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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on
Regulations Relating to Passenger
Carriers, Ridesharing and New Online
Enabled Transportation Services.

Rulemaking 12-12-011

DECISION ON DATA CONFIDENTIALITY ISSUES TRACK 3

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DECISION ON CONFIDENTIALITY ISSUES TRACK 3

Summary

This decision reverses a policy the Commission adopted in 2013 that allowed entrants into the newly regulated “ride-sharing” transportation industry, known as Transportation Network Companies (TNCs), to submit their annual reports required by the Commission on a confidential basis. The presumption of confidentiality was acknowledged at a time when TNCs were a nascent transportation service, and the Commission accepted the representations that failure to grant confidentiality to the annual reports, particularly the disaggregated data contained therein, might compromise sensitive information and place the compliant TNCs in an unfair competitive disadvantage. For the past six years, the TNCs have submitted their annual reports to Commission staff on a presumed confidential basis.

But the Commission has since obtained a greater understanding of the TNC operations, which requires that the confidentiality presumption attendant to the TNC annual reports be ended. As there are no apparent competitors that can rival Uber and Lyft’s market-share dominance, the suggestion that producing their annual reports could place them in an unfair competitive disadvantage lacks factual support.

As a result of these changed factual circumstances, the Commission will no longer permit TNC annual reports to be submitted confidentially.

Decision 13-09-045 will be modified to delete footnote 42. Going forward, the Commission adopts the protocol, with some modifications, set forth in the Commission’s General Order 66-D, effective January 1, 2018, and places the burden on each TNC to establish, by way of a noticed motion and supporting declaration, that its annual reports should not be made publicly available. The

Commission's newly adopted approach in this proceeding aligns with California's policy that public agencies conduct their business with the utmost transparency, and that absent a compelling reason to the contrary, information provided by a TNC to the Commission should be available to the public.

Finally, while this decision applies on a prospective basis, the Commission is aware that the parties, as well as public and nonprofit entities, have expressed a continuing interest in obtaining unredacted copies of the TNC annual reports submitted from 2014 through 2019. The Commission defers to the assigned Commissioner and assigned Administrative Law Judge to determine, by way of an appropriate procedural vehicle, if any or all previously filed TNC annual reports should be made available to the parties on the service list and to the public.

This proceeding remains open.

1. Background

1.1. Decision 13-09-045, Data Reports, and Footnote 42

On December 20, 2012, the Commission opened this proceeding in order to adopt rules, regulations, and reporting requirements that would apply to the Transportation Network Companies (TNCs) that had begun operating in San Francisco and have subsequently expanded their operations throughout California and the rest of the United States. In its first decision (Decision (D.) 13-09-045),¹ the Commission adopted specific safety requirements and regulatory requirements, the latter also requiring each TNC to file annual

¹ *Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry.*

reports, covering specific reporting categories, with the Commission's Safety Enforcement Division, that covered:

- ***Data on drivers:*** (number of drivers that became eligible and completed the TNC's driver training course; average and median number of hours and miles each TNC driver spent driving for the TNC);²
- ***Data on traffic incidents and accidents:*** (the cause of the incident, the amount paid, if any, for compensation to any party in each incident; date and time of the incident; amount that was paid by the driver's insurance, the TNC's insurance, or any other source; and the total number of incidents during the year);³
- ***Data on zero-tolerance complaints regarding drugs and alcohol:*** (number of drivers 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);⁴
- ***Data on TNC trips*** (accepted requests): (the number of rides requested and accepted by TNC drivers within each zip code where the TNC operates; the date, time, and zip code of each request; the concomitant date, time, and zip code of each ride that was subsequently accepted; for each ride accepted, the zip codes of where the ride began and ended, the miles traveled, and the amount paid/donated);⁵
- ***Data on TNC trips*** (unaccepted requests): (the number of rides that were requested but not accepted by TNC drivers within each zip code where the TNC operates; concomitant date, time, and zip code of each ride that was not accepted);⁶ and

² D.13-09-045 at 27.

³ *Id.*, at 32.

⁴ *Id.*, at 32.

⁵ *Id.*, at 31-32.

⁶ *Id.*, at 31-32.

- ***Data on accessibility:*** (the number and percentage of their customers who requested accessible vehicles, and how often the TNC was able to comply with request for accessible vehicles; description of any instances or complaints of unfair treatment or discrimination of persons with disabilities; and necessary improvements (if any), and additional steps to be taken by the TNC to ensure that there is no divide between service provided to the able and disabled communities).⁷

While the Commission permitted these annual reports to be submitted confidentially per footnote 42, there was no intent on the Commission's part to treat the reports required by D.13-09-045 as confidential in perpetuity. In fact, the Commission has the authority, after giving notice to the parties and giving them an opportunity to be heard, to "rescind, alter, or amend any order or decision made by it."⁸ Thus, the Commission has the inherent power to modify an order or decision if warranted by changed factual circumstances, law, or a legislative directive.⁹

In addition to being able to modify its prior orders, the Commission also has the authority and duty to independently evaluate the legal and factual sufficiency of future TNC claims of information confidentiality. In fact, in a subsequent ruling in the instant proceeding, the assigned Commissioner and Administrative Law Judge rejected a request from Uber to file documents and responses to a ruling under seal, finding that Uber had failed to meet its burden of proving that the subject documents were confidential. (*See Assigned*

⁷ *Id.*, at 30-31, 33-34, and 54.

⁸ Pub. Util. Code § 1708.

⁹ Interested persons may also petition the Commission to adopt, amend, or repeal a regulation pursuant to Pub. Util. Code § 1708.5.

Commissioner's and Administrative Law Judge's Ruling Denying Motion of Uber Technologies, Inc. for Leave to File the Confidential Version of its Response to Assigned Commissioner and Administrative Law Judge's Ruling Under Seal (September 4, 2015); and D.16-01-014, wherein the Commission rejected Rasier-CA's claims of trade secret protection as to trip data.¹⁰⁾

1.2. Decision 16-04-041

As the TNC industry continued to grow and modify its business model, the Commission realized that it was necessary for the effective oversight of this industry that additional data reports were necessary. Thus, the Commission adopted D.16-04-041 and required the TNCs to submit additional reporting data on the following subjects:

- *Data on driver suspensions:* (identification of TNC drivers suspended or deactivated for any reasons relating to safety and/or consumer protection);¹¹
- *Data on traffic incidents and accidents arising from the TNC fare-splitting services such as UberPOOL:* (complaint, incidents, and the cause of each incident; the amount paid, if any, for compensation to any party in each incident; and amounts paid for compensation to any party in each incident if the amount is known by the TNC);¹²

¹⁰ *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 at 104-117, Conclusion of Law Nos. 17 and 18.*

¹¹ D.16-04-041 at 24.

¹² *Id.*, at 49.

