

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298**FILED**
7-15-15
12:12 PM

July 15, 2015

TO PARTIES OF RECORD IN RULEMAKING 12-12-011:

This proceeding was filed on December 20, 2012, and is assigned to Commissioner Liane M. Randolph and Administrative Law Judge (ALJ) Robert M. Mason III. This is the decision of the Presiding Officer, ALJ Robert M. Mason III.

Any party to this adjudicatory proceeding may file and serve an Appeal of the Presiding Officer's Decision within 30 days of the date of issuance (i.e., the date of mailing) of this decision. In addition, any Commissioner may request review of the Presiding Officer's Decision by filing and serving a Request for Review within 30 days of the date of issuance.

Appeals and Requests for Review must set forth specifically the grounds on which the appellant or requestor believes the Presiding Officer's Decision to be unlawful or erroneous. The purpose of an Appeal or Request for Review is to alert the Commission to a potential error, so that the error may be corrected expeditiously by the Commission. Vague assertions as to the record or the law, without citation, may be accorded little weight.

Appeals and Requests for Review must be served on all parties and accompanied by a certificate of service. Any party may file and serve a Response to an Appeal or Request for Review no later than 15 days after the date the Appeal or Request for Review was filed. In cases of multiple Appeals or Requests for Review, the Response may be to all such filings and may be filed 15 days after the last such Appeal or Request for Review was filed. Replies to Responses are not permitted. (See, generally, Rule 14.4 of the Commission's Rules of Practice and Procedure at www.cpuc.ca.gov.)

If no Appeal or Request for Review is filed within 30 days of the date of issuance of the Presiding Officer's Decision, the decision shall become the decision of the Commission. In this event, the Commission will designate a decision number and advise the parties by letter that the Presiding Officer's Decision has become the Commission's decision.

/s/ KAREN V. CLOPTON
Karen V. Clopton, Chief
Administrative Law Judge

KVC: ar9

Attachment

Decision PRESIDING OFFICER'S DECISION (Mailed 7/15/2015)

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
(Filed December 20, 2012)

Robert Maguire, Attorney at Law,
DAVIS WRIGHT TREMAINE LLP,
Attorney for Rasier-CA, LLC.

Valerie Kao, Safety and Enforcement
Division, San Francisco.

Brewster Fong, Safety and Enforcement
Division, San Francisco.

Selina Shek, Attorney at Law, Legal Division, for
Safety and Enforcement Division.

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

Table of Contents

Title	Page
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	2
Summary	2
1. Background.....	2
1.1. Rasier-CA Failed to Submit All of the Information Ordered in D.13-09-045	5
1.2. Efforts to Obtain Compliance with Requirements g, j, and k.	8
1.3. Expansion of the Scope of the Proceeding to Include Order to Show Cause (OSC)	10
1.4. Rasier-CA was Ordered to Appear and Show Cause.	10
1.4.1. Pub. Util. Code § 2107	11
1.4.2. Pub. Util. Code § 2108	11
1.4.3. Pub. Util. Code § 5381	11
1.4.4. Pub. Util. Code § 5411	11
1.4.5. Pub. Util. Code § 5415	11
1.4.6. Pub. Util. Code § 2113	12
1.4.7. Rule 1.1	12
1.4.8. Pub. Util. Code § 701	12
1.4.9. Pub. Util. Code § 5378(a).....	12
1.5. Party Filings for OSC Hearing.....	13
1.6. Rasier-CA’s Motion to Set Aside Submission and Reopen the Record.....	15
2. Matters to Which this Decision Takes Official Notice or Admits as Authorized Admissions and Party Admissions	16
2.1. Official Notice/Judicial Notice	16
2.2. Authorized Admissions and Party Admissions	21
3. Conclusions Regarding Rasier-CA’s Compliance and Non Compliance	23
3.1. Reporting Requirement g (Report on Accessibility).....	23
3.2. Reporting Requirement j (Report on Providing Service by Zip Code).....	25
3.3. Reporting Requirement k (Report on Problems with Drivers).....	29

Table of Contents (Cont'd)

Title	Page
3.4. Summary of Rasier-CA’s Failure to Comply with D.13-09-045’s Reporting Requirements	30
4. Contempt.....	30
4.1. Contempt and the Appropriate Burden of Proof.....	30
4.2. Rasier-CA’s Conduct was Willful (i.e. Inexcusable).....	32
4.2.1. Rasier-CA had Knowledge of D.13-09-045’s Reporting Requirements	32
4.2.2. Rasier-CA had the Ability to Comply with D.13-09-045’s Remaining Reporting Requirements	33
4.3. Rasier-CA Disobeyed D.13-09-045’s Reporting Requirements by Asserting Unsubstantiated Legal Arguments.....	35
4.3.1. Rasier-CA Wrongfully Characterizes this OSC Proceeding as a Discovery Dispute with SED	35
4.3.2. Rasier-CA Fails to Substantiate its Claims that the Data Ordered by Reporting Requirements j and k are Unduly Burdensome, Cumulative, and Overly Broad.	39
4.3.3. Rasier-CA Fails to Substantiate its Claim that Strict Compliance with Reporting Requirements j Violates the Fourth Amendment.....	41
4.3.4. Rasier-CA Fails to Substantiate its Claim that the Date Ordered by Requirement j is Trade Secret Commercial Information	45
4.3.5. Rasier-CA Fails to Substantiate its Claim that the Disclosure of Trip Data Would Amount an Unconstitutional Taking of a Trade Secret.....	47
4.4. Rasier-CA’s Claim of Substantial Compliance is Factually Erroneous	53
4.4.1. Burden of Proof	53
4.4.2. Rasier-CA has not Substantially Complied with Reporting Requirement j (Report on Providing Service by Zip Code)	54
4.5. Contempt and Determination of Fine.....	57
5. By Disobeying D.13-09-045’s Reporting Requirements, Rasier-CA Violated Rule 1.1 of the Commission’s Rules of Practice and Procedure.....	58

