

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-371
Administrative Law Judge Division
[Date]

RESOLUTION

RESOLUTION ALJ-371. Resolves the Appeal K.19-03-015 of Citation No. F-5517 by GoGo Technologies.

SUMMARY

This resolution resolves the appeal of Citation No. F-5517 to GoGo Technologies by the California Public Utilities Commission's Consumer Protection and Enforcement Division. Citation No. F-5517 cites and fines GoGo Technologies for operating and advertising as a charter-party carrier without authority. The citation is dismissed on the grounds that GoGo Technology is not a charter party carrier.

BACKGROUND

Public Utilities Code Section 5360 defines "charter-party carrier of passengers" (TCP) as "every person engaged in the transportation of persons by motor vehicle for compensation."¹

Section 5431(c) defines a particular TCP that is "an organization ... that provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle" as a "transportation network company" (TNC).

GoGo Technologies, doing business as GoGoGrandparent (GoGo), permits individuals who do not own or cannot operate a smartphone, primarily seniors, to request rides from TNCs such as Uber and Lyft. GoGo's customers register their phone number, special needs, home location and, optionally, regular destinations with GoGo. A customer requests a ride by calling GoGo's toll-free phone number and, after hearing a prompt, pressing a number on their touch-tone phone to indicate where they would like

¹ All subsequent references are to the Public Utilities Code.

to be picked up and their destination. GoGo's computer program recognizes the customer's identity from the pre-registered information and interprets the ride request.

GoGo's computer program then conveys the information to a TNC. Instead of connecting using the TNC's smartphone app, GoGo's computer program connects using the TNC's Application Programming Interface (API) portal. Upon receiving GoGo's request, the TNC queries its driver pool and, when a driver accepts the assignment, the TNC conveys a phone link back to GoGo's computer program via the API portal. GoGo uses the phone link to screen the driver regarding their ability to meet the customer's special needs. GoGo charges the customer the TNC's charge plus GoGo's "concierge fee" of \$.27 per mile.

Consumer Protection and Enforcement Division (CPED) maintains that GoGo is a TCP pursuant to Section 5360 and a TNC pursuant to Section 5431(c). GoGo maintains that it is neither.

GoGo further asserts that the Commission's citation appeal process (Resolution ALJ-299) is unlawful for failing to comply with the requirements of "adjudication" proceedings under Public Utilities (Pub. Util.) Code Sections 1701.1 and 1701.2 and that the Commission should open a rulemaking (or delegate this issue to an existing rulemaking such as Rulemaking 12-12-011) to consider whether, as a policy matter, modifications might be made to GoGo Technologies' operations that would allow it to provide its services without subjecting it to the Commission's jurisdiction.

We address the issue of whether GoGo is a TCP or a TNC below. Because we find that it is neither, we do not reach GoGo's further assertions.

DISCUSSION

1. Ambiguity

Section 5360's definition of a TCP is ambiguous. A "person engaged in the transportation of persons by motor vehicle for compensation" is commonly understood to mean an individual or entity who drives another person for compensation. However, it is unclear from its plain language whether the definition is limited to the entity that does the driving or, conversely, extends to include any entity that hails a ride for another person such as hotel might do through a doorperson or concierge.

Section 5431(c) is likewise ambiguous. While CPED interprets the "user" in the phrase "using an online-enabled application" to include an organization that uses the Lyft or Uber app on behalf of the ultimate passenger, it can also be reasonably construed to

refer strictly to the entity that is providing the app that connects the passenger and the driver, i.e., Lyft and Uber themselves.

CPED maintains that there is no ambiguity. CPED maintains that GoGo plainly “transports” persons pursuant to Section 5360 by virtue of connecting the customer with a driver. (CPED opening brief, p. 3.) As CPED argues, however, “transportation” “has been judicially defined as implying ‘the taking up of persons or property at some point and putting them down at another.’” (*Id.*, citing to *Golden Gate Scenic Steamship Lines Inc. v. Public Utilities Comm.* (1962) 57 Cal.2d 373, 380.) “Connecting the customer with a driver” and “taking up a person at some point and putting them down at another” are two separate interpretations of “transportation,” which only serves to demonstrate the inherent ambiguity of the term.

CPED maintains that GoGo is “engaged” in the transportation of persons pursuant to Section 5360 by virtue of being “involved in [the] activity” as the Merriam-Webster dictionary defines the term. (CPED opening brief, p. 4.) However, if mere involvement in the activity were enough to define a person as a TCP, CPED staff might be held to be TCPs: They are “engaged” in the transportation of persons by motor vehicle by virtue of this enforcement action and they are compensated for their activity. This absurd result of relying on its dictionary definition demonstrates the ambiguity of the term “engaged.”

CPED maintains that, by its plain meaning, GoGo “uses” an on-line platform to connect passengers to drivers pursuant to Section 5431(c). (CPED opening brief, pp. 7-8.) As discussed above, the term “user” can be reasonably interpreted to mean the entity on whose app the passengers and drivers register, the passengers and driver who use the app, or both.