- *Data on zero-tolerance complaints:* (identification of TNC drivers suspended or deactivated for violation of the zero-tolerance policy);¹³
- *Data on assaults and harassments:* (identification of TNC drivers suspended or deactivated for assaulting, threatening, or harassing a passenger or any member of the public while providing TNC services);¹⁴
- *Data on “Off-Platform” trip solicitations by drivers:* (identification of TNC drivers suspended or deactivated for soliciting business that is separate from those arranged through the TNC’s app);¹⁵ and
- *Data on shared/pooled rides:* (report on how fare-splitting operation has impacted the environment; report on structure of fares for split fare rides; and data on the number of TNC vehicles that have traveled more than 50,000 miles within a year).¹⁶

1.3. Data Template and Data Requests from the Commission’s Consumer Protection and Enforcement Division

As needed, the Commission Consumer Protection and Enforcement Division (CPED) has supplemented the reporting requirements in D.13-09-045 and D.16-04-041 by propounding data requests and by supplying the TNCs with granular data categories that the TNCs needed to fill out in order for the development of the annual report template. For example, with respect to data on traffic incidents and accidents, CPED asked each TNC to provide: the Waybill

¹³ *Id.*, at 24.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*, at 56.

number of the trip,¹⁷ complaint identification number, name of driver and driver identification number, vehicle identification number, incident and accident location (by latitude, longitude, and zip code), date and time complaints were filed and resolved, cause of the incident, outcome or status of investigation of each incident or accident, and whether an incident or accident occurred during a trip involving fare-splitting.

1.4. Amended Phase III.C. Scoping Memo and Ruling of Assigned Commissioner

In view of the changes that the Commission adopted for the procedural requirements and the showing a party would have to make to substantiate a claim of confidentiality, the Commissioner issued her *Amended Phase III. C. Scoping Memo and Ruling (Amended Scoping Memo)* which identified various confidentiality issues, including whether footnote 42 should be eliminated or modified, and if a TNC, instead of automatically submitting its annual reports as confidential, must comply with the procedural requirements and factual showing required by General Order 66-D. The specific questions are set forth in Section Two of this decision, under the heading **Issues for Resolution**.

On November 6, 2019, the Assigned Administrative Law Judge issued a *Ruling* requiring parties to file opening comments to the confidentiality issues set forth in the *Amended Scoping Memo* by December 3, 2019, with reply comments due on December 20, 2019. The following parties filed opening comments: San Francisco Taxi Workers Alliance, Uber, Lyft, METRANS Transportation Center, Joint Comments (from the San Diego Association of Governments, Sacramento Area Council of Governments, and Metropolitan Transport),

¹⁷ Required by General Order 157-E, Part 3.01 (Prearranged Transportation).

HopSkipDrive, San Francisco Municipal Transportation Agency, San Francisco County Transportation Authority, San Francisco City Attorney's Office, San Francisco International Airport, and University of California, Davis Policy Institute for Energy, the Environment and the Economy, American Automobile Association of Northern California, Nevada and Utah, and the Los Angeles Department of Transportation. The following parties filed reply comments: HopSkipDrive, Uber, TechNet, SFTWA, Electronic Frontier Foundation, Lyft, and San Francisco International Airport, Office of the City Attorney for San Francisco, San Francisco Municipal Transportation Agency, San Francisco County Transportation Authority, the Los Angeles Department of Transportation, METTRANS Transportation Center, and the Silicon Valley Leadership Group.

Uber and Lyft are most vocal in their opposition to the possible elimination of footnote 42. Lyft, in particular, cites a plethora of California and out of state decisions to support its claims that data in the annual reports are confidential trade secrets protected from disclosure by Government Code §§ 6254(k) and 6255(a), Evidence Code §§ 1040(b)(2) and 1060, Civil Code §§ 1798 *et seq* and 3426.1(d), Pub. Util. Code § 583, and the Commission's General Order 66-C, which has been superseded by General Order 66-D.

The government entity parties are equally passionate about wanting to obtain unfettered access to the TNC Annual Reports. They set forth a number of beneficial policy reasons that they believe justify both the elimination of footnote 42, but also lay the groundwork for them to see the disaggregated TNC data in the Annual Reports so that they can make necessary transportation, environmental, and infrastructure decisions to address the impact that TNC drivers are having in their respective jurisdictions.

We discuss these comments, as needed, in the balance of this decision.

2. Issues for Resolution

- Should the Commission revise D.13-09-045 and eliminate or modify footnote 42, which instructed TNCs to file confidentially the reports required by D.13-09-045?
- Should the Commission deem that reports the TNCs must file pursuant to D.13-09-045 should not automatically be treated as confidential?
- Should the Commission deem that reports the TNCs must file pursuant to any decision issued in this proceeding should not automatically be treated as confidential?
- If a TNC wishes to claim that any reports it is required to file pursuant to a decision issued in this proceeding are protected from public disclosure on the grounds of either trade secrets, privacy, or any other claim of confidentiality, must the TNC file a motion for confidential treatment and comply with the requirements in D.17-09-023 (*Phase 2A Decision Adopting General Order 66-D an Administrative Processes for Submission and Release of Potentially Confidential Information*) and General Order 66-D for establishing a claim for confidential treatment?

In responding to the foregoing questions, the *Amended Scoping Memo* instructed parties to state all facts and supporting authorities to support or dispute a TNC's claim that the contents of any reports that are required to be filed pursuant to a decision issued in this proceeding are protected from public disclosure.

3. Discussion and Analysis

3.1. The Public's Right to Information

The California Constitution, Article I, § 3(b)(1), is clear that the public has a constitutional right to access most government information:

The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of

public bodies and the writings of public officials and agencies shall be open to public scrutiny.¹⁸

The California Constitution also states that statutes, court rules, and other authority limiting access to information must be broadly construed if they further the people's right of access, and narrowly construed if they limit the right of access.¹⁹ Rules that limit the right of access must be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.²⁰

The California Public Records Act (CPRA) requires that public agency records be open to public inspection unless they are exempt from disclosure under the provisions of the CPRA.²¹ "Public records" are broadly defined to include all records "relating to the conduct of the people's business"; only records of a purely personal nature fall outside this definition.²² Since records received by a state regulatory agency from regulated entities relate to the

¹⁸ See, e.g., *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 328-329.

¹⁹ Cal. Const., Article 1, § 3(b)(2): "A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest." (See, e.g., *Sonoma County Employee's Retirement Assn. v. Superior Court (SCERA)* (2011) 198 Cal.App.4th 986, 991-992.)

²⁰ *Id.*

²¹ *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370: "The Public Records Act, section 6250 et seq., was enacted in 1968 and provides that "every person has a right to inspect any public record, except as hereafter provided." (§ 6253, subd. (a).) We have explained that the act was adopted "for the explicit purpose of 'increasing freedom of information' by giving the public 'access to information in possession of public agencies.'" (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651 [citation omitted])."