Table of Contents (Cont'd)

Title	Page
5.1. Burden of Proof.....	58
5.2. Rasier-CA Violated Rule 1.1.....	59
6. By Disobeying D.13-09-045’s Remaining Reporting Requirements in Violation of Rule 1.1, Rasier-CA is Subject to Penalties and/or Fines Pursuant to Pub. Util. Code §§ 2107 and 5411.	60
6.1. Burden of Proof.....	62
6.2. Criteria for the Assessment of the Size of a Rule 1.1 and Pub. Util. Code § 2107 Fine	63
6.2.1. Criterion 1: Severity of the Offense	64
6.2.2. Criterion 2: Conduct of the Utility.....	65
6.2.3. Criterion 3: Financial Resources of the Utility	66
6.2.3.1.The Corporate Relationship Between Uber, Rasier, LLC, and Rasier-CA	68
6.2.3.2.Uber’s Financial Viability is Dependent on Rasier-CA....	72
6.2.3.3.Uber’s Control of Rasier-CA’s Transportation Operations	74
6.2.3.4. Rasier-CA’s Revenues.....	76
6.2.3.5. Uber’s Revenues	76
6.2.4. Criterion 4: Totality of the Circumstances.....	77
6.2.5. Criterion 5: The Role of Precedent in Setting the Fine or Penalty .78	
6.2.5.1. Calculating the Fine or Penalty Based on a Continuing Offense	78
6.2.5.2. Calculating the Fine or Penalty by Considering National and California Revenues.....	79
6.2.5.3. Calculating the Fine or Penalty by Considering Revenues of both Parent and Subsidiary Companies.....	80
6.3. Calculation of the Fine or Penalty	81
6.3.1. Rasier-CA’s Position	81
6.3.2. SED’s Position.....	81
6.3.3. Discussion	81
7. Suspension of Rasier-CA’s Authority to Operate as a TNC.....	83
8. Assignment of Proceeding	83
Findings of Fact.....	83
Conclusions of Law	88
ORDER	91

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 COMMISSISON DECISION 13-09-045

Summary

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

This decision also finds that Rasier-CA violated Rule 1.1 of the Commission's Rules of Practice and Procedure by failing to comply fully with Reporting Requirements g, j, and k in D.13-09-045 and shall pay a fine in the amount of \$7,326,000 pursuant to Pub. Util. Code §§ 2107, 2108, 5411, and 5415.

Finally, this decision finds that Rasier-CA's license shall be suspended. Rasier-CA's suspension shall start 30 days after this decision is served and neither Rasier-CA nor SED files an appeal, and/or a Commissioner does not request review. But if this decision is appealed or a Commissioner requests review, then the suspension shall start 30 days after the modified decision is issued. The suspension shall remain in effect until Rasier-CA complies fully with the outstanding requirements in Reporting Requirements' g, j, and k in D.13-09-045 and pays the above-enumerated fines.

1. Background

On September 19, 2013, the Commission, in Decision (D.) 13-09-045 (Decision) created a new category of transportation charter party carrier (TCP) of passengers called Transportation Network Companies (TNCs). The Decision set

forth the various requirements that TNCs must comply with in order to operate in California. Among other regulatory requirements, the Decision required TNCs to submit annual reports containing certain information. Specifically, the Decision states that:

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

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

number of rides that were requested but not accepted by TNC drivers.²

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

² *Id.* at 31-32 (Requirement j).

³ *Id.* at 32 (Requirement k).

⁴ *Id.* at 32-33 (Requirement l).

to the Commission on an annual basis the number of drivers that became eligible and completed the course.⁵

1.1. Rasier-CA⁶ Failed to Submit All of the Information Ordered in D.13-09-045

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

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

Requirement	Title	What Respondent Failed to Provide
g	Accessibility Information	1.) The number and percentage of customers who requested accessible vehicles; 2.) How often the TNC was able to comply with requests for accessible vehicles;

⁵ *Id.* at 27 (Requirement f).

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

j	Report on Service Information by Zip Code	<ol style="list-style-type: none"> 1.) The number of rides requested and accepted by TNC drivers within each zip code where the TNC operates; 2.) The number of rides that were requested but not accepted by TNC drivers within each zip code where the TNC operates; 3.) The date, time, and zip code of each ride request; 4.) The concomitant date, time, and zip code of each ride that was subsequently accepted or not accepted; 5.) Columns that displays the zip code of where each ride that was requested and accepted began, ended, the miles travelled, and the

		<p>amount paid/donated;</p> <p>6.) Information aggregated by zip code and a statewide total of the number of rides requested and accepted by TNC drivers within each zip code where the TNC operates and the number of rides that were requested but not accepted by TNC drivers;</p>
k	Problems with Drivers	<p>1.) For the report on issues with drivers, the cause of each incident reported;</p> <p>2.) For each incident reported, the insurance amount paid, if any, by any party other than the TNC's insurance.⁷</p>

⁷ See Exhibit 1 at 4-5.

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

Since September 19, 2014, SED has worked to obtain complete information as required by D.13-09-045 through the issuance of an additional data request dated October 6, 2014. (Exhibit 2, Attachment C.) Rasier-CA provided its claimed confidential responses on October 10, 2014, and a digital versatile disc (DVD) on October 20, 2014. (*Id.*) SED reviewed these further responses and determined that SED has not received all of the information ordered by D.13-09-045.⁸ Instead, Rasier-CA provided the following:

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

⁸ *Id.* at 3-4.

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

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

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

As such, this Ruling amends the scope of this proceeding to include an OSC against both UberX and Lyft. As part of the OSC, UberX and Lyft will be given an opportunity to be heard and to explain why they should not be found in contempt, why fines and penalties should not be imposed, and why their licenses to operate should not be revoked or suspended for allegedly violating some of the reporting requirements set forth in D.13-09-045.¹⁰

The OSC phase of this proceeding was designated as adjudicatory.

