states as true any material matter which he knows to be false, is guilty of a felony and shall be punished by a fine not to exceed five hundred thousand dollars ($500,000).

Rasier-CA then cites to D.94-11-018, wherein the Commission said that Pub. Util. Code § 2114 did not create an independent basis for imposing a standalone fine upon a utility since any alleged violation of § 2114 must be prosecuted in the California courts.[211]

Yet even D.94-11-018 recognized that there was some apparent authority for the Commission to impose fines under § 2114 even if it was construed as a criminal statute:

> We do note, however, that I.92-01-002 did mention at page 3 that a possible sanction included monetary penalties under § 2114. The

[211] Appeal at 58.

> staff has referred to a § 2114 fine with respect to the other carriers as well. The cellular carriers' briefs oppose the imposition of a § 2114 fine, but with the exception of BACTC, none of the other carriers have moved to strike the § 2114 references from the staff's brief. Due to the other references by the staff that a fine under § 2114 should apply to the other carriers as well, we will deny BACTC's motion to strike.[212]

Thus, we are confronted with the task of reconciling the seemingly contradictory statement by the Commission from D.94-11-018 that a fine under Pub. Util. Code § 2114 must be predicated by a criminal court finding, and the allegation from staff and the Commission's OII that sanctions could include monetary penalties under Pub. Util. Code § 2114 without any predicate criminal determination of guilt from a superior court. We are guided in this task by the authority cited in D.94-11-018, *People v. Miles & Sons Trucking Service, Inc*. (*People*) (1968) 257 Cal.App.2d 597, 707, which recognized the independent jurisdictions of the superior courts and the Commission in dealing with violations of Commission rules and regulations:

> The courts have exclusive jurisdiction of proceedings for the prosecution of criminal offenses defined by the Public Utilities Code even though the offenses charged are premised on violations of rules and regulations prescribed by that code, or the Public Utilities Commission, which also may be subjects of investigation and disciplinary proceedings by the Public Utilities Commission. (In re Marriott, 218 Cal. 179, 181 [22 P.2d 692]; *see* also California Oregon Power Co. v. Superior Court, 45 Cal. 2d 858, 869-870 [291 P.2d 455]; Coast Truck Line v. Asbury Truck Co., 218 Cal. 337, 339 [23 P.2d 513]; gen. *see* Pub. Util. Code, § 3806.) The action of the courts in the exercise of their jurisdiction in the premises is independent of the exercise by the commission of its jurisdiction.

[212] 57 CPUC2d at 191.

*People* tacitly acknowledged the dual system of jurisdiction between the superior court and the Commission, which is discussed by the California Supreme Court in *California Oregon Power Co. v. Superior Court* (1955) 45 Cal.2d 858, 870:

> There is no merit to defendant's contention that the state Public Utilities Commission has jurisdiction over the subject matter to the exclusion of the superior court. The state commission is given broad powers to regulate public utilities by our Constitution and statutes, *supra* (People v. Western Air Lines, Inc., 42 Cal. 2d 621 [268 P.2d 723]), but the only case which is directly in point on the issues here present is Yolo Water etc. Co. v. Superior Court, *supra*, where the court held that a superior court has jurisdiction to abate a nuisance created or maintained by a public utility and neither the public utility law nor the Constitution excludes such jurisdiction. That case has been cited with approval. (Truck Owners etc., Inc. v. Superior Court, 194 Cal. 146 [228 P. 19]; Coast Truck Line v. Ashbury Truck Co., 218 Cal. 337 [23 P.2d 513].) While the discussion in the Yolo case may be dictum in part, it is persuasive on the point here involved.

It would not appear logical to place enforcement powers within the Pub. Util. Code and then not permit the Commission from utilizing those very enforcement powers when a utility has violated the Commission's rules, orders, or regulations. Such a result would be contrary to the dual jurisdictional authority of the superior court and the Commission which the California Supreme Court has recognized.

Finally, since we find that the Commission does have power to impose penalties or fines pursuant to Pub. Util. Code § 5411, we reject Rasier-CA's argument that the Commission was without authority to impose a continuing penalty or fine pursuant to Pub. Util. Code § 5415.

### 10.8.3. Piercing the Corporate Veil

#### 10.8.3.1 Unity of Interest

Rasier-CA cites *Gerritsen v. Warner Bros. Entertainment, Inc.* (C.D. Cal 2015) , WL 3958723 and claims the Court held that a since wholly-owned and controlled subsidiary of Warner Brothers was not an alter-ego, it was inappropriate to pierce the corporate veil. In finding that there was no unity between the companies, the Court said that even the overlap of officers and directors was a normal attribute of ownership that officers and directors of the parent serve as officers and directors of the subsidiary.[213] Moreover, "the fact that a parent and subsidiary share the same office location, or the same website and telephone number, does not necessarily reflect an abuse of the corporate form" and existence of an alter ego relationship.[214]

But as SED points out in its response, the POD identified more than the above aspects of the relationship between Uber and Rasier-CA that established the requisite unity of interest between the two entities:

1. Transportation Network Company (TNC) drivers who want to obtain passengers from Uber must enter into a Software License and Online Services Agreement with Uber or a Transportation Provider Service Agreement with Rasier, LLC, an Uber Subsidiary;
2. Any passenger wishing transportation service with Rasier-CA via the Uber App must download the passenger version of the Uber App to a smartphone and create an account with Uber;
3. Uber ensured that its TNC subsidiary Rasier LLC (together with Rasier-CA, LLC) procured a commercial insurance policy with $1 million in coverage per incident;

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[213] Appeal at 66.