²² See, e.g., *Cal. State University v. Superior Court* (2001) 90 Cal.App.4th 810, 825.

agency's conduct of the people's regulatory business, the CPRA definition of public records includes records received by, as well as generated by, the agency.²³

Further, the Legislature has declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."²⁴ An agency must base a decision to withhold a public record in response to a CPRA request upon the specified exemptions listed in the CPRA, or a showing that, on the facts of a particular case, the public interest in confidentiality clearly outweighs the public interest in disclosure.²⁵ The CPRA favors disclosure, and CPRA exemptions must be narrowly construed,²⁶ meaning the fact that a record may fall within a CPRA exemption does not preclude the agency from disclosing the record if the agency believes disclosure is in the public interest. Unless a record is subject to a law prohibiting disclosure, CPRA exemptions are permissive, not mandatory; they allow nondisclosure but do not prohibit disclosure.²⁷ The CPRA requires the

²³ See Cal. Gov't Code §§ 6252(e).

²⁴ Cal. Gov't. Code § 6250.

²⁵ Cal. Gov't. Code § 6255(a): "The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."

²⁶ Cal. Const., Article 1, § 3(b)(2), *supra*. See, e.g., *American Civil Liberties Union of Northern California v. Superior Court (ACLU)* (2011) 202 Cal.App.4th 55, 67; and *SCERA, supra*, 198 Cal.App.4th at 991-992.

²⁷ See, e.g., *CBS, Inc. v. Block, supra*, 42 Cal.3d at 652; *ACLU, supra*, 202 Cal. App. 4th at 67-68 fn. 3; Cal. Gov't. Code § 6253(e); *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 905-906; *Black Panthers v. Kehoe* (1974) 42 Cal.App.3d 645, 656; *Re San Diego Gas & Electric Company (SDG&E)* (1993) 49 Cal.P.U.C.2d 241, 242; and D.05-04-030, at 8.

Commission to adopt written guidelines for access to agency records, and requires that such regulations and guidelines be consistent with the CPRA and reflect the intention of the Legislature to make agency records accessible to the public.²⁸

In *Re Sierra Pacific Power Company* (1988) 28 CPUC2d 3, the Commission has relied on the foregoing policy favoring open access and transparency to its regulatory proceedings to reject a utility's unsubstantiated confidentiality claims:

The Commission intends to continue the policy of openness as enunciated in the *Pacific Bell* decision and will expect the utility to fully meet its burden of proving that the material is in fact confidential and that the public interest in an open process is outweighed by the need to keep the material confidential. Granting confidentiality to the contract terms requested by Sierra would unduly restrict scrutiny of the reasonableness of fuel costs and operations. We conclude that Sierra has not adequately demonstrated that any harm to it would occur; therefore, we will deny the request for confidentiality in this order. We believe that Sierra's ratepayers are best served and protected by open disclosure of contract terms.²⁹

A similar result is dictated by the facts of the instant proceeding, even though we are dealing with a party's duty to comply with annual reporting requirements imposed by the Commission rather than a CPRA request. The purpose behind the annual reports that each permitted TNC was ordered to submit was to give the Commission, and the parties, a better understanding of each TNC's operations. In turn, the information assists the Commission and staff in

²⁸ Cal. Gov't. Code § 6253.4(b): "Guidelines and regulations adopted pursuant to this section shall be consistent with all other sections of this chapter and shall reflect the intention of the Legislature to make the records accessible to the public...."

²⁹ 28 CPUC 2d at 11.

determining what follow up investigations are needed at the staff level, and whether the Commission should expand the scope of the proceeding to facilitate the issuance of additional decisions regarding TNC functions.

3.2. Footnote 42 and its Presumption of Confidentiality Must be Reversed

Since initially permitting TNCs to file their annual reports confidentially, there have been three important developments that have caused this Commission to conduct a fresh consideration of whether any of the information required by the annual reports should be confidential and protected from public disclosure: (1) lack of viable competition in the TNC industry; (2) the Commission's adoption of stricter standards for establishing a claim of confidentiality; and (3) the heightened public interest in obtaining unredacted TNC annual reports. We discuss each of these developments below.

3.2.1. The Lack of Viable Competition in the TNC Industry Undermines the Previously Articulated Confidentiality Claims

The level of competition in the TNC industry has altered significantly since the Commission opened this proceeding. Initially, there were three visible competing TNCs (Uber [operating through its wholly owned subsidiary Rasier-CA]; Lyft; and SideCar) and at the start of this proceeding there was scant information regarding each company's market share. Over time, the number of regulated TNCs has grown to 17, yet 15 of these TNCs are either of the niche

variety in that they service a discrete customer base³⁰ or serve the general public but on a much smaller scale than Uber and Lyft.³¹

In contrast, Uber and Lyft dominate the TNC market in California. They are mature and robust operations that, because of their size, occupy a duopoly status (*i.e.* two companies who own all or nearly all of the market for a given product or service) in the TNC California market.³² We reach this conclusion by examining the data submitted to the Commission since 2014 on the number of rides that have been completed on an annual basis that has been provided by Uber and Lyft. The total rides provided by these two companies exceeds one billion. By comparison, the number of rides provided by the remaining TNCs that are currently permitted and operational in California is slightly above one million. Uber and Lyft's total rides gives them a greater than 99.9% TNC market share compared to the remaining TNC participants' total rides.

When we look at the stark contrast in market share positions, the question we must ask is this – who are Uber and Lyft's competitors from whom the annual reports must be shielded? In their comments, neither Uber nor Lyft point to a specific competitor that could rival their market share, or undermine their unquestioned dominance in California's TNC industry, if their annual reports were made public. Instead, in their comments, Uber and Lyft refer to

³⁰ The following TNCs specialize either in transporting minors (Superior Car Service, Pawar Transportation LLC, HopSkipDrive, Inc., Zum Services, Inc., Kango, and Adroit Advanced Technologies, Inc.) or seniors (Silverride LLC and Onward Care, Inc.).

³¹ TNCs serving the general public are Wingz, Opoli, Bounce, Via, Ziro Ride LLC, Ridvy, and U-Hop, Inc.

³² By Uber's own account, "nearly 4 million Uber trips happened every day in the US – more than 45 rides every second." (Uber's 2017-2018 US Safety Report at 10.)

competitors in opaque terms, thus failing to substantiate that their claims of an unfair competitive disadvantage have any factual validity.³³ Similarly, Uber and Lyft's declarations and representations attendant to their annual reports, even those submitted after General Order 66-D became effective on January 1, 2018, are equally vague as they fail to identify a single competitor that could rival them.³⁴ In sum, with respect to Uber and Lyft's concerns about other potential rivals obtaining an unfair competitive disadvantage, both Uber and Lyft fail to identify a single competitor with the same or similar sized scope of operations, market capitalization, infrastructure, number of drivers who utilize their apps, or number of passengers who subscribe to their apps. Based on the information that has been developed to date, the Commission fails to see any California permitted TNC, or a TNC that is waiting in the wings, who could be a viable competitor to either Uber or Lyft that would use the disaggregated data to Uber and Lyft's disadvantage.