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

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

⁹ The Lyft OSC is addressed in a separate decision.

¹⁰ Ruling at 2.

1.4.1. Pub. Util. Code § 2107

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

1.4.2. Pub. Util. Code § 2108

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

1.4.3. Pub. Util. Code § 5381

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

1.4.4. Pub. Util. Code § 5411

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

1.4.5. Pub. Util. Code § 5415

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

1.4.6. Pub. Util. Code § 2113

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

1.4.7. Rule 1.1

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

1.4.8. Pub. Util. Code § 701

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

1.4.9. Pub. Util. Code § 5378(a)

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

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

1.5. Party Filings for OSC Hearing

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

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

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

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

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

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

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

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

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

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

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

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

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

1.6. Rasier-CA’s Motion to Set Aside Submission and Reopen the Record

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

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

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

On March 6, 2015 Rasier-CA filed its Reply to SED’s Response. As we explain, *infra*, the matter was submitted as of June 23, 2015.

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

2.1. Official Notice/Judicial Notice

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

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

- *Notice of Decision*, dated January 6, 2015, from the Taxi & Limousine Tribunal, A Division of the Office of Administrative Trials and Hearings, City of New York, in the matter of *Taxi and Limousine Commission against Weiter LLC*, Summons Number FC0000332 (*Notice of Decision, Weiter*).

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

- The Complaint and First Amended Complaint, filed September 9, 2014, and November 12, 2014, respectively (Complaint, *National*; First Amended Complaint, *National*)

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

Pursuant to Evidence Code Section 452(d), this decision also takes judicial notice of the following pleadings, documents, and rulings from *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2013),

Case No. 13-03826-EMC:

- Defendant Uber Technologies, Inc.'s Answer to Plaintiffs' Class Action Complaint, filed December 19, 2013 (Uber's Answer, *O'Connor*);
- Order Granting Defendant's Motion for Judgment on the Pleadings, filed September 4, 2014 (Order Granting, *O'Connor*);

- Declaration of Michael Colman in Support of Defendant's Motion for Summary Judgment, filed December 4, 2014 (Colman Decl., *O'Connor*); and
- Order Denying Defendant Uber Technologies, Inc.'s Motion for Summary Judgment, filed March 11, 2015 (Order Denying, *O'Connor*).

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

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

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

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

Rasier-CA and SED were given until June 23, 2015, to present their positions on the propriety of taking judicial notice, as well as the tenor of the matter to be noticed. Their comments have been received and analyzed, and nothing

contained therein causes this decision to refrain from its determination to take judicial notice of those matters identified above.¹²

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

We have examined these decisions, as well as the decisions rendered pursuant to Federal Rule of Evidence 201(b),¹³ the federal counterpart to

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

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

Footnote continued on next page

Evidence Code § 452 (h).¹⁴ Without having to resolve the split of authority, we adopt the following approach for purposes of this decision: first, we will take judicial notice of the existence of pleadings, findings of fact, and conclusions of law in other proceedings. Second, with the exception noted below, we will not take judicial notice of the truth of the matters asserted or found in the pleadings, findings of fact, and conclusions of law if they were matters that were reasonably subject to dispute in the other proceedings. Third, we will take judicial notice of the truth of certain matters asserted by Uber in other proceedings (*e.g.* through the Uber’s pleadings and declarations) which are undisputed, and certain findings of fact and conclusions of law that are based on matters asserted by Uber, put into evidence by Uber, stipulated to by Uber, or where the matter is not reasonably subject to dispute. We believe this third guiding principle is consistent with Evidence Code § 452 (h) and Federal Rule of Evidence 201(b). (*See Taylor v. Charter Medical Corp.* (5th Cir. 1998) 162 F.3d 827, 830 [Some courts have not taken a *per se* rule against taking judicial notice of an adjudicative fact since it is “conceivable that a finding of fact may satisfy the indisputability requirement of Fed.R.Evid. 201(b)[,]” quoting from *General Electric Capital Corp. v. Lease Resolution Corp.* (7th Cir. 1997) 128 F.3d 1074, 1082, footnote 6.])

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

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

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

2.2. Authorized Admissions and Party Admissions

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

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

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

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

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

Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

- (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement;
- (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

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

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

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

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

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

3.1. Reporting Requirement g (Report on Accessibility)

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

But the fact that Rasier-CA may not have had an accessible-vehicle feature on its app does not lead to the conclusion that it lacked any information responsive to Reporting Requirement g. As of September 9, 2014, Uber, Rasier, LLC, and Rasier-CA, LLC had been sued by the National Federation of the Blind of California for discrimination against blind individuals who use service dogs.²⁰ The complaint alleges multiple instances, all before Rasier-CA's September 19, 2014 reporting date, where blind customers with service dogs claimed they were denied service by UberX drivers.²¹ The Complaint also alleges that some of these customers complained to Uber about their treatment.²²

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

¹⁹ Rasier-CA's Reply Brief at 3.

²⁰ (Complaint, *National*.)

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

²² *Id.* at ¶¶ 41 and 43.

²³ Proof of Service, *National*.

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

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

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

In reaching this conclusion, we take a more expansive view of the concept of accessible vehicles than Rasier-CA. The Americans with Disabilities Act (ADA) prohibits discrimination against persons with disabilities as to matters of public accommodation, specified public transportation service, and travel service.²⁵ The TNC service Rasier-CA provides can fit, at a minimum, within these definitions.²⁶ Persons with vision impairment are included within the ADA's definition of disability.²⁷ California law affords similar protections to

²⁴ Stipulation, *National*.