[214] *Id.*, citing *Gerrittse*n.

4. Wayne Ting, Uber's General Manager, verified Rasier-CA's Verified Statement in this OSC proceeding and testified at the OSC hearing;
5. Uber sets fares it charges riders unilaterally;
6. Uber bills its riders directly for the entire amount of the fare charged;
7. Uber claims a proprietary interest in its riders, and prohibits its drivers from answering rider queries about booking future rides outside the Uber app, or otherwise soliciting rides from Uber riders;
8. Uber exercises control over the qualification and selection of its drivers;
9. Uber terminates the accounts of drivers who do not perform up to Uber standards; and
10. Uber deactivates accounts of passengers for low ratings or inappropriate conduct.[215]

When we compare the above *indicia* of unity with the standards set forth in *Gerritsen,* we conclude that there is a greater unity of interest and ownership demonstrated between Uber and Rasier-CA than the parent/subsidiary relationship that existed in *Gerritsen*. In so doing we are guided by *Gerritsen's* further clarification of what factors can establish an unity of interest and ownership: "[W]here a 'parent dictates [e]very facet [of the subsidiary's business—from broad policy decision[s] to routine matter of day-to-day operation[],' the unity of interest and ownership test is satisfied." The facts here demonstrate that Uber dictates every facet of Rasier-CA's business from broad policy decisions to routine matters of day-to-day operation, a showing *Gerritsen*

[215] Response at 31; POD at 74-75. The Response lists additional examples of Uber's control over Rasier-CA. (Response at 32.)

recognized would be persuasive to show unity of interest, citing to *NetApp. Inc*., 2015 WL 400251 at *5; *Doe v.Unocal Corp* (2001) 248 F.3d 915, 926-927; and *Rollins Burdick Hunter of So. Cal., Inc. v. Alexander & Alexander* (1988) 206 Cal.App.3d 1,11.

#### 10.8.3.1.1. Uber Makes the Broad Policy Decisions

**a) Uber's Operations and Communications**

All information regarding Uber's operations and policies are on the Uber.com website. In its application, Rasier-CA provides the contact address as rasier-ca@uber.com.

**b) Uber Articulates the Legal Positions Regarding the Commission Jurisdiction**

Uber took the position that the Commission lacks jurisdiction because Uber is a software technology company rather than a transportation company.[216]

Uber took the position that it is not a TCP.[217]

Uber took the position that no public interest or public safety purpose would be served by the Commission's regulation of Uber.[218]

Uber took the position that IP-enabled services are exempt from regulation by the Commission.[219]

Uber took the position that the Commission's attempted regulation would conflict with the Federal Telecommunications Act of 1996.[220]

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[216] Uber's Comments to OIR at 2.

[217] *Id.* at 5-6.

[218] *Id.* at 7.

[219] *Id.* at 8-9.

[220] *Id.* at 10-13.

**c) Uber Articulates the Positions on Matters of Personal and Public Safety**

Uber took the position that the use of the Uber App enhances personal and public safety.[221]

**d) Uber Verified the Defenses to and Appears at the OSC Proceeding**

It was an officer and General Manager from Uber (Wayne Ting) who verified Rasier's Statement (Exhibit 10) where the following defenses were asserted:

- The information sought by Reporting Requirement j is a trade secret.[222]
- The Commission lacks the regulatory authority to require a TNC to comply with Reporting Requirement j.[223]
- Strict Compliance with Reporting Requirement j would violate the Fourth Amendment.[224]
- Requiring the disclosure of trade secrets would amount to an unconstitutional taking in violation of the Fifth Amendment.[225]

**e) Uber Provides Witness and Declaration Support Re: OSC**

Only Wayne Ting (Uber's officer and General Manager) testified on Rasier-CA's behalf at the OSC hearing.

Krishna K. Juvvadi, Uber's Senior Counsel, submitted declarations on behalf of Rasier-CA.

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[221] *Id.* at 14.

[222] Verified Statement at 19-25.

[223] *Id.*, Appendix C (Petition of Raiser-CA to Modify Decision 13-09-045 at 14-17.)

[224] *Id.*, Appendix C (Petition of Raiser-CA to Modify Decision 13-09-045 at 17-18.)

[225] *Id.*, Appendix C (Petition of Raiser-CA to Modify Decision 13-09-045 at 21-24.)