³³ See Uber's Opening Comments (December 3, 2019) at 7 (the release of unredacted reports "could give Uber's competitors an unfair business advantage and be used by competitors to target potential business opportunities that negatively impact Uber."); and Lyft's Opening Comments (December 3, 2019) at 11 ("Lyft's trip data is extremely valuable to Lyft's competitors. ... The release "would allow a competitor to tailor its operations more effectively by taking the data that Lyft has generated[.]")

³⁴ For Uber, see letter from Lisa P. Tse (December 15, 2016); letter from Nancy Allred (September 19, 2015); letter from Nancy Allred (September 19, 2016); letter from Christopher T. Ballard (September 19, 2017); Declaration of Anna Uhls, ¶4; Declaration of Tom Maguire ¶3; letter from Tom Maguire (September 19, 2018); Declaration of Jane Lee, ¶4; and Declaration of Shivani Sidhar, ¶4. For Lyft, see letter from Andrea Ambrose Lobato (September 16, 2015); letter from Anthony Albert (November 12, 2015); letter from Whitney Hudak (November 11, 2014); letter from Andrea Ambrose Lobato (September 19, 2016); Declaration of Kelly Kay, ¶¶ 5-10; Declaration of Andrea Lobato, ¶¶ 6, 7, 10, 12, 18, 23, 31, 33, 38, and 44; Declaration of Brett Collins, ¶¶ 7, 10, 14, 16, 19, 21, 27, 32, 37, 40, and 42.

Nor is the Commission aware of any information to suggest that the public release of the annual reports would create an unfair competitive disadvantage between Uber and Lyft. Neither company identifies the other as a competitor against whom the unredacted annual report information must be shielded. Instead, they argue that their redacted information must be protected against unnamed competitors who have not yet entered the TNC market.³⁵ These two dominant companies began operations at about the same time and operate in the major transportation markets throughout California. The following examples, taken from their Terms of Service and other publicly available information sources, demonstrate the similarity of their operations:

Pricing

- Location dependent pricing where the price of a ride depends on the passenger's location, time of day and traffic.³⁶
- Both raise prices when demand is high, something Uber calls surge pricing and Lyft calls Prime Time.³⁷
- A warning is given to the passenger if a fare is subject to higher pricing due to demand.³⁸

³⁵ See, e.g., Lyft's Opening Comments (December 3, 2019) at 11 ("TNCs are an emerging market and there is significant competition among companies seeking to gain and establish entry into this market."); Declaration of Andrea Lobato, ¶¶ 13 (same) and 23 ("Lyft's competitors (actual and potential) would obtain economic value from the disclosure of this information[.]"); and Declaration of Brett Collins, ¶ 40 (repeating above text from Lyft's Opening Comments).

³⁶ Understanding Lyft Fees for Passengers and Drivers, January 15, 2020, available at: <https://www.ridester.com/lyft-fees/>; Uber How are fares calculated?, available at: <https://help.uber.com/riders/article/how-are-fares-calculated/?nodeId=d2d43bbc-f4bb-4882-b8bb-4bd8acf03a9d>.

³⁷ Uber How surge pricing works, available at: <https://www.uber.com/us/en/drive/partner-app/how-surge-works/>; How Lyft Works: 6 Things to Know Before Your First Ride, Lyft Blog, available at: <https://blog.lyft.com/posts/how-does-lyft-work>.

- Passengers can see an estimated cost of a ride prior to booking.³⁹
- Passengers can take advantage of periodic discounts.⁴⁰
- Various in-app payment options are provided to passengers, *e.g.* credit card Apple Pay and PayPal.⁴¹
- Both offer an option to purchase subscription services. Uber offers a monthly Ride Pass for \$25 that gives you a 20% discount off rides and protection from surge pricing while Lyft offers 30 rides in 30 days for a set fee.⁴²

Information Storage

- There are options within the app to save a passenger's home, work or other address for easy access.⁴³

Vehicle Options

- Both offer an array of vehicle options, from a four-door car to a large SUV.⁴⁴

³⁸ Uber How surge pricing works, available at: <https://www.uber.com/us/en/drive/partner-app/how-surge-works/>; How Lyft Works: 6 Things to Know Before Your First Ride, Lyft Blog, available at: <https://blog.lyft.com/posts/how-does-lyft-work>.

³⁹ Lyft How to estimate a Lyft ride's cost, available at: <https://help.lyft.com/hc/en-us/articles/115013080308-How-to-estimate-a-Lyft-ride-s-cost>; What is Uber's fare estimator and how does it work?, Uber Blog, available at: <https://www.uber.com/en-NL/blog/what-is-ubers-fare-estimator-and-how-does-it-work/>.

⁴⁰ Lyft Promo Codes, available at: <https://www.lyft.com/promo-coupon-code-free-rides>; Uber promo codes for 2019, available at: <https://www.uber.com/us/en/promo/>.

⁴¹ Lyft Terms of Service, Section 4, available at: <https://www.lyft.com/terms>; SEC Form S-1 Registration Statement, Uber Technologies, Inc., p. 155, available at: <https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752ds1.htm>.

⁴² Uber Ride Pass, available at: <https://www.uber.com/us/en/ride/how-it-works/uber-pass/>; See, *e.g.*, Lyft's latest pitch: 30 rides for \$299, USA Today, October 16, 2018, available at: <https://www.usatoday.com/story/tech/talkingtech/2018/10/16/lyfts-new-299-subscription-plan-offers-30-rides-but-you-might-pay-more/1603468002/>.

⁴³ How to add custom locations to Uber and Lyft, IPHONEFAQ, March 6, 2018, available at: <https://www.iphonefaq.org/archives/976537>

Ride Sharing Options

- A passenger can travel for lower fares if they are willing to share a ride with another passenger going in the same direction. Uber calls its shared-ride service "Pool," while Lyft is simply "Shared."⁴⁵

Tipping

- The opportunity to add a tip at the end of a ride and rate a driver on a scale of 1 to 5.⁴⁶

Rating System

- Passenger ratings by drivers and driver ratings by passengers. Uber passengers can see their score in the app, while Lyft passengers must contact the company to get their rating.⁴⁷

Multiple-Stop Option

- Multi-stop rides if a passenger needs to pick up or drop off friends along the way.⁴⁸

⁴⁴ SEC Form S-1 Registration Statement, Uber Technologies, Inc., pp. 1-2, available at: <https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752ds1.htm>; SEC Form S-1 Registration Statement, Lyft, Inc., March 1, 2019, pp. 139-140, available at: <https://www.sec.gov/Archives/edgar/data/1759509/000119312519059849/d633517ds1.htm>.

⁴⁵ SEC Form S-1 Registration Statement, Lyft, Inc., March 1, 2019, pp. 1-2, available at: <https://www.sec.gov/Archives/edgar/data/1759509/000119312519059849/d633517ds1.htm>; SEC Form S-1 Registration Statement, Uber Technologies, Inc., pp. 27, 41, 91, 106, , available at: <https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752ds1.htm>.