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

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

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

persons with vision impairment.²⁸ Thus, and as the Center for Accessible Technology points out, those passengers in need of accessible vehicles can include blind persons traveling with service animals.²⁹

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

Rasier-CA's declarants (Ting and Juvvadi) assert on February 5, 2015, Rasier-CA produced to SED individual trip-level information, including requested and accepted rides, requested but not accepted rides, and revised annual reports. (Exhibit 11-A at ¶ 3; Exhibit 11-B at ¶ 3.) SED acknowledges that Rasier-CA did produce this information *albeit* 139 days late.³⁰

Nevertheless, SED claims that even with this late production, Rasier-CA still remains out of compliance with Reporting Requirement j since the production did not include information on the concomitant date, time and zip

²⁸ Civil Code §54.1 states:

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

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

³⁰ SED's Reply at 5.

code of each ride that was subsequently accepted or not accepted (*i.e.* of the driver at the time they accept or decline a ride request), as well as fare information.³¹

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

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

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

³¹ *Id.* at 4.

³² Rasier-CA's Reply at 3.

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

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

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

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

In addition, Uber’s Terms and Conditions has a paragraph entitled “Payment Terms” which provides:

³⁵ www.uber.com/pricing

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

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

Second, we reject the argument that, since the Commission stated, in footnote 6, in D.97-07-063³⁷ that TCPs are not public utilities, that finding somehow divests the Commission with authority to demand that TNCs provide information regarding actual fares charged. Nothing in the decision or the

³⁶ Exhibit B at 44, to the Workshop Brief, filed on April 3, 2013 by TPAC.

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

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

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

Passenger Charter-Party Carriers' Act prevents the Commission from requiring a TCP from producing fare information to the Commission. To the contrary, pursuant to Pub. Util. Code § 5381, the Commission "may supervise and regulate every charter party carrier of passengers in the State and may do all things, whether specifically designated in this part, or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." More specifically, pursuant to Pub. Util. Code § 5389, the Commission may have access at any time to a TCP's operations and "may inspect the accounts, books, papers, and documents of the carrier." The breadth of such authority certainly includes the power to require TNCs to provide information regarding fare information, a fact not lost on the other TNCs that provided this information to the Commission.

3.3. Reporting Requirement k (Report on Problems with Drivers)

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

We are unpersuaded by Rasier-CA's assertion that information regarding the cause of each incident "is not readily available because Rasier-CA did not previously assign a specific cause to each incident." (Exhibit 10 at 13.) Rasier-CA further asserts that the task would entail "stitching together multiple

³⁸ *Id.* at 1-3 and 5.

databases and could be misleading and inaccurate.” (*Id.* at 14.) Yet not assigning a cause does not mean that Rasier-CA does not know – or could not determine-- the cause of each incident. While the task may require some effort to retrieve, the fact that the other TNCs have complied with Reporting Requirement k leads us to conclude that the task may not be as Herculean as Rasier-CA makes it out to be.

3.4. Summary of Rasier-CA’s Failure to Comply with D.13-09-045’s Reporting Requirements

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

4. Contempt

4.1. Contempt and the Appropriate Burden of Proof

Pursuant to Pub. Util. Code § 2113:

Every public utility, corporation, or person which fails to comply with any part of any order, decision, rule, regulation, direction, demand, or requirement of the commission or any commissioner is in contempt of the commission, and is punishable by the commission for contempt in the same

manner and to the same extent as contempt is punished by courts of record. The remedy prescribed in this section does not bar or affect any other remedy prescribed in this part, but is cumulative and in addition thereto.

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

- The person’s conduct must have been willful in the sense that the conduct was inexcusable; or
- That the person accused of the contempt had an indifferent disregard of the duty to comply; and
- Proof must be established beyond a reasonable doubt.³⁹

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

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

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

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

Rasier-CA was fully aware of the September 14, 2014 reporting deadline. By its own admission, Rasier-CA's parent, Uber, objected on August 23, 2013 to these reporting requirements when they first appeared in the July 30, 2013 Proposed Decision of Commissioner Peevey. (Exhibit 10 at 6, footnote 10.) These reporting requirements were then made part of D.13-09-045 that was issued on September 23, 2013. Tellingly, Rasier-CA's parent, Uber, chose not to raise any concerns with the reporting requirements when it filed an Application for Rehearing of D.13-09-045 on October 23, 2013. Nor did either Rasier-CA or Uber file a Petition for Modification of D.13-09-045 within the time frame specified in Rule 16.4 of the Commission's Rules of Practice and Procedure.⁴⁰ Instead, Rasier-CA filed a Petition to Modify D.13-09-045 on December 4, 2014, less than one month after the OSC was issued, in an obvious attempt to delay the OSC proceeding.

On September 14, 2014, SED sent out a courtesy reminder e-mail to all TNC representatives. (Exhibit 1 at 3.) SED and Rasier-CA representatives met

⁴⁰ 16.4(d) states:

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

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

face-to-face on September 11, 2014, and Rasier-CA “explained it could provide the SED with more user-friendly, relevant, and meaningful information, and it could do so in a way that would avoid disclosing confidential and proprietary business information and trade secrets, such as by providing certain information in the aggregate.” (Exhibit 10 at 6-7.)

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

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

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

With respect to Reporting Requirement j, Rasier-CA admits in its Verified Statement that it has the individual trip data ordered by Reporting Requirement j but has not yet produced it. (Verified Statement at 3 [“the detailed, individual trip data sought in request (j) – the only data requested in the TNC Decision that Rasier-CA possesses and has not produced.”].) Instead, Rasier-CA tried to negotiate with SED to produce the information in a format contrary to what was required by D.13-09-045.

Rasier-CA is able to comply with Reporting Requirement j (trip information by zip code) because its parent company, Uber, has provided this information in other jurisdictions. After Massachusetts enacted rules in January 2015 to recognize TNCs, Uber worked out a deal with Boston Mayor Martin J.