Given these ambiguities, we must therefore consider the context of the statute and the consequences that will flow from defining GoGo’s business model as that of a TCP or TNC:

When uncertainty arises in a question of statutory interpretation, consideration must be given to the consequences that will flow from a particular interpretation. [Citation.] In this regard, it is presumed the Legislature intended reasonable results consistent with its expressed purpose, not absurd consequences. [Citations.] ‘[W]here the language of a statutory provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted.’ [Citation.]

(*Harris v. Capital Growth Investors XIV* (1991) 52 Cal. 3d 1142, 1165-1166.)
[93 Cal. App. 4th 894]

2. Consequences of interpreting the statutes to define GoGo as a TCP or TNC

Interpreting the statutes to define GoGo as a TCP or TNC would lead to the absurd consequence of subjecting GoGo to requirements with which it cannot practicably comply.

For example, Section 5374 and Section 5445.2, as implemented by General Order 157-E, require TCPs and TNCs to identify their drivers, to register them in the California Department of Motor Vehicle's Employer Pull Notice Program and to regularly check their driving records, to establish a driver safety education and training program for all drivers, and to institute a mandatory controlled substance and alcohol testing certification program for TCP drivers and a zero-tolerance intoxicating substance policy for TNC drivers. In addition, D.16-04-041 requires that all TCPs including TNCs maintain records demonstrating that all of their vehicles and their drivers' vehicles are regularly inspected by a facility licensed by the California Bureau of Automotive Repair at the appropriate 12-month or 50,000-mile mark and shown to pass the 19-point checklist required by D.13-09-045.

GoGo procures rides for its customers from TNCs. It does not have vehicles or drivers. As a result, GoGo cannot practicably comply with these statutory and regulatory requirements because it has no information as to the identity of the TNC driver or their vehicle in advance of procuring them through the TNC for a specific ride.²

CPED argues there are entities, such as those that it identifies in its opening brief, that hold TCP or TNC permits that do not own their own vehicles and/or "hire" drivers. (CPED opening brief, pp. 6-7 and 9; CPED reply brief, p. 5.) CPED misses the point, which is whether it is feasible for GoGo to comply with these statutory mandates. GoGo reasonably suggests the likelihood that, like Lyft and Uber and many TCPs that contract with subcarriers, the TCPs and TNCs that CPED identifies have the means to identify the vehicles and the drivers that they dispatch and thus the capability to ensure the safety of the vehicles and the drivers. (GoGo reply brief, pp. 8-10.) In any event, as CPED improperly raises these factual allegations for the first time in its brief and they are not in evidence, we cannot rely on them for their truth.

² CPED correctly observes that owning or leasing vehicles is not determinative of whether an entity is a TCP or TNC and that Uber does not own any vehicles or employ any drivers. (CPED reply brief, p. 4.) However, Lyft and Uber contract with their drivers and are thereby able to identify them and their vehicles, unlike GoGo.

3. Reasonable results consistent with expressed purpose

In addition to the driver and vehicular safety requirements, the statutes and Commission decisions require TCPs and TNCs to maintain liability insurance against passenger claims. We consider whether GoGo's activities present an incremental risk to the public such that it would be reasonable to subject it regulation as a TCP or TNC for this purpose. We conclude that they do not.

The Legislature has determined the amount and breadth of liability insurance that TCPs and TNCs must maintain to meet the public interest. GoGo's activities do not place its customers at any greater risk of injury than a passenger that obtains a Lyft or Uber ride directly by using their own smartphone. There is no rational basis to require GoGo to maintain liability insurance as an additional source of compensation in the event of a passenger injury.

CPED argues that GoGo has not demonstrated that its customers would be covered by Lyft's and Uber's liability insurance. As an initial matter, CPED bears the burden to prove a *prima facie* case supporting the issuance of this citation. (Resolution ALJ-299, Appendix A, Rule 11.) That requires presenting a case that Lyft's and Uber's liability insurance does *not* cover GoGo's customers in the same manner as other passengers. CPED presents no such case.

Furthermore, the record evidence demonstrates that Lyft's and Uber's liability insurance *does* cover GoGo's customers in the same manner as other passengers. It includes examples where Lyft and Uber covered damages to GoGo's customers involved in automobile accidents while riding in an Uber or Lyft driver's vehicle (Ex. 4, p.12; RT 106:15-107:14 and 109:6-17); the Lyft concierge agreement with GoGo that states that Lyft's limitation of liability "shall not apply to ... nor shall it limit the scope of Lyft's commercial automobile liability policy" (Ex. G to Ex. 1); and Lyft and Uber both offer declarations to the effect that their insurance policies would cover GoGo's customers the same as any other passengers. (Ex. 7 and Ex. 8.)