⁴⁶ Lyft Driver Addendum, Section 4, available at: <https://www.lyft.com/terms/driver-addendum>; In-app tips on Uber, available at: <https://www.uber.com/us/en/ride/how-it-works/tips/>.

⁴⁷ SEC Form S-1 Registration Statement, Uber Technologies, Inc., p. 157, available at: <https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752ds1.htm>; Lyft Terms of Service, Section 4A, available at: <https://www.lyft.com/terms>.

⁴⁸ Lyft How to navigate a ride, available at: <https://help.lyft.com/hc/en-us/articles/115012926147-How-to-navigate-a-ride>; Uber Request a ride with multiple stops, available at: <https://help.uber.com/riders/article/request-a-ride-with-multiple-stops?nodeId=26f09874-91e9-4fe1-9537-ec680a47ecbe>.

Payment Arrangements

- Drivers are paid a percentage of the fare for each ride, with Uber and Lyft taking a certain percentage.⁴⁹

Can either company honestly state that they will be surprised or learn something new about the other if their annual reports were disclosed publicly? The information known to date suggests otherwise.

3.2.2. The Commission has Adopted a More Exacting Standard for Establishing a Claim of Confidentiality

As the Commission will demonstrate, the law regarding information confidentiality has evolved so that a party required to comply with a Commission order, ruling, or other staff data request is no longer entitled to a presumption of confidentiality.

Public Utilities Code § 583

Pub. Util. Code § 583 states:

No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. Any present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor.⁵⁰

⁴⁹ Lyft Driver Addendum, available at: <https://www.lyft.com/terms/driver-addendum>); Uber Technology Services Agreement, Section 4, November 25, 2019, available at: <https://www.documentcloud.org/documents/6560126-Rasier-Technology-Services-Agreement-November-25.html>.

⁵⁰ With the potential imposition of a criminal penalty, this provision ensures that Commission staff are vigilant about protecting information submitted to the Commission from public

Footnote continued on next page

The implication from the language that information provided may not be open to public inspection except by an order of the Commission or an Assigned Commissioner appears to be that once filed, the requested information is presumed confidential. It is not uncommon for a party to read that presumption into Pub. Util. Code § 583 when complying with a Commission order by stamping either the cover page or each page of the subject document with verbiage asserting confidentiality pursuant to Pub. Util. Code § 583. In fact, this is a practice that both Uber and Lyft have employed since the Commission first opened this proceeding.⁵¹

But Pub. Util. Code § 583 “neither creates a privilege of nondisclosure for a utility, nor designates any specific types of documents as confidential.” (*Re Southern California Edison Company* (1991) 42 CPUC2d 298, 301; *Southern California Edison Company v. Westinghouse Electric Corporation* (1989) 892 F.2d 778, 783 [“On its face, Section 583 does not forbid the disclosure of any information furnished to the CPUC by utilities.”]; and Decision 06-06-066,⁵² as modified by Decision 07-05-032 at 27 [583 does not require the Commission to afford confidential treatment to data that does not satisfy substantive requirements for

disclosure unless directed to do so by Commission order, ruling, decision, or other legislative directive.

⁵¹ For example, see letter from Lisa P. Tse (December 15, 2015), which states, in part: “These files are stamped with the following confidentiality notice CONFIDENTIALITY/PROPRIETARY – CONFIDENTIAL/PROPRIETARY INFORMATION PROVIDED PRUSUANT TO D.13-09-045, THE UNIFORM TRADE SECRETS ACT, G.O. 66-C, and PUBLIC UTILITIES CODE SECTION 5412.5 AND 583; and letter from Andrea Ambrose Lobato (September 15, 2015) which states, in part: “Pursuant to confidentiality and privacy protections specifically provided for in Public Utilities Code Section 583 and General Order 66-C, each page of Lyft’s submission has been marked as ‘Proprietary and Confidential.’”

⁵² *Interim Opinion Implementing Senate Bill No. 1488, Relating to Confidentiality of Electric Procurement Data Submitted to the Commission.*

such treatment created by other statutes and rules.] In fact, Pub. Util. Code § 583 vests the Commission with broad discretion to disclose information that a party deems confidential. (D.99-10-027⁵³ (1999) Ca. PUC LEXIS 748 at *2 [Pub. Util. Code § 583 gives the Commission broad discretion to order confidential information provided by a utility made public.]) As such, a party may not rely on Pub. Util. Code § 583 for the proposition that information required by the Commission to be submitted is confidential.

General Order 66-C

In addition to relying on Pub. Util. Code § 583, parties asserting confidentiality regarding their information and documents also stamp them as confidential pursuant to General Order 66-C.⁵⁴ Effective June 5, 1974, General Order 66-C, entitled “Procedures for Obtaining Information and Records in the Possession of the Commission and its Employees and Commission Policy Orders Thereon,” provides a list of public records of the Commission that are not open to the public. For the next 40 plus years, parties subject to the Commission’s jurisdiction would routinely stamp their records and other responses as confidential pursuant to General Order 66-C.

Rulemaking 14-11-001 and Decision 17-09-023

Because of the need to promote greater transparency by providing more public access to Commission proceedings and the related documents developed therein, on November 14, 2014, the Commission opened Rulemaking

⁵³ *Order Clarifying Order Instituting Investigation I.99-09-001 and Denying Rehearing of the Order, as Clarified.*

⁵⁴ *See footnote 35 for examples of how Uber and Lyft have relied on both GO-66-C and Pub. Util. Code § 583.*

(R.) 14-11-001⁵⁵ “to increase public access to records furnished to the Commission by the entities we regulate, while ensuring that information truly deserving of confidential status retains that protection.”⁵⁶ On August 18, 2016, the Commission issued its interim D.16-08-024⁵⁷ which implemented an updated and clarified process for submitting potentially confidential information to the Commission. Phase 2 of the proceeding was opened and after receiving party comments which included comments from Uber and Lyft, the Commission adopted D.17-09-023⁵⁸ which created General Order 66-D, superseding General Order 66-C, and entitled *Procedures for (1) Submission of Information to the California Public Utilities Commission with Claims of Confidentiality; (2) Submission of Request Per the California Public Records Act; and (3) the Release of any Information by the Commission, Including Pursuant to the California Public Records Act.*

General Order 66-D

The adoption of D.17-09-023 is significant because it ended the presumption of confidentiality for records submitted to the Commission. Pursuant to General Order 66-D, Section 3.2, when a person submits information to the Commission and wants to claim confidentiality, the information submitter bears the burden to establish a basis for confidential treatment by the Commission. To request confidential treatment of information submitted to the Commission, the following requirements must be met:

⁵⁵ *Order Instituting Rulemaking to Improve Public Access to Public Records Pursuant to the California Public Records Act.*

⁵⁶ R.14-11-001 at 1.