Walsh to provide trip data such as ride duration and distance traveled with users' zip codes on a quarterly basis.⁴¹

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

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

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

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

⁴³ *Id.*

⁴⁴ Matthew Wing, member of Uber's policy and communications team, quoted in "Uber backs down in data fight with NYC." Ben Fisher. *New York Business Journal*. January 30, 2015, updated January 31, 2015 <http://www.bizjournals.com/newyork/blog/techflash/2015/01/uber-backs-down-in-data-fight>.

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

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

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

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

Rasier-CA argues that it had several communications with SED regarding the scope of the reporting requirements, and sought an explanation as to how the Commission and SED intended to use individual trip-level information to protect the public's safety or prevent redlining, or how they intend to use this data at all. (Exhibit 10 at 7; Exhibit 3 at 3 [Request 1-1].) In advancing this argument, however, Rasier-CA wrongly attempts to transmogrify a Commission order to a discovery dispute, and attempts to shift the burden onto the Commission to justify the need for the information and in the format required. (Exhibit 4 at 1-2.) The Commission's orders are not party invitations where the Respondent may *R.S.V.P.* as it sees fit. Pursuant to Pub. Util. Code § 702, compliance is mandatory:

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

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

To the extent that such is not inconsistent with the provisions of this chapter, the commission may supervise and regulate every charter-party carrier of passengers in the State and may do all things, whether specifically designated in this part, or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

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

Additionally, we question Rasier-CA's sincerity in asserting this line of argument. Rasier-CA is well-aware that D.13-09-045 announced the Commission's intention to hold a workshop to discuss "the impacts of this new mode of transportation and accompanying regulations." (74, OP 10.) As such, full compliance with the reporting requirements is important so that the Commission has sufficient information to enable it to determine if any of the TNC regulations should be modified. For example, the data can help the Commission evaluate if changes should be made to improve safety of

passengers, and ensure equal access to TNC vehicles, especially for passengers with special accessibility needs. The data can also shed light on the impact of TNCs on either increasing or reducing traffic congestion. (Exhibit 4 at 8.)⁴⁵ In agreeing to provide trip data in Boston, Justin Kintz, Uber's Head of Policy, stated that the data could help city officials determine where to build new roads or offer other transportation options based on daily commute patterns.⁴⁶

To evaluate these and other transportation impacts, the Commission would certainly need the TNCs to comply with the reporting requirements in order to give the Commission the most exhaustive data possible on the TNC operations. Such an exercise would be in accordance with the Commission's authority to examine records of all entities subject to its jurisdiction,⁴⁷ and that services are provided in accordance with Pub. Util. Code § 451 which requires that "every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service...as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public." A similar sentiment is found in Pub. Util. Code § 5352 regarding TCPs:

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

⁴⁶ See discussion, *supra*.

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

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

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

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

The Legislature enacted Pub. Util. Code §§ 702 and 5381 to ensure regulated utilities obey every Commission decision, order, direction, or rule. Without such mandatory compliance with Pub. Util. Code §§ 702 and 5381, the Commission

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

⁴⁹ *Id.* at 6.

would be hampered in its ability to fulfill its duty to obtain and analyze data from regulated utilities in order to establish rules for their regulation.

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

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

Rasier-CA has failed to carry its burden. Without any factual substantiation, Rasier-CA asserts that the trip data ordered by Reporting Requirement j is "unduly burdensome, cumulative, and overly broad." (Exhibit 10, 3.) Such a statement is similar to Rasier-CA's earlier unsubstantiated claims that it lacked the information technology and trained staff to extract the

required data within the specified timeframe. (Exhibit 1 at 4.) Rasier-CA's claims are suspect when one realizes that other TNCs regulated by this Commission had no difficulty meeting the reporting deadline (Exhibit 1 at 4, footnote 7), and Lyft has now complied with Reporting Requirement j.⁵⁰ SED continued to press Rasier-CA on this topic, and in response to SED's follow up data request as to why Rasier-CA did not use the on-line template for complying with Reporting Requirement j, Rasier-CA said that "the voluminous amount of data produced by Rasier-CA simply would not fit on the templates provided." (Exhibit 2, Attachment C [Rasier-CA's Response to SED's Data Request, Question 11].) Putting aside the fact that the templates were available on the Commission's website as of February 12, 2014 (Exhibit 1 at 6), which should have given Rasier-CA ample time to determine if it could utilize the template, Rasier-CA did have the option of supplying the Reporting Requirement j data with a different template as long as it provided the information required by D.13-09-045. (Exhibit 4 at 6 ["SED confirmed during the September 11, 2014 meeting that Rasier-CA may submit the required data in a different format if Rasier-CA could not, for whatever reason, use the reporting templates, consistent with the format discussion contained in D.13-09-045".])

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

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

why Rasier-CA cannot instruct that third party to organize and supply the trip data in the manner required by the Reporting Requirement j template.

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

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

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

Rasier-CA argues that, because Reporting Requirement j is essentially unbounded in scope, requiring strict compliance would violate the unreasonable search and seizure prohibition set forth in the Fourth Amendment to the United States Constitution. (Exhibit 10 at 22-23, which also references the arguments in Rasier-CA’s Petition to Modify D.13-09-045 at 17-18.) Rasier-CA asserts the trip data lacks any connection to a legitimate regulatory purpose such as securing public safety or equal access to TNC services. (*Id.*)

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,

and particularly describing the place to be searched, and the persons or things to be seized.

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

We reject Rasier-CA’s attempt to rely on the Fourth Amendment to excuse compliance with Reporting Requirement j. First, in D.13-09-045, the Commission stated it would conduct a further analysis of the TNC industry as a whole “to consider the impacts of this new mode of transportation and accompanying regulations.”⁵¹ The Commission has been tasked by the Legislature to regulate certain aspects of the transportation industry, and that includes TCPs, of which TNCs are a subset.⁵² Since the Commission was regulating a new industry, it wanted to have the opportunity to evaluate the impact of its regulations on the industry and the public.⁵³ Thus, it required the regulated TNCs to comply with the reporting requirements within a year after the issuance of the decision.⁵⁴ The reporting requirements are part of the adopted regulations, and the Commission needs each regulated TNC to comply in full so that the Commission acquires the

⁵¹ D.13-09-045 at 74, OP 10.

