PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

January 3, 2020

Agenda ID #18072
Alternate to Agenda ID #17707

TO PARTIES OF RECORD IN ALTERNATE RESOLUTION ALJ-371

Enclosed is the Alternate Resolution of Commissioner Randolph to the Draft Resolution of Administrative Law Judge (ALJ) Yacknin previously mailed to you. This cover letter explains the comment and review period and provides a digest of the alternate resolution.

When the Commission acts on the alternate resolution, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own order. Only when the Commission acts does the alternate resolution become binding on the parties.

Public Utilities Code Section 311(e) requires that an alternate to a draft resolution or to a decision subject to subdivision (g) be served on all parties, and be subject to public review and comment prior to a vote of the Commission.

You may serve comments on the alternate resolution. Opening comments shall be served no later than January 27, 2020, and reply comments shall be served no later than February 3, 2020. Service is required on all persons on the attached service list and comments shall be served consistent with the requirements of Pub. Util. Code § 311(g) and Rule 14.5 of the Rules of Practice and Procedure.

Finally, comments must be served separately on Administrative Law Judge Yacknin at hsy@cpuc.ca.gov and Commissioner Randolph's advisor, Mark A. Smith, at msh@cpuc.ca.gov. For that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ JEANNE McKINNEY for
Anne E. Simon
Chief Administrative Law Judge

AES: jt2

Attachments

ATTACHMENT

Agenda ID #18072
Alternate to Agenda ID #17707
2/6/2010
CPUC01 #322027905

DIGEST OF DIFFERENCES BETWEEN ADMINISTRATIVE LAW JUDGE YACKNIN'S PROPOSED RESOLUTION AND THE ALTERNATE PROPOSED RESOLUTION OF COMMISSIONER RANDOLPH

Pursuant to Public Utilities Code Section 311(e), this is the digest of the substantive differences between the draft resolution of Administrative Law Judge Hallie Yacknin and the alternate draft resolution of Commissioner Liane Randolph.

There is no difference in outcome—Citation No.F-5517 is dismissed. Additionally, the reasoning for the dismissal is the same in that both the PD and Alternate find that GoGo Technologies is not a TNC. However, the Alternate makes this finding for purposes of the Citation Appeal proceeding only. The Alternate finds that a Rulemaking proceeding is the more appropriate venue; a Citation Appeal proceeding is an inappropriate venue for a final determination on GoGo's regulatory status.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Alternate Resolution ALJ-371
Administrative Law Judge Division
[Date]

ALTERNATE DRAFT RESOLUTION

ALTERNATE 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. For purposes of this proceeding of a citation appeal, 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 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.

[1] All subsequent references are to the Public Utilities Code.

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 for purposes of this proceeding of a citation appeal that it is neither, we do not reach GoGo's further assertions.

DISCUSSION

1. Ambiguity

In its brief, GoGo challenges CPED's interpretation of Sections 5360 and 5431(c) as applied to it and to other, similar "concierge services." (GoGo opening brief, pp. 38-40.) As in all Commission cases, when statutory language is unambiguous, the Commission can determine the intent from the plain meaning of the language itself. (*Carlton Browne & Co. v. Super. Ct.* (1989) 210 Cal.App.3d 35, 40.) On the other hand, when an ambiguity exists, the Commission may look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. (*Estate of Griswold v. See* ("*Griswold*") (2001) 25 Cal.4th 904, 911.) An ambiguity exists "when language as applied to a concrete dispute is reasonably susceptible of different, plausible, meanings." (*Cal. Dept. of Human Resources v. Service Employees Internat. Union, Local 1000* (2012) 209 Cal.App.4th 1420, 1430 [contract interpretation]; see also *In re C.C.* (2009) 178 Cal.App.4th 915, 922 [the meaning of language generally hinges on its application to a given set of facts]; *Missionary Guadalupanas of Holy Spirit Inc. v. Rouillard* (2019) 38 Cal.App.5th 421, 427

[ambiguity analysis requires consideration of "whether the language of the law in question is ambiguous as applied to the circumstances presented."].) In addressing ambiguity, the Commission must "select the construction that comports most closely with the apparent intent…with a view to promoting rather than defeating the general purpose…, and avoid an interpretation that would lead to absurd consequences." (*Griswold* at p. 911.)

Here, as applied to the facts and circumstances in this dispute, several provisions of sections 5360 and 5431(c) are ambiguous.

As applied here, 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 as applied in this instance. 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.)

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 subject GoGo to requirements with which it cannot practicably comply nor is GoGo's compliance necessary to effectuate the statutory purposes of these sections.

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 coordinates with licensed TNCs to connect riders to those TNCs. GoGo accesses the Uber and Lyft platforms through each of those companies' Application Program Interface (API) Portal. The API Portal allows an entity the ability to request a ride by using a computer as opposed to a smartphone. It does not have vehicles or drivers nor does GoGo have any visibility into how the TNC will provide the service once the rider

has been linked to the TNC. 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 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.

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.

[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. (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.

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 hailed using GoGo 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 personal 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 not persuasive. 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 in this proceeding we tentatively 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 an Order Instituting Rulemaking (OIR) to determine the type of permit that they should be required to obtain. (CPED opening brief, p. 27.)

Both GoGo and CPED have separately requested that an OIR be opened. Due to the range of possible business configurations across the spectrum spanning from clearly a TCP or TNC to clearly not a regulated entity, the Commission may want to consider opening an OIR. This may be especially helpful if further instances of ambiguous regulatory control arise. Alternatively, an existing proceeding may be rescoped to include a review of what elements need to exist to be within or outside our jurisdiction. An OIR is a more appropriate venue than a citation appeal.

6. Conclusion

For all these reasons, for this proceeding in which we are considering a citation appeal, 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.

CONCLUSION OF LAW

For purposes of a citation appeal, we find that 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

COM/LR1/jt2

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

INFORMATION REGARDING SERVICE

I have electronically served all persons on the attached official service list who have provided an e-mail address for Resolution ALJ-371.

Upon confirmation of this document's acceptance for filing, I will cause a Notice of Availability of the document to be served by U.S. mail on all parties listed in the "Party" category of the official service list for whom no e-mail address is provided.

Dated January 3, 2020, at San Francisco, California.

/s/ JOYCE TOM
Joyce Tom

N O T I C E

Persons should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

* *

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074 or TDD# (415) 703-2032 five working days in advance of the event.

********** SERVICE LIST K1903015**********
Last Updated on 02-JAN-2020 by: AMT

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