⁵⁷ *Decision Updating Commission Processes Relating to Potentially Confidential Documents.*

⁵⁸ *Phase 2A Decision Adopting General Order 66-D and Administrative Processes for Submission and Release of Potentially Confidential Information.*

- The information submitter must designate each page, section, or field, or any portion thereof, as confidential.
- Specify the basis for the Commission to provide confidential treatment with specific citation to an applicable provision of the California Public Records Act. A citation or general marking of confidentiality, such as General Order-66 and/or Pub. Util. Code § 583 without additional justification is insufficient to meet the burden of proof.
- If the information submitter cites Government Code § 6255(a) (the public interest balancing test) as the basis to withhold the document from public release, then the information submitter must demonstrate with granular specificity on the facts of the particular information why the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. A private economic interest is an inadequate interest to claim in lieu of a public interest.
- If the information submitter cites Government Code § 6254(k) (which allows information to be withheld when disclosure is prohibited by federal or state law), it must cite the applicable statutory provision and explain why the specific statutory provision applies to the particular information.
- The information submitter must provide a declaration in support of the legal authority relied on to support the confidentiality claims for Government Code §§ 6254(k) and 6255(a).

With respect to submissions in a formal proceeding (*i.e.* a party intends to file information in the docket), Section 3.3 of General Order 66-D requires the information submitter file a motion for treatment of confidentiality pursuant to Rule 11.4 of the Commission's Rules of Practice and Procedure, or comply with a process established by the Administrative Law Judge for that specific proceeding.

3.2.3. There is Public Interest in Obtaining Access to the Annual Reports

As the TNC industry continues to grow, California cities and counties have endeavored to comprehend the impacts that such a service has on their residents, infrastructure, and transportation operations. To ascertain that knowledge, and to help them develop local regulations so that the TNCs can operate without jeopardizing the continued viability of established transportation systems, various government and nonprofit entities have expressed to the Commission an interest in reviewing the annual reports, particularly this disaggregated data. Accordingly, the Commission amended the scope of this proceeding to consider whether and how to share disaggregated TNC trip data with interested government entities.⁵⁹

Since adding this issue to the scope of the proceeding, the Commission has learned from government entities about their desire to obtain copies of the disaggregated data from the annual reports in order to promote state and local policy goals. For example, in the *Opening Comments of San Francisco International Airport and the San Francisco Municipal Transportation Agency to Phase III.B. Scoping Memo and Ruling of Assigned Commissioner (Track 3 – TNC Data)*, the parties assert:

Without all relevant data, traffic engineers, environmental agencies, city planners and others can only guess how to design effective solutions to increasing urban density and the resulting congestion. As the editorial board of Bloomberg View recently opined, “[c]ity and county governments need to understand how people are using

⁵⁹ *Amended Phase III. B. Scoping Memo and Ruling of Assigned Commissioner* at 4, Track 3. Non-government entities have also expressed a similar interest in providing government entities with TNC trip data. (See, e.g., *Opening Comments of The San Francisco Taxi Workers Alliance on Administrative Law Judge Ruling Ordering Comments on Data Confidentiality, Collection, and Sharing Issues* (December 3, 2019) at 1, and footnotes 1 and 2.

ride-service companies so they can see where changes are needed in transit services and in traffic engineering on local streets. Uber and Lyft ridership patterns might well suggest where express bus services are needed or train services should be improved.”⁶⁰

Other government entities claim that disaggregated trip data can assist them address issues of traffic congestion, public safety and health issues, transportation access, meet environmental goals such as greenhouse gas (GHG) reduction, and evaluate infrastructure impacts in order to improve quality of life for residents.⁶¹

Yet another concern and need for disaggregated trip data is to help government entities understand the impact TNCs have on existing modes of public transportation in order to formulate corrective programs. For example, in the *Opening Comments of the San Francisco Municipal Transportation Agency, San Francisco County Transportation Authority, San Francisco City Attorney's Office, and San Francisco International Airport to Phase III.C. Scoping Memo and Ruling of Assigned Commissioner (Track 3 – TNC Data)*, the parties state:

⁶⁰ *Opening Comments* at 2. See also *Opening Comments of the Los Angeles Department of Transportation to Amended Phase III.C. Scoping Memo on Data Confidentiality, Collection, and Sharing Issues* at 1 and 2: “preliminary studies had revealed what many cities were already experiencing on the ground – an increase in congestion and a decrease in transit ridership correlated with TNC trips. ...Without access to relevant data that reveals these impacts, “government entities like LADOT are left unable to adequately manage their own curb space, ensure parity with other for-hire modes, or design complementary services, and without access to TNC data local governments are left unable to discern whether these operators or their employees comply with existing law.”

⁶¹ See, e.g., *Joint Comments of the San Diego Association of Governments, the Sacramento Area Council of Governments, and the Metropolitan Transportation Commission Regarding the Questions and Issues Raised Regarding Data Confidentiality, Collection, and Sharing* (filed December 3, 2019) at 7; and *Reply Comments of the San Francisco Municipal Transportation Agency, San Francisco County Transportation Authority, San Francisco City Attorney's Office, and San Francisco International Airport to Phase III.C. Scoping Memo and Ruling of Assigned Commissioner* (filed December 20, 2019) at 6-7, and footnotes 6-7.

In some places, the growth of TNC service has coincided with a decline in use of transit and other sustainable modes, and it is essential for public agencies to document and understand these correlations. California faces a housing, land use and transportation emergency that calls for data-driven public policy at all levels of government. Commission action to eliminate footnote 42 is essential to these efforts and to ensure that the state's sustainability, equity, accessibility, and other goals are met.⁶²

In addition, the University of California Davis Policy Institute notes that under the California Road Repair and Accountability Act of 2017, it receives \$5 million annually for transportation research that benefits California.⁶³ As part of its Comments, University of California Davis Policy Institute has offered to act as a third-party repository for TNC data so that interested state agencies, city and regional governments, and other research institutions could be granted privileged access so that research related to transportation issues could be performed while respecting TNC claims of confidentiality and privacy.⁶⁴

These comments have given the Commission a more expansive understanding of the need to make the TNC annual reports publicly available. As the number of Uber and Lyft rides demonstrates, at the time D.13-09-045 was adopted, TNC ridership was not as pervasive as it is today. So it was understandable that in 2013 cities and counties might not have been in a position to appreciate the potential impact of TNC operations on traffic congestion, pollution, public transportation, and access to transportation services needed by

⁶² At 2.

⁶³ *Opening Comments of UC Davis Policy Institute for Energy, Environment, and the Economy on Data Confidentiality, Collection, and Sharing Issues* at 3.

⁶⁴ *Id.*, at 4.

the disabled community. As public policy decisions tend to be data driven, it stands to reason that giving access to government entities, and nonprofit entities that provide support for government entities, may assist them in developing policy programs to aid the riding public, reduce traffic congestion, reduce GHG emissions, and make the necessary infrastructure improvements so that transportation is a safe and accessible experience for all riders.

Of course, there may be instances where personal information about TNC passengers and TNC drivers may need to be submitted under seal. The Commission does not have to identify and resolve all possible scenarios in this decision. Instead, it will be up to the TNCs to establish all instances where such personal information contained in the annual reports should be filed under seal.