#### 10.8.3.1.2. Uber Dictates the Day-to-Day Operations of Raiser-CA's Business

**a) Passenger Access to Uber**

Passengers must subscribe to the Uber App in order to obtain a ride with Rasier-CA.[226] Passenger must agree with Uber's Terms and Conditions.[227]

Uber's Terms and Conditions dictates:

- License grant and copyright policy;
- Accessing and downloading agreements;
- Payment terms;
- Intellectual property ownership;
- Third party interactions;
- Indemnification;
- Disclaimers and warranties;
- Limitation of liability;
- Assignments; and
- Dispute resolution procedures.

Uber deactivates accounts of passengers for low ratings or inappropriate conduct.[228]

**b) Drivers**

Drivers who wish to book passengers need to access Uber's UberX software platform.[229] The Agreement contains an arbitration provision for claims against Rasier-CA or Uber.[230]

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[226] Comments of Uber to OIR at 3.

[227] *Id.*

[228] POD at 74-75.

[229] Colman Decl. ¶ 6 (*National*).

Rasier-CA enters into the Agreement with TNC drivers who desire to have access to the Uber transportation services.[231]

Uber exercises control over the qualifications and selection of its drivers.[232]

Uber terminates the accounts of drivers who do not perform up to Uber's standards.[233]

**c) Dealings with the Commission**

In terms of Rasier-CA's compliance with D.13-09-045, SED has met exclusively with Uber's attorneys and regulatory representatives.[234]

**d) Rasier-CA's Response**

Despite the overwhelming evidence of unity of interest, Rasier-CA continues to claim that it and Uber are distinct entities. Rasier-CA argues that had it known that veil-piercing was an issue, it would have presented the following evidence to establish that it and Uber are separate legal entities:

- Rasier-CA's managers are distinct from Uber's directors.
- Although the POD judicially notices that Uber's CEO, Mr. Kalanick, was the "sole managing partner" of Rasier-CA as evidence of control, that fact was no longer true in September 2014, when Raiser filed its verified report.
- Rasier-CA has two separate managers.
- Rasier-CA pays Uber a service fee for the overhead and administrative [costs] provided by Uber.

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230 Agreement at 11.

231 Response of Uber to Assigned Commissioner and Administrative Law Judge's Ruling at 4.

232 POD at 74-75.

233 *Id.*

234 SED's Response to Rasier-CA's Appeal at 32.

- Rasier-CA independently contracts with driver-partners.
- Rasier-CA is covered by its own insurance that does not cover Uber.
- And the Commission has already recognized their separate regulatory status: Rasier-CA is an acknowledged TNC, while "Uber does not meet the definition of a TNC."[235]

We are unpersuaded by this showing. First, Raiser-CA became aware of the veil-piercing issue when it reviewed the POD. As part of its appeal, it could have presented evidence to support its argument as to the separate nature of Uber and Rasier-CA but elected not to do so. The only evidence it submitted as part of its appeal was another declaration from Krishna Juvvadi, Senior Counsel for Uber, who did not discuss any of these corporate separation issues that Rasier-CA identified in its appeal. If Uber and Rasier-CA truly are separate, why is it that Uber's company representatives speak on Rasier-CA behalf? Why is it that Rasier-CA did not produce a single representative to testify on its behalf at the OSC evidentiary hearing and instead relied solely on Uber's one witness? Why is it that Uber deals with SED to ensure Rasier-CA's compliance with the Commission's reporting requirements? The evidence appears overwhelming that there is a unity of interest between Uber and Rasier-CA. This is true even if the Commission opined that Rasier-CA is a TNC but Uber does not meet the definition of a TNC. Uber still maintains control over Rasier-CA's broad policy decisions and the day-to-day operations.

[235] Appeal at 65.

### 10.8.3.2. Inequitable Result

*Gerritsen* also states that before the corporate veil will be pierced, it must be shown that an inequitable result will follow if the corporate separateness of the two entities is not disregarded. (*See Orloff v. Allman* (9th Cir. 1987) 819 F.2d 904, 908-909; and *First Western Bank & Trust Co. v. Bookasta* (1968) 267 Cal.App.2d 910, 914-915 [examples of an inequitable result would be to either sanction a fraud or promote injustice].)

We initially address Rasier-CA's argument that California courts have cautioned against piercing the corporate veil specifically to warrant higher awards by looking at a parent company's higher revenues. Rasier-CA cites *Walker v. Signal Companies, Inc*. (1978) 84 Cal.App.3d 982, 1001 for the proposition that a court may not pierce the corporate veil if the sole purpose is to increase an award of punitive damages.[236] *Walker* did not issue such a sweeping caution. Plaintiffs' pleadings did not contain an alter ego claim, and evidence on the theory was successfully objected to by defense counsel. Thus, when the jury in the punitive damage award against Signal and Landmark made their damage determination, they considered the separate values of parent and subsidiary companies. Given those set of circumstances, it is understandable that the *Walker* court said "[t]here is no factual justification" to hold Signal liable in order to increase the award of punitive damages. In other words, if there is evidence that it would be appropriate to pierce the corporate veil, it would be appropriate to do so even if the result were to increase a damage award.