⁵² *Id.* at 21-24.

⁵³ *Id.* at 74, OP 10.

⁵⁴ *Id.* at 30-33.

fullest possible picture of the impact that TNCs are having on California passengers wishing to avail themselves of this TNC service.

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

We note that transportation entities have had their Fourth Amendment challenges rejected in other jurisdictions and have been required to produce trip data. In *Carniol*, which was cited in *Notice of Decision, supra*, where Uber's challenges to providing trip data were rejected, the Court cited to *Minnesota v. Carter* (1998) 525 U.S. 83, 88 for the proposition that a party may not prevail on a Fourth Amendment claim unless he can show that the search and seizure by the state infringed on a legitimate expectation of privacy. Where a government entity is vested with broad authority to promulgate and implement a regulatory program for the regulated transportation industry, those participating "have a

diminished expectation of privacy, particularly in information related to the goals of the industry regulation.” (*Buliga v. New York City Taxi Limousine Comm’n* (2007) WL 4547738 *2, *affd sub nom. Buliga v. New York City Taxi & Limousine Comm’n* 324 Fed Appx 82 (2d Cir. 2009); and *Statharos v. New York City Taxi & Limousine Comm’n* (2d Cir. 1999) 198 F.3d 317, 325.) This is true even beyond the transportation industry since the key is whether the industry is closely regulated. The United States Supreme Court recognized that the greater the regulation the more those subject to the regulation can expect intrusions upon their privacy as it pertains to their work. (*Vernonia Sch. Dist. 47J v. Acton* (1995) 515 U.S. 646, 657.)

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

To the extent that such is not inconsistent with the provisions of this chapter, the commission may supervise and regulate every charter-party carrier of passengers in the State and may do all things, whether specifically designated in this part, or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

This Commission found in D.13-09-045 that TNCs were TCPs subject to the Commission’s existing jurisdiction.⁵⁵ Pursuant to General Order 157-D, Section 3.01, providers of prearranged transportation are required to maintain waybills which must include, at a minimum, points of origination and destination. Pursuant to General Order 157-D, Section 6.01, every TCP is

⁵⁵ At 23.

required to maintain a set of records which reflect information as to the services performed, including the waybills described in Section 3.01. The Commission also found that it would expand on its regulations regarding TCPs and utilize its broad powers under Pub. Util. Code § 701 to develop new categories of regulation when a new technology is introduced into an existing industry.⁵⁶ Given this expansive authority, TNCs would certainly have reason to expect intrusions upon their privacy as it relates to the provision of TNC services.

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

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

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

Pursuant to Civil Code § 3426.1, a trade-secret is "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Rasier-CA fails to meet this two-part definition. First, the type of consumer data compilations that have been accorded trade secret status are ones that contain client names, addresses and phone numbers that have been acquired by lengthy and expensive efforts. (*See MAI Sys. Corp. v. Peak Computer, Inc.*

⁵⁶ *Id.*

(9th Cir. 1993) 991 F.2d 511, 521, *cert. denied*, 510 U.S. 1033; *Courtesy Temp. Serv. v. Camacho* (1990) 222 Cal.App.3d 1278, 1288.) In other words, the party seeking trade-secret protection has, on its own initiative, developed some product or process for its own private economic benefit. In contrast, it is the Commission that has ordered the TNCs to respond, in template format, with the trip data by zip code. The compilation is being put together at the behest of the Commission, rather than by Rasier-CA for some competitive advantage over its competitors.

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

Third, Rasier-CA's assertion of a trade secret also stems from the apparent fear that, if the information it provides to the Commission is released to the public, its competitors may obtain some economic value from the disclosure. (Exhibit 10 at 23-24.) Yet Rasier-CA fails to make a credible argument as to how its competitors can obtain economic value from the information's disclosure. All TNC drivers are competing for the same pool of potential passengers. All TNC drivers know where the zip codes and neighborhoods are that have the greater

chances of securing rides for the day, so any release of Rasier-CA's trip data isn't going to provide the competition with information that they don't already possess.

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

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

The Takings Clause, which is deemed applicable to the states *via* the Fourteenth Amendment,⁵⁸ is found in the Fifth Amendment of the U.S.

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

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

Constitution and provides that “nor shall private property be taken for public use, without just compensation.” The purpose behind the clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” (*Armstrong v. United States* (1960) 364 U.S. 40, 49.) While takings law had its genesis in real property disputes, over time the United States Supreme Court expanded the constitutional protection of property beyond the concepts of title and possession and sought to protect the value of investments against governmental use or regulation. (See *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415 [“while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”])⁵⁹ In *Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528, 538, the United States Supreme Court recognized two categories of regulatory takings for Fifth Amendment purposes: first, where government requires an owner to suffer a permanent physical invasion of the property; and second, where the government regulation completely deprives an owner of all economically beneficial use of the property.⁶⁰

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

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

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

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

As such, other courts have also recognized that “every statute promulgated by the Legislature is fortified with a strong presumption of regularity and constitutionality.” (*Keystone Insurance Co. v. Foster*, 732 F. Supp. 36 (E.D. Pa. 1990); *Illinois v. Krull*, (1987) 480 U.S. 340, 351 ([“Indeed, by according laws a presumption of constitutional validity, courts presume that legislatures act in a constitutional manner. (See e.g., *McDonald v. Board of Election Comm'rs of Chicago* (1969) 394 U.S. 802, 808-809.)