3.3. The New Protocol that TNCs Must Follow to Establish a Claim of Confidentiality

If a TNC wants to claim that any information contained in its annual reports should be protected from public disclosure on the grounds of confidentiality, trademark protection, market sensitivity, or any other privilege, or on personal privacy grounds covered by one or more of the exemptions set forth in Government Code § 6254 of the CPRA, the burden shall be on the TNC to do the following:

- The TNC must file and serve a Motion pursuant to Rule 11.4 of the Commission's Rules of Practice and Procedure 90 days before the annual report(s) is(are) due.
- The TNC must identify each page, section, or field, or any portion thereof, that it wishes to be treated as confidential.
- The TNC must specify the basis for the Commission to provide confidential treatment with specific citation to an applicable provision of the California Public Records Act. A citation or general marking of confidentiality, such as General Order-66

and/or Pub. Util. Code § 583 without additional justification is insufficient to meet the burden of proof.

- If the TNC cites Government Code § 6255(a) (the public interest balancing test) as the basis to withhold the document from public release, then the TNC must demonstrate with granular specificity on the facts of the particular information why the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. A private economic interest is an inadequate interest to claim in lieu of a public interest.
- If the TNC cites Government Code § 6254(k) (which allows information to be withheld when disclosure is prohibited by federal or state law), it must cite the applicable statutory provision and explain why the specific statutory provision applies to the particular information.
- If the TNC claims that the release of its annual report(s), or any part thereof, will place it an unfair business disadvantage, the TNC's competitor(s) must be identified and the unfair business advantage must be explained in detail.
- If the TNC claims that the release of its annual report(s), or any part thereof, will violate a trade secret (as provided by Civil Code §§ 3426 through 3426.11 and Government Code §6254.7(d) , the TNC must establish that the annual report(s) (a) contain information such as a formula, pattern, compilation, program, device, method, technique, or process; (b) 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 (c) are the subject of efforts that are reasonable under the circumstances to maintain their secrecy.
- The TNC must provide a declaration (executed with personal knowledge and under penalty of perjury) in support of the legal authority relied on to support the confidentiality claims for Government Code §§ 6254(k) and 6255(a), General Order 66, Civil Code §§ 3426 through 3426.11, Government Code § 6254.7(d), and any other statute, rule, order, or decision that the TNC is relying upon to support each claim of confidentiality.

4. Conclusion

In closing, the Commission cautions any TNC to this quasi-legislative proceeding against the use of broad-brush-style confidentiality claims. In *Re Pacific Bell* (1986) 20 CPUC 2d 237, the Commission warned that it would view such sweeping claims with suspicion:

We think [an] overall comment about one recurring and nagging procedural point is warranted simply because there seems little likelihood, from what we have observed thus far, that its recurrence will diminish without comment on our part. At many turns, PacBell has raised concerns and objections to parties, including our staff, having access to and fully using data which it alleges is “proprietary.” ...These issues tend to divert parties’ resources and energy from the more pressing goal of our process, which is a full, open, and expeditious airing of facts, unimpeded by procedural roadblocks and obstacles.

We think PacBell would do well to recall the fable of the boy who cried wolf too often and paid a dear price because when it really mattered nobody took him seriously. 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.⁶⁵

That same policy of openness is applicable to this quasi-legislative proceeding, and the Commission expects that TNCs will take this guidance from this Commission to heart as they comply with the Commission’s reporting requirements.

⁶⁵ 20 CPUC2d at 252.

5. Comments on Proposed Decision

The proposed decision of Commissioner Shiroma in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure.

On February 27, 2020, the following parties filed opening comments: Uber, Lyft, HopSkipDrive, Los Angeles Department of Transportation (LADOT), joint comments from San Francisco Municipal Transportation Agency, San Francisco City Attorney's Office, San Francisco International Airport, and San Francisco County Transportation Authority (collectively referred to as SFMTA), and the UC Berkeley Labor Center (UC Berkeley).

On March 3, 2020, the following parties filed reply comments: Uber, SFMTA, and Lyft.

On the whole, there was nothing in the comments that would persuade the Commission to make any major changes to its decision. Instead, minor corrections have been made in response to comments as noted in this section.

Uber

Uber raises a number of arguments in opposition to the decision:

The annual TNC reports contain a large volume of personal information that must be kept confidential;⁶⁶

The Commission must establish that the data production it requires meets a legitimate regulatory purpose;⁶⁷

⁶⁶ Uber's Comments at 1-3.

⁶⁷ *Id.*, at 3-6.

The government entities' expression of interest does not rise to the level of a legitimate regulatory purpose that would justify their access to the reporting data;⁶⁸

The information in the TNC annual reports continues to be trade secret information;⁶⁹ and

The proposed confidentiality protocol is discriminatory, inefficient, and should be modified.⁷⁰

The Commission rejects each of Uber's arguments. Whether or not the TNC annual reports contain confidential personal information and/or trade secret information are issues that the Commission will address once Uber (and every other TNC that wishes to shield all or portions of its annual reports from public review) files the requisite motion for treatment of confidentiality in the manner adopted by this decision.

We do not understand Uber's argument that the Commission's "exclusive" jurisdiction to regulate TNCs somehow impacts a government entity's right to request access to the TNC annual reports. First, the Pub. Util. Code Section that Uber cites (Section 5353(g)) does not state that the Commission has exclusive jurisdiction. Second, even if it did, exclusive jurisdiction does not prohibit the entity with jurisdiction from sharing information with a government entity that has a legitimate regulatory interest in the information. As this Commission has found, SFMTA, LADOT, and other parties have articulated legitimate interests in obtaining access to disaggregated trip data in the annual reports. It will be up to

⁶⁸ *Id.*, 6-8.

⁶⁹ *Id.*, at 8-12.

⁷⁰ *Id.*, at 12-15.

a TNC when it files its motion for treatment of confidentiality that it will have to demonstrate why its claims of confidentiality outweigh a government entity's interest in obtaining the disaggregated trip data in the annual reports.

The Commission is also unimpressed with Uber's claim that the confidentiality protocol is discriminatory and inefficient. Uber first claims that being required to file a motion under seal 90 days in advance has the practical effect of requiring it to file annual reports three months before the deadline. There is nothing in the protocol that requires such a result. It will be up to the TNC to make the necessary showing with however much of the TNC report that it wishes to share with the Commission. Obviously, the less information that is conveyed, the more difficult it will be for the TNC to carry its burden of proof. As such, it will be up to the TNC to provide the Commission with sufficient information so that a meaningful determination of a claim of confidentiality can be made.

Uber next claims that the unfair business disadvantage requirement has no basis in GO-66D. Instead, that language comes from GO-66-C which has been superseded.⁷¹ Uber is correct in that regard so the reference to GO-66D, Section 3.4, will be deleted. But, as Uber acknowledges, the concept of unfair business disadvantage is encompassed by the statutory definition of a trade secret.⁷² Accordingly, there is no reason to delete the unfair business disadvantage language as a TNC must establish the basis for asserting such a trade secret claim regardless of whether the language is found in GO 66-D.