CPED argues that GoGo should be required to maintain TCP or TNC liability insurance against injury to its customers because they may be at higher risk than other TNC passengers. CPED cites to Lyft's declaration that incidents related to a passenger entering and exiting the vehicle are often ambiguous and require a case-by-case investigation to ascertain whether it is covered by TNC insurance. CPED argues that, as a result, "[s]eniors being a majority of GoGo's customers would be placed in a more vulnerable position." (CPED opening brief, p. 12.) This argument is without merit. Requiring GoGo to maintain TNC liability insurance does not alleviate the ambiguity regarding whether an incident related to entering and exiting a vehicle is covered pursuant to statutory and regulatory requirements.

CPED also argues that GoGo should be regulated as a TCP or TNC because GoGo has received a “significant number” of public complaints regarding its service that are “quite disturbing and disheartening.” (CPED opening brief, pp. 18-19, Attachment A.) The public complaints that CPED identifies are Yelp reviews displayed on October 2017, April 2018 and September 2018, each containing a range of ratings from one star to five, and each earning an average rating of 2 ½ or 3 ½ stars. The negative reviews generally reflect instances where the TNC driver and GoGo’s customer were unable to find each other, the TNC driver canceled the ride, or the customer was unhappy with the wait, duration or route of the ride. CPED makes no showing that these service quality issues are regulated either by statute or Commission regulation.

CPED also argues that the Commission should regulate GoGo as a TNC in order to protect against GoGo’s disclosure of a customer’s person information pursuant to Section 5437 and to ensure that GoGo provides its customers with the TNC driver’s name and license plate number as required by Section 5445.1. (CPED opening brief, p. 20.) These requirements are incidental to the manifest purpose of the TCP and TNC statutes and the Commission’s authority over TCPs and TNCs. They do not independently confer that authority.

4. Precedent

In interpreting Sections 5360 and 5431(c), we also consider Commission precedent. Decision (D.) 93 06 034 (*Tower Tours*) considered whether a broker or agent for charter party carrier services operated by other persons who hold TCP authority is thereby a TCP. It determined that they do not:

Someone who operates no vehicles, does not hold out nor advertise itself as TCP, and does little more than book space and sell tickets for a TCP is not operating as a TCP and is not subject to the jurisdiction of this Commission. (*In re Golden Bay Tour Company dba Tower Tours Agency*, 1993 Cal. PUC LEXIS 474, *10, 49 CPUC2d 506.)

Similarly, GoGo acts as an agent for its customers, operates no vehicles, does not hold out itself or advertise itself as a TCP, and does little more than operate TNCs’ API portals on behalf of its customers.

CPED argues that *Tower Tours* is distinguishable because the entity subsequently applied for and was granted a TCP certificate in 2003. (CPED reply brief, p.3.) This fact is wholly uninformative. There is nothing in the record regarding whether *Tower Tours*’ operations were identical in 1993 and in 2003 or whether, as is more likely,

Tower Tours expanded its activities to include passenger charter party carrier services requiring that authority.

CPED also argues that *Tower Tours* is distinguishable because the entity sold tickets for tours while GoGo's customers are "vulnerable passengers who would not otherwise have access to transportation services." (CPED reply brief, pp. 3 4.) This argument has no basis in law or fact. There is no legal authority for CPED's suggestion that D.93-06-034 turns on the fact that Tower Tours offered leisure transportation. Furthermore, there is no evidence that GoGo's customers would not have access to transportation but for GoGo.

5. Request for rulemaking

Because we find that GoGo is not a TCP or TNC, we do not reach GoGo's request that the Commission consider modifications to GoGo's operations that would take it out of our jurisdiction.

CPED recommends that, if the Commission determines for policy reasons that entities such as GoGo should not be considered TNCs, we open a rulemaking to determine the type of permit that they should be required to obtain. (CPED opening brief, p. 27.) Because we find that GoGo is not a TCP or TNC as a matter of law, we do not reach or consider CPED's request.

6. Conclusion

For all these reasons, we conclude that GoGo is not a TNC or a TCP and dismiss the citation.

COMMENTS

Pub. Util. Code § 311(g)(1) requires that a draft resolution be served on all parties and be subject to a public review and comment period of 30 days or more, prior to a vote of the Commission on the resolution. A draft of today's resolution was distributed for comment by the parties.

CPED served comments on the draft resolution on September 18, 2019, reiterating the arguments made in its opening and reply briefs. The draft resolution addressed CPED's arguments and there is no cause to revise the draft resolution to address them further.

CONCLUSION OF LAW

GoGo Technologies dba GoGoGrandparent is not a transportation network company or otherwise a charter-party carrier.

THEREFORE, IT IS ORDERED that:

1. Citation No. F-5517 is dismissed.
2. This proceeding is closed.

This resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on _____, the following Commissioners voting favorably thereon:

ALICE STEBBINS
Executive Director