The concern for respecting state legislative action is certainly applicable to the Commission’s regulatory activities. It derives some of its powers from Article XII of the California Constitution and by powers granted from the Legislature. (*People v. Western Air Lines, Inc.*(1954) 42 Cal.2d, 621, 634 [“The Commission is therefore a regulatory body of constitutional origin, deriving certain of its powers by direct grant from the Constitution which created it.

(*Pacific Tel. & Tel. Co. v. Eshleman* (1913), 166 Cal. 640 [137 P. 1119, Ann.Cas. 1915C 822, 50 L.R.A.N.S. 652]; *Morel v. Railroad Com.* (1938), 11 Cal.2d 488 [81 P.2d 144].) The Legislature is given plenary power to confer other powers upon the Commission. Art. XII, §§ 22 and 23.)”].)

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

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

While written in the conjunctive rather than the disjunctive, some decisions suggest that a reviewing court “may dispose of a takings claim on the basis of one or two of these factors.” (*Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1277; *Bronco Wine v. Jolly*(2005) 129 Cal. App.4th 988, 1035 [“The court may dispose of a takings claim on the basis of one or two of these factors. (*Maritrans Inc. v. United States* (Fed. Cir. 2003) 342 F.3d 1344, 1359 [where the nature of the governmental action and the economic impact of the regulation did not establish a taking, the court need not consider investment-backed expectations]; *Ruckelshaus v. Monsanto Co., supra*, 467 U.S. 986, 1009] [disposing of takings claim relating to trade secrets on absence of reasonable investment-backed expectations prior to the effective date of the 1972 amendments to the Federal Insecticide, Fungicide, and Rodenticide Act].) But for completeness sake,

we will evaluate Rasier-CA's takings argument against all of the criteria set forth, *supra*, in both *Lingle* and in *Penn Central*.

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

Rasier-CA's regulatory takings argument also fails under the *Penn Central* factors. With respect to the character-of-the-governmental- action prong, a takings claim is less likely to be found "when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." (*Penn Central, supra*, 438 U.S. at 124.) Here, the reason for requiring the trip data in raw form is for the Commission to continue reviewing its regulations over the TNC industry in order to evaluate the impact on the riding public. Determining who is being served, what areas are being served, and the volume can assist the Commission in deciding if this new mode of transportation is being made available to all customers utilizing the Uber app for service. Equal access to a regulated transportation service is the common good that is one of the prime goals of the Commission's regulatory authority over the transportation industry.

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

Finally, Rasier-CA's argument fails under the investment-backed-privacy-expectation standard. As the Supreme Court explained in *Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980) 449 U.S. 155, 161, property interests, and the privacy expectations attendant thereto, "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Here, there is no state law that recognizes trip data as inherently private or that the creation of same invests it with some sense of privacy. Indeed, Rasier-CA was aware that the Commission ordered all TNCs to create the trip data report so that the Commission could determine how its regulations were working and if any adjustments would be needed. In other words, Rasier-CA's claim of a privacy expectation is subject to the Commission's power to regulate TNCs for the public good. Moreover, even if there was a distinct investment-backed expectation, "a taking through an exercise of the police power occurs only when the regulation

‘has nearly the same effect as the complete destruction of [the property] rights’ of the owner.” (*Pace Resources, Inc. v. Shrewsbury Tp.* (3rd Cir. 1987) 808 F.2d 1023, 1033, quoting *Keystone Bituminous Coal Association v. Duncan* (3d Cir. 1985) 771 F.2d 707, 716, *aff’d* (1987) 480 U.S. 470.) There is no complete destruction of Rasier-CA’s property as it can utilize its trip data for whatever legitimate business purposes it deems appropriate.

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

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

4.4.1. Burden of Proof

Rasier-CA cites to numerous Commission decisions (and appends approximately 47 Commission decisions to its appendix of authorities) where the concept of substantial compliance is utilized but a precise and uniform definition has not been articulated.⁶¹ In the Commission decision upon which Rasier-CA places principal reliance in its Verified Statement, *Butrica v. Beasley, dba Phillipsville Water Company (Beasley)*,⁶² we glean that substantial compliance can be established if there has been some significant effort to comply with the Commission’s orders.⁶³ This standard, if it can truly be called that, is similar to the one articulated by the California Supreme Court in *Western States Petroleum Association v. Board of Equalization* (2013) 57 Cal.4th 401, 426: “substantial compliance, as the phrase is used in the decisions, means actual compliance in

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

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

⁶³ *Id.* at 7-9.

respect to the substance essential to every reasonable objective of the statute. ... Where there is compliance as to all matters of substance technical deviations are not to be given the stature of noncompliance. ... Substance prevails over form.”

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

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

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

(Exhibit 10 at 15.) Rasier-CA argues that the Commission and SED can “derive from these tables all the information needed to assess and determine the zip codes in which Rasier-CA most frequently operates, and the zip codes from which rides are most frequently accepted.” (*Id.*) According to Rasier-CA, by reviewing what Rasier-CA terms “voluminous responsive data,”⁶⁴ the Commission and SED will be able to fulfill the policy objectives of Reporting Requirement j.

We reject Rasier-CA’s argument that it has substantially complied with Reporting Requirement j. Data presented in table form and the specific trip data organized by zip code in the suggested template are neither identical nor substantially similar concepts, and presenting one does not comply (substantially

⁶⁴ Rasier-CA’s Post-Hearing Opening Brief at 10.

or otherwise) with Reporting Requirement j. This salient fact distinguishes *Beasley* from the instant action in that in *Beasley*, defendants were endeavoring to provide the information required by OP 1 and 4, rather than by providing tables and expecting Commission staff to ferret through them for the applicable data and then populate the template. Thus, presenting data from which the required reporting data may be derived does not satisfy the actual reporting requirement. The other TNCs understood these separate requirements and provided the Commission with the information as required in Reporting Requirement j.