The inequitable result here in not piercing the corporate veil would be to deny the fact that the Commission would have an incomplete picture generated

[236] Appeal at 64.

by the TNC services in California in terms of the allocation of revenues. Some of the revenues generated from rides in California are apportioned to Uber. While it is true that Raider-CA reports gross revenues to the Commission in its quarterly Public Utility Commission Transportation Reimbursement Account (PUCTRA) revenue details, based on the terms of the operative agreements, part of the money trail goes as follows: (1) under the terms and conditions agreement between Uber and a passenger, Uber charges the passenger's credit card for the ride; and (2) the charge is then split between the TNC driver and Uber:

> At the completion of the ride, as the agent of the Partner/Driver, Uber processes payment (via use of a third party credit card payment processing company) for the transportation service provided. The User immediately receives a receipt from Uber via email. Uber forwards the fare, less Uber's commission, to the Partner/Driver. Uber does not charge the Partner/Driver for credit card processing fees. [237]

In the Software License and Online services Agreement that, in California, is between subscribing drivers and Rasier-CA,[238] in consideration for receiving the driver app and Uber's services, the driver agrees to pay a service fee to Rasier-CA on a per transportation service provided, which is calculated as a percentage of the fare.[239] Since the money from each California passenger transported by a TNC driver via Rasier-CA is going to both Uber and Rasier-CA, it makes sense to pierce the veil and consider both companies' revenues for purposes of calculating a fine.

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[237] Uber's Comments on OIR at 2-3.

[238] If the driver is in Pennsylvania, the agreement is with Rasier-PA, LLC. Otherwise the agreement is between the subscribing driver and Rasier, LLC.

[239] *See* Software License and Online Services Agreement attached as Appendix C to Uber's Response to Assigned Commissioner and Administrative Law Judge's Ruling.

#### 10.8.4. Degree of Harm Caused by Rasier-CA's Failure to Comply with the Commission's Reporting Requirements

Rasier-CA challenges the POD's finding that Rasier-CA's actions harmed the regulatory process because it impeded the Commission's staff from exercising its obligations to analyze the required data so it could report to the Commission on the public impact of the new TNC regulations. It asserted that there is no evidence to support this claim, and that SED was not impeded because the aggregate data and the raw data that Rasier-CA offered would have allowed SED to prepare meaningful reports.[240]

In *Pacific Gas & Electric Company, supra,* the Court of Appeal rejected similar "no harm no foul" arguments in weighing the Commission's power to impose fines and penalties:

> Much of this is familiar. PG&E's argument that "the adjudicated violations did not cause any harm and did not pose any risk to the Commission, its staff, any party, or the public" is literally true, but it completely misperceives what was at issue. "No harm no foul" may work in the schoolyard, but it is no principle for the maintenance of public safety. Given the context here, PG&E's emphasis on "actual damages" is dismaying, antithetical to the entire concept of deterrence. The Commission takes a very dim view **[*105]** of denying it information, treating it as a factor in aggravation when it comes to fixing penalty. (*See Cal.P.U.C. Dec. No. 13-09-028, supra, 2013 Cal.P.U.C. Lexis 514 at pp. *51–*52* ["The withholding of relevant information causes substantial harm to the regulatory process, which cannot function effectively unless participants act with integrity at all times. … [T]his criterion weighs in favor of a significant fine."].) We have already determined that virtually denuding the Commission's jurisdiction would be a consequence of the way PG&E wants to have *Rule 1.1*, as well as *sections 2107* and

[240] Appeal at 68-69.

> *2108*, interpreted. The notion that a civil penalty cannot be imposed if "the potential risk never materialized …" would encourage utilities not to self-report, and, by stripping the Commission's sanction power, would make a Commission order to self-report essentially meaningless—indeed, it would reward defiance of the Commission. PG&E will not prevail in its attempt to repackage in constitutional wrapping the same intent-based arguments we have already rejected.

In so ruling, *Pacific Gas & Electric Company* also recognized the importance of the Commission's police power to compel compliance even in the absence of a demonstrated harm:

> As we have noted in refusing to accept an argument such as PG&E makes here: '[T]he legitimate police power device of securing obedience…requires more than compensation of [actual] loss, a penalty that might achieve little or no compliance.' (City and County of San Francisco v. Sainez (2000) 77 Cal.App.4th 1302, 1315.) Our Supreme Court is equally unreceptive to challenges to the Commission's powers to impose deterrent penalties: 'Civil penalties under [section 2107]…require no showing of actual harm,' 'are imposed…irrespective of actual damage suffered,' 'without regard to motive,' and 'require no showing of malfeasance or intent to injure.' (Kizer v. County of San Mateo, *supra*, 53 Cal.3d 139, 147.)[241]
>
> As such, the lack of a demonstrated harm is no impediment to the Commission's decision to issue a fine.

[241] *33-34.