⁷¹ Id., at 13.

⁷² Id.

Finally, as to Uber's claim that the decision misstates the statutory definition of trade secret, the decision deletes the phrase "such as" and inserts "including" in Ordering Paragraph 2(g).

Lyft

Lyft does not oppose the repeal of footnote 42 going forward.⁷³

Lyft argues that the protocol adopted herein contradicts D.17-09-023 and singles out TNCs for disparate treatment. But there is nothing in D.17-09-023 that prevents the Commission in another proceeding from establishing protocols not contemplated by GO 66-D. In fact, for formal proceeding, GO 66-D, Section 3.3, provides that the Administrative Law Judge may establish a process "for that specific proceeding." Thus, modifications to the submission process provided by GO 66-D, Section 3.2, have been authorized by D.17-09-023 by its creation of GO 66-D, Section 3.3, which covers formal proceedings.

We reject Lyft's claim that the 90 day requirement for filing a motion for confidentiality is problematic because "as history has shown, TNCs may not even know what data they will be required to submit at the time such a motion is filed."⁷⁴ But as TNCs have been filing the annual reports since 2014, the Commission believes that the TNCs know what their submittal requirements consist of.

The Commission also rejects Lyft's request that information regarding the lack of viable competition be deleted from the decision.⁷⁵ As part of any upcoming motion for confidentiality, it will be up to each TNC filing such a

⁷³ Lyft Comments at 1.

⁷⁴ *Id.*, at 4.

⁷⁵ *Id.*, at 5-11.

motion to explain the nature of the competition and why information required in an annual report should be shielded from public disclosure.

LADOT

LADOT suggests that the Commission issue a decision requiring TNCs to provide more frequent and more robust data.⁷⁶ This issue is not before the Commission in this decision.

SFMTA

SFMTA supports the decision but asks for clarifications regarding which issues remain open.⁷⁷ Specifically, SFMTA asks that decision state that the other tracks of the Assigned Commissioner's October 25, 2019 Amended Scoping Memo and Ruling remain open. This is an issue that the Assigned Commissioner can address in a subsequent ruling.

UC Berkeley

UC Berkeley asks that prior TNC annual reports should be made available to local governments.⁷⁸ The Commission leaves it to the Assigned Commissioner and Administrative Law Judges whether to make this recommendation to the Commission following the development of a sufficient record.

6. Assignment of Proceeding

Genevieve Shiroma is the assigned Commissioner and Robert M. Mason III and Debbie Chiv are the assigned Administrative Law Judges in this proceeding.

⁷⁶ LADOT Comments at 3.

⁷⁷ SFMTA Comments at 3.

⁷⁸ UC Berkeley Comments at 3.

Findings of Fact

1. Footnote 42 was added to D.13-09-045 at a time when TNCs were a nascent transportation service.
2. In 2013, the Commission accepted the TNCs' representations that failure to grant confidentiality to the annual reports required by D.13-09-045, particularly the disaggregated data contained therein, might compromise sensitive information and place the compliant TNCs in an unfair competitive disadvantage.
3. The Commission adopted D.16-04-041 and required the TNCs to submit additional reporting data.
4. Since first permitting their operations, the TNC industry has grown to become a preferred mode of transportation.
5. Uber and Lyft account for more than 99.9% of the TNC rides provided in California.
6. In their annual reports, neither Uber nor Lyft identify a competitor by name who would gain an unfair competitive disadvantage if their annual reports were made public.
7. In their comments, neither Uber nor Lyft identify a competitor by name who would gain an unfair competitive disadvantage if their annual reports were made public.
8. Uber and Lyft's TNC operations are similar in terms of pricing, information storage, vehicle options, ride-sharing options, tipping, rating systems, multiple-stop options, and payment arrangements.
9. The government entity parties have shown a public interest in obtaining access to the TNC annual reports.

Conclusions of Law

1. It is reasonable to conclude that footnote 42 in D.13-09-045 should be deleted.
2. It is reasonable to conclude that the TNC annual reports should not be presumed to be confidential.
3. It is reasonable to conclude that the burden of proof should be on the TNC to justify why its annual reports should not be disclosed publicly.

O R D E R

IT IS ORDERED that:

1. Footnote 42 in Decision 13-09-045 is deleted. The Transportation Network Company annual reports will no longer be presumed to be confidential.
2. If a Transportation Network Company (TNC) wants to claim that any information contained in its annual reports should be protected from public disclosure on the grounds of confidentiality, trademark protection, market sensitivity, or any other privilege, or on personal privacy grounds covered by one or more of the exemptions set forth in Government Code Section 6254 (California Public Records Act), the burden shall be on the TNC to do the following:
 - a. The TNC must file and serve a Motion pursuant to Rule 11.4 of the Commission's Rules of Practice and Procedure 90 days before the annual report(s) is(are) due.
 - b. The TNC must identify each page, section, or field, or any portion thereof, that it wishes to be treated as confidential.
 - c. The TNC must specify the basis for the Commission to provide confidential treatment with specific citation to an applicable provision of the California Public Records Act. A citation or general marking of confidentiality, such as General Order-66

and/or Pub. Util. Code § 583, without additional justification is insufficient to meet the burden of proof.

- d. If the TNC cites Government Code § 6255(a) (the public interest balancing test) as the basis to withhold the document from public release, then the TNC must demonstrate with granular specificity on the facts of the particular information why the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. A private economic interest is an inadequate interest to claim in lieu of a public interest.
- e. If the TNC cites Government Code § 6254(k) (which allows information to be withheld when disclosure is prohibited by federal or state law), it must cite the applicable statutory provision and explain why the specific statutory provision applies to the particular information.
- f. If the TNC claims that the release of its annual report(s), or any part thereof, will place it an unfair business disadvantage, the TNC's competitor(s) must be identified and the unfair business disadvantage must be explained in detail.
- g. If the TNC claims that the release of its annual report(s), or any part thereof, will violate a trade secret (as provided by Civil Code §§ 3426 through 3426.11 and Government Code § 6254.7(d), the TNC must establish that the annual report(s) (a) contain information including a formula, pattern, compilation, program, device, method, technique, or process; (b) 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 (c) are the subject of efforts that are reasonable under the circumstances to maintain their secrecy.
- h. The TNC must provide a declaration (executed with personal knowledge and under penalty of perjury) in support of the legal authority relied on to support the confidentiality claims for Government Code §§ 6254(k) and 6255(a), General Order 66, Civil Code §§ 3426 through 3426.11, Government Code § 6254.7(d), and any other statute, rule, order, or decision that the TNC is relying upon to support each claim of confidentiality.

3. Rulemaking 12-12-011 remains open.

This order is effective today.

Dated March 12, 2020, at Sacramento, California.

MARYBEL BATJER

President

LIANE M. RANDOLPH

MARTHA GUZMAN ACEVES

CLIFFORD RECHTSCHAFFEN

GENEVIEVE SHIROMA

Commissioners