### 10.8.5. Proportionality of the Proposed Fine

#### 10.8.5.1. The Comparison of the Proposed Fine to the Lyft Settlement

Rasier-CA attempts to challenge the fine as disproportionate in comparison to the relatively small fine adopted for Lyft of $30,000.[242] What Rasier-CA overlooks is that the figure reached with Lyft was a settlement, and pursuant to Rule 12.5, those amounts do not constitute precedent regarding any principle or issue in the proceeding or in any future process unless the Commission expressly provides otherwise:

> Commission adoption of a settlement is binding on all parties to the proceeding in which the settlement is proposed. Unless the Commission expressly provides otherwise, such adoption does not constitute approval of, or precedent regarding, any principle or issue in the proceeding or in any future proceeding.

Thus, the amount Lyft agreed to pay has no bearing on the amount of the fine to impose on Rasier-CA.

#### 10.8.5.2. The Comparison of the Proposed Fine to Rasier-CA's Gross Revenues

| Quarter | Public Utility Commission Transportation Reimbursement Account (PUCTRA) for Rasier-CA |
|---|---|
| 4th Quarter 2013 | Excess of $10 million |
| 1st Quarter 2014 | Excess of $5 million |
| 2nd Quarter 2014 | Excess of $ 8 million |
| 3rd Quarter 2014 | Excess of $ 4 million |
| 4th Quarter 2014 | Excess of $ 40 million |
| 1st Quarter 2015 | Excess of $ 30 million |
| 2nd Quarter 2015 | Excess of $ 50 million |

[242] Appeal at 70-71.

Even if the Commission were to only look at Rasier-CA's revenues, the proposed fine is less than five percent of Rasier-CA's reported gross revenues. As such, we do not consider the fine to be either constitutionally excessive or disproportionate.

#### 10.8.5.3. The Comparison of the Proposed Fine to SED's Recommendations

Rasier-CA claims that the proposed fine so far exceeds SED's recommendation to make it disproportionate, unreasonable, and contrary to due process.[243] While the Commission appreciates and takes the recommendations of SED into consideration in assessing an appropriate fine or penalty, it is the Commission that ultimately makes the final decision on the fine or penalty amount. By way of example, pursuant to Rule 12.4, the Commission has the power to reject a proposed settlement "whenever it determines that the settlement is not in the public interest." These settlements are usually negotiated between a regulated utility and SED, but the Commission is not bound to follow them. The Commission has the same power to reject a recommendation from SED that is not connected to a settlement agreement.

#### 10.8.5.4. The Comparison of the Proposed Fine to Punitive Damages Standards

Rasier-CA cites two United States Supreme Court cases that discuss the ratio between compensatory and punitive damages (*BMW of North America v. Gore* (1996) 517 U.S. 559, and *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425). Rasier-Ca argues that the fine is inconsistent with the United

[243] Appeal at 70.

States Supreme Court's standards given the large disparity between the actual damages and the calculated fine.

Rasier-CA's analogy to punitive damages law is flawed since the fines and penalties the Commission issues are not punitive damages. The Commission clarified this point in D.03-01-087:

> The case law cited by Qwest in support of this argument is inapplicable, because statutory civil penalties like those authorized by **Public Utilities** Code Section 2107 are not **punitive damages.** Though both types of sanctions are "intended to punish the wrongdoer and to deter future misconduct," civil penalties and **punitive damages** differ in important ways and therefore require different evidentiary showings. *See* People v. First Federal Credit Corp. (2002) 104 Cal. App. 4th 721 (statutory penalties under the Unfair Competition Law require proof of violations by a preponderance of the evidence, while **punitive damages** require "clear and convincing evidence of oppression, fraud, or malice"). Among other distinctions, the amount of statutory penalties is determined by the Legislature (within a range, and capped), whereas the amount of **punitive damages** is determined by a fact finder (judge or jury). *See* Rich v. Schwab, 63 Cal. App. 4th 803, 816 (1998) (while exemplary (**punitive) damages** and statutory penalties both are intended to punish wrongdoers, they are "distinct legal concepts, one of which is entrusted to the factfinder, **[*14]** the other to the Legislature"); *see* also Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1598-99 (where Legislature has set a minimum and maximum penalty for a violation, that sanction is a statutory penalty, not **punitive damages)**.
>
> Fines imposed by the **Commission** pursuant to Section 2107 are statutory civil penalties, with a minimum and maximum amount set by the Legislature ($ 500 to $ 20,000 per violation). The **Commission** correctly required that the violations alleged in this investigation be proved by a preponderance of the evidence. (D.02-10-059, p. 4 (citing CTS, D. 97-05-089, 72 CPUC2d 621, 642) and Conclusion of Law 1). As the Decision correctly noted also, proof of intent is not required to establish a violation of Section 2889.5. (Decision at 3.) Qwest's

> argument that the fine imposed by the Commission is akin to punitive damages and therefore requires a higher standard of proof, including proof that the violations were intentional, is without merit.

Also, punitive damages require a compensable harm in order to determine the amount of the punishment. (*See Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc*. (1984) 155 Cal.App.3d 381, 389 ["The factors to be considered in assessing a punitive damages award are the nature of the defendant's acts, the amount of compensatory damages awarded and the wealth of the defendant[,]" citing to *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.) In contrast, and as we discussed, *supra*, the Commission may award a fine even if there is no harm to ratepayer since the harm can be to the regulatory process itself.

A further reason why the analogy to punitive damages cases is erroneous is that the Commission does not award compensatory damages of the type that is the predicate for a punitive damages award. While the Commission has the power to order refunds or to make reparations,[244] the Commission has repeatedly ruled that only the Superior Court has the power to award consequential damages as opposed to reparations. (*See, e.g., Balassy v. Sprint Telephony PCS*, LP, (2012) D.12-04-031; *Gregory v. Pacific Bell Telephone Company*, (2011) D.11-11-003 ["It is clear that complainant seeks damages for defendants'

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[244] In *Diener v. Pacific Gas and Electric Company*, (2011) D.11-09-027, the Commission explained that:

> Pub. Util. Code § 2100 *et seq*. provides a wide variety of remedies designed to redress violations of Commission decisions committed by public utilities. These include orders to common carriers to collect under-charges or unlawful rebates, actions for mandamus or injunction, actions to recover penalties, imposition of fines, criminal prosecutions, and contempt proceedings.

alleged improper conduct. As we have no jurisdiction to award damages, we dismiss the complaint for failing to plead a cause of action within our jurisdiction"]); (*Day v. Verizon California*, (2006) D.06-06-061 ["Complainant's remedy for any alleged intentional damage to her DSL service is with the courts, not the Commission"]; and *Swepston v. California-American Water Company*, (2004) D.04-12-032 ["Since the Commission has no jurisdiction to award damages, the courts have held that complaints alleging breach of contract should be brought in civil courts"].)

#### 10.8.5.5. The Comparison of the Proposed Fine to Prior Commission Decisions

Rasier-CA cites to D.04-09-061 wherein this Commission found that an 18 percent penalty on under-reported earnings was not reasonable because the errors had no consequences for ratepayers.[245] That decision is inapplicable here because as this Commission has made clear, and as we have discussed earlier in this decision, harm to the regulatory process is a sufficient basis to impose a fine.

## 11. Assignment of Proceeding

Liane M. Randolph is the assigned Commissioner. Robert M. Mason III is the assigned ALJ and the hearing officer for this adjudicatory OSC portion of this proceeding.

## Findings of Fact

1. On September 19, 2013, the Commission adopted D.13-09-045, creating a new category of transportation charter party carrier (TCP) of passengers called Transportation Network Companies (TNCs).

[245] *Id.*

2. D.13-09-045 set forth the various requirements that TNCs must comply with in order to operate in California.

3. Among other regulatory requirements, the Decision required TNCs to submit annual reports containing certain information. Specifically, the Decision states that:

- One year from the effective date of these rules and annually thereafter, each TNC shall submit to the Safety and Enforcement Division a report detailing the number and percentage of their customers who requested accessible vehicles, and how often the TNC was able to comply with requests for accessible vehicles.
- One year from the effective date of these rules and annually thereafter, each TNC shall submit to the Safety and Enforcement Division a verified report detailing the number of rides requested and accepted by TNC drivers within each zip code where the TNC operates; and the number of rides that were requested but not accepted by TNC drivers within each zip code where the TNC operates. The verified report provided by TNCs must contain the above ride information in electronic Excel or other spreadsheet format with information, separated by columns, of the date, time, and zip code of each request and the concomitant date, time, and zip code of each ride that was subsequently accepted or not accepted. In addition, for each ride that was requested and accepted, the information must also contain a column that displays the zip code of where the ride began, a column where the ride ended, the miles travelled, and the amount paid/donated. Also, each report must contain information aggregated by zip code and by total California of the number of rides requested and accepted by TNC drivers within each zip code where the TNC operates and the number of rides that were requested but not accepted by TNC drivers.
- One year from the effective date of these rules and annually thereafter, each TNC shall submit to the Safety and Enforcement Division a verified report in electronic Excel or other spreadsheet format detailing the number of drivers that were found to have committed a violation and/or suspended, including a list of zero

tolerance complaints and the outcome of the investigation into those complaints. Each TNC shall also provide a verified report, in electronic Excel or other spreadsheet format, of each accident or other incident that involved a TNC driver and was reported to the TNC, the cause of the incident, and the amount paid, if any, for compensation to any party in each incident. The verified report will contain information of the date of the incident, the time of the incident, and the amount that was paid by the driver's insurance, the TNC's insurance, or any other source. Also, the report will provide the total number of incidents during the year.

- One year from the effective date of these rules and annually thereafter, each TNC shall submit to the Safety and Enforcement Division a verified report detailing the average and mean number of hours and miles each TNC driver spent driving for the TNC.
- TNCs shall establish a driver training program to ensure that all drivers are safely operating the vehicle prior to the driver being able to offer service. This program must be filed with the Commission within 45 days of the adoption of this decision. TNCs must report to the Commission on an annual basis the number of drivers that became eligible and completed the course.

4. On September 19, 2014, Rasier-CA submitted its annual report information to SED.

5. SED reviewed the information and found that Rasier-CA had failed to provide all of the information specified in the Decision. Specifically, Rasier-CA had failed to comply fully with Reporting Requirements g, j, and k.

6. Since September 19, 2014, SED has worked to obtain complete information as required by the Commission's Decision through the issuance of an additional data request dated October 6, 2014.

7. Rasier-CA provided its claimed confidential responses on October 10, 2014 and a DVD on October 20, 2014. SED reviewed these further responses and

determined that SED has not received all of the information for Reporting Requirements g, j, and k ordered by D.13-09-045.

8. Rasier-CA provided its claimed confidential responses on October 10, 2014 and a DVD on October 20, 2014. (Id.) SED reviewed these further responses and determined that SED has not received all of the information ordered by D.13-09-045.

9. The OSC phase of this proceeding was determined to be adjudicatory.

10. On November 14, 2014, the assigned ALJ issued a ruling ordering Rasier-CA to appear for hearing and to show cause as to why it should not be found in contempt, why penalties should not be imposed, and why Rasier-CA's license to operate should not be revoked or suspended for its failure to comply with D.13-09-045.

11. The November 14, 2014 ruling ordered Rasier-CA to address Rule 1.1 of the Commission's Rules of Practice and Procedure, as well as Pub. Util. Code §§ 701, 2107, 2108, 2113, 5411, 5415, 5378(a), and 5381.

12. On December 4, 2014, Rasier-CA filed its Verified Statement Responding to Order to Show Cause.

13. On December 4, 2014, Rasier-CA filed its Petition to Modify Decision 13-09-045.

14. On December 8, 2014, at 5:01 p.m., Rasier-CA served an Emergency Motion Requesting Deferral of Hearings. The assigned ALJ denied the Emergency Motion on December 8, 2014 at 7:13 p.m.

15. On December 9, 2014, SED filed its Verified Reply to Rasier-CA's Verified Statement Responding to Order to Show Cause.

16. On December 10, 2014, Rasier filed a Motion to strike Portions of the SED's Verified Reply.

17. On January 21, 2015, SED and Rasier-CA filed their respective post-hearing opening briefs.

18. On February 5, 2015, SED and Rasier-CA filed their respective post-hearing reply briefs.

19. On February 17, 2015, Rasier-CA filed its Motion to Set Aside Submission and Reopen the Record in Order to Show Cause in Rulemaking 12-12-011.

20. On February 19, 2015, the assigned ALJ granted the Motion and set a further briefing schedule.

21. On February 27, 2015, SED filed its Response to Rasier-CA's Motion to Set Aside Submission and Reopen the Record in Order to Show Cause in Rulemaking 12-12-011.

22. On March 6, 2015, Rasier-CA filed its Reply to SED's Response.

23. As of September 9, 2014, Uber, Rasier, LLC, and Rasier-CA, LLC had been sued by the National Federation of the Blind of California for discrimination against blind individuals who use service dogs.

24. The complaint alleges multiple instances, all before Rasier-CA's September 19, 2014 reporting date, where blind customers with service dogs claimed they were denied service by UberX drivers.

25. The Complaint also alleges that some of these customers complained to Uber about their treatment.

26. On September 24, 2014, Uber was served with the *National Federation of the Blind* complaint.

27. On October 9, 2014, Uber entered into a stipulation with plaintiffs for additional time to file a responsive pleading to the *National Federation of the Blind* complaint.

28. On October 22, 2014, Uber filed a Motion to Dismiss the *National Federation of the Blind of California* complaint.

29. As of September 24, 2014, Uber, Rasier-CA's parent company, was aware of complaints by persons with disabilities regarding their claimed inability to take advantage of the TNC service provided by UberX. Rasier-CA, as Uber's wholly owned subsidiary, should have supplemented its September 19, 2014 report regarding Reporting Requirement g to include the above responsive information.

30. The other TNCs subject to the Commission's jurisdiction have complied with Reporting Requirements g, j, and k.

31. Uber has provided trip data similar to what is required by Reporting Requirement j to the mayor of Boston, Massachusetts, and to the New York Taxi and Limousine Commission.

32. To facilitate its transportation service, Uber licenses a software application service known as the Uber App which is used by TCP holders and TNC holders to generate leads to provide transportation services.

33. For TCP holders and TNC holders operating in California, the Software Sublicense & Online Services Agreement is executed with Rasier-CA.

34. Uber only makes money if the drivers signing up with Rasier-CA actually transport passengers.

35. All pleadings in this proceeding on behalf of Uber, Rasier, LLC and Rasier-CA have been filed by the same law firm—Davis Wright Tremaine LLP.

36. Rasier-CA has reported to the Commission revenues in excess of $140 million.

## Conclusions of Law

1. The Americans with Disabilities Act (ADA) prohibits discrimination against persons with disabilities as to matters of public accommodation, specified public transportation service, and travel service. The TNC service Rasier-CA provides can fit, at a minimum, within these definitions.

2. Persons with vision impairment are included within the ADA's definition of disability.

3. Rasier-CA was out of compliance with the remaining reporting requirements of Reporting Requirement g by not reporting on the instances of blind passengers with service dogs who were allegedly declined service by UberX drivers until August 13, 2015.

4. Rasier-CA was out of compliance with the remaining reporting requirements of Reporting Requirement j since Rasier-CA's production did not include information on the concomitant date, time and zip code of each ride that was subsequently accepted or not accepted (*i.e.* of the driver at the time they accept or decline a ride request) until March 6, 2015, as well as fare information, until August 13, 2015.

5. Pursuant to Pub. Util. Code § 5381, the Commission may supervise and regulate every charter party carrier of passengers in the State and may do all things, whether specifically designated in this part, or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

6. Pursuant to Pub. Util. Code § 5389, the Commission may have access at any time to a TCP's operations and may inspect the accounts, books, papers, and documents of the carrier.

7. The breadth of Pub. Util. Code § 5381 and Pub. Util. Code § 5389 includes the power to require TNCs to provide information regarding fare information.

8. Rasier-CA was out of compliance with the remaining reporting requirements of Reporting Requirement k by not providing information on the cause of each incident until August 13, 2015.

9. Rasier-CA was aware of the September 9, 2014 reporting deadlines imposed by D.13-09-045.

10. Rasier-CA had the ability to comply with the outstanding information for Reporting Requirements g, j, and k.

11. Rasier-CA's failure to comply with the outstanding information for Reporting Requirements g, j, and k was willful (*i.e.* inexcusable).

12. Rasier-CA wrongfully characterizes this OSC proceeding as a discovery dispute with SED.

13. Compliance with a Commission's ordering paragraphs is mandatory, and compliance may not be excused by the Respondent's claimed lack of knowledge as to why the information is needed or how the required information may be used.

14. The integrity of the regulatory process relies on the accurate and prompt reporting of information.

15. Rasier-CA fails to substantiate its claims that the data ordered by Reporting Requirements j and k are unduly burdensome, cumulative, and overly broad.

16. Rasier-CA has failed to substantiate its claim that strict compliance with Reporting Requirement j violates the fourth amendment.

17. Rasier-CA has failed to substantiate its claim that the data ordered by Requirement j is trade secret commercial information.

18. Rasier-CA has failed to substantiate its claim that the disclosure of trip data would amount an unconstitutional taking of a trade secret.

19. Rasier-CA has not substantially complied with the remaining requirements of Reporting Requirement j prior to its production on August 13, 2015.

20. The evidence establishes, beyond a reasonable doubt, that Rasier-CA is in contempt for failing to comply with the remaining reporting requirements of Reporting Requirements g, j, and k.

21. The evidence establishes, by a preponderance of the evidence, that Rasier-CA has violated Rule 1.1 of the Commission's Rules of Practice and Procedure for failing to comply with the remaining reporting requirements of Reporting Requirements g, j, and k.

22. Rasier-CA should be fined $1,000.00 for contempt.

23. Rasier-CA's conduct satisfies the criteria for the issuance of a fine under Rule 1.1, and Pub. Util. Code §§ 2107, 2108, 5411, and 5415.

24. Uber is the parent of Rasier, LLC and Rasier-CA.

25. Rasier, LLC and Rasier-CA are the wholly-owned subsidiaries of Uber.

26. Uber's control over the transportation services provided by Rasier-CA is extensive.

27. The Commission may consider Uber's revenues in setting a fine against Uber's subsidiary.

28. Rasier-CA should be fined $7,626,000.

29. Rasier-CA's authority to operate as a TNC should be suspended 30 days after the issuance of this decision if Rasier-CA has not paid the fines identified in Conclusions of Law 22 and 28.

## O R D E R

**IT IS ORDERED** that:

1. Rasier-CA, LLC (Rasier-CA) shall pay a $1,000.00 contempt fine, and a $7,626,000 fine, by check or money order 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 40 days of the effective date of this order. Rasier-CA shall write on the face of the check or money order "For deposit to the General Fund pursuant to Decision 16-01-014."

2. All money received by the California Public Utilities Commission's Fiscal Office pursuant to Ordering Paragraph 1 shall be deposited or transferred to the State of California General Fund.

3. Rasier-CA, LLC's (Rasier-CA) license to operate as a Transportation Network Company shall be suspended. Rasier-CA's suspension shall start 30 days after this decision is issued if Rasier-CA has not paid the fines of $1,000 and $7,626,000. The suspension shall remain in effect until Rasier-CA pays the fines of $1,000 and $7,626,000.

4. Rasier-CA, LLC's Motion to Strike Portions of Safety and Enforcement Division's Verified Reply is denied.

5. Rasier-CA, LLC's Motion for Modification of Decision 13-04-045 is denied.

6. The Order to Show Cause portion of this rulemaking is closed.

7. The remainder of Rulemaking 12-12-011 is open.

This order is effective today.

Dated January 14, 2016, at San Francisco, California.

MICHAEL PICKER
President
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
CARLA J. PETERMAN
LIANE M. RANDOLPH
Commissioners