Rasier-CA's efforts are more akin to discovery dumps of thousands of documents on an adversary, a practice that is disfavored in California. For example, in *Kayne v. Grande Holdings Ltd.* (2011) 198 Cal.App.4th 1470, 1476, Grande produced 90,600 pages of documents, and plaintiffs had to hire three attorneys to organize the documents by category and date. Plaintiffs filed a motion to recover \$74,809 in fees and costs which the court granted as compensation for Grande's willful abuse of the discovery procedure and for failing to comply with Code of Civil Procedure § 2023.010. We find the *Kayne* decision instructive. Neither the Commission nor SED should have to sort through the voluminous data to find the information responsive to Reporting Requirement j.

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

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

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

Rasier-CA’s suggestion that Commission staff simply review the voluminous documents also runs afoul of the California Discovery Act’s prohibition – which we use as a guide – against referring to a set of documents or testimony without identifying, specifically, how and which documents are responsive to the production demand. (*See Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 293-294; and *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 783-784 [“Answers must be complete and responsive. Thus, it is not proper to answer by stating, ‘See my deposition,’ ‘See my pleading,’ or ‘See the financial statement.’”]) The Commission expects a regulated utility to be as equally forthcoming in responding to a Commission order as it would when faced with a discovery request in a superior court proceeding where the requirements of the California Discovery Act apply.

But before leaving the issue of substantial compliance, we must also address Rasier-CA’s subsequent February 5, 2015, production of zip code

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

4.5. Contempt and Determination of Fine

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

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

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

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

Rule 1.1 of the Commission’s Rules of Practice and Procedure States:

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

5.1. Burden of Proof

The burden of proof for establishing a Rule 1.1 violation is not as stringent as the burden of proof for establishing contempt. The Commission has determined that a person subject to the Commission’s jurisdiction can violate Rule 1.1 without the Commission having to find that the person intended to disobey a Commission Rule, Order, or Decision. Instead, in D.01-08-019, the Commission ruled that intent to violate Rule 1.1 was not a prerequisite but that “the question of intent to deceive merely goes to the question of how much weight to assign to any penalty that may be assessed. The lack of direct intent to deceive does not necessarily, however, avoid a Rule 1 violation.” Thus, as the Commission later reasoned in D.13-12-053, where there has been a “lack of

candor, withholding of information, or failure to correct information or respond fully to data requests,” the Commission can and has found a Rule 1.1 violation.⁶⁵ This standard was recently affirmed in *Pacific Gas and Electric Company v. Public Utilities Commission* (2015) Cal.App.LEXIS 512. The party claiming the violation must establish that fact “by a preponderance of the evidence.”⁶⁶

5.2. Rasier-CA Violated Rule 1.1

As we have established, *supra*, in Section 3 of this decision, Rasier-CA failed to comply with the remaining requirements in Reporting Requirements g, j, and k. First, Rasier-CA was aware of information responsive to Reporting Requirement g but tried to argue that its app had not yet been updated to track requests for accessible vehicles. Second, Rasier-CA elected to withhold trip-data information in violation of Reporting Requirement j by not providing it in the form required by D.13-09-045. Rasier-CA also violated Reporting Requirement j by not providing trip-fare information. Third, Rasier-CA has failed to provide

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

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

the remaining information required by Reporting Requirement k. By doing so, Rasier-CA failed to comply with the laws of this state and further misled this Commission by an artifice or false statement of law by asserting multiple legal defenses that were unsound. Such conduct warrants the imposition of penalties or fines.⁶⁷

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

Pub. Util. Code § 2107 states:

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

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

Every charter-party carrier of passengers and every officer, director, agent, or employee of any charter-party carrier of passengers who violates or who fails to comply with, or who procures, aids, or abets any violation by any charter-party carrier of passengers of any provision of this chapter, or who fails to obey, observe, or comply with any order, decision, rule, regulation, direction, demand, or requirement of the

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

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

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

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

As part of the expansive authority, the courts have recognized that the Commission has the authority to impose fines directly on public utilities without the need to first commence an action in Superior Court. (140 Cal.App.4th, at 736.) Instead, the Commission has determined that it need only commence an action in superior court to collect unpaid fees. (*Id.*, citing to *Order Denying Rehearing of Decision 99-11-044* (Mar. 2, 2000) Dec. No. 00-03-023 [2004 Cal.P.U.C. Lexis 127,

*6-7]; *Re Communications TeleSystems International* (1997) 76 Cal.P.U.C.2d 214, 219-220, 224, fn. 7; *Toward Utility Rate Normalization (TURN) v. Pacific Bell* (1994) 54 Cal.P.U.C.2d 122, 124.) The Commission's interpretation of its own statutory authority should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language." (140 Cal.App.4th, at 736, citing *PG&E Corporation v. Public Utilities Commission* (2004) 118 Cal.App.4th 1174, 1194.)

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

6.1. Burden of Proof

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

That lesser standard is easily met. It is beyond dispute that Rasier-CA failed to comply with D.13-09-045 when it failed to produce the remaining information required for Reporting Requirements g, j, and k. That failure

violated Rule 1.1 which, in turn, has triggered the Commission's authority to issue fines and penalties.

Further, Pub. Util. Code § 2108 states:

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

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

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

The Commission has relied on these statutory provisions to assess fines for each day that a utility is in violation of a Commission order or law.⁶⁸ Without question, the Commission's ability to impose penalties and fines on public utilities and TCPs is supported by the plain reading of Pub. Util. Code §§ 2107 and 5411.

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

D.98-12-075 and Public Utilities Code Sections 2107-2108 provide guidance on the application of fines.⁶⁹ As stated in D.98-12-075, two general factors are

⁶⁸ See, e.g., Resolution ALJ-261 at 5-6 (discussing Pub. Util. Code § 5414.5 and 5415, noting that "with each day of a continuing violation constituting a separate violation;" and Carey, D.98-12-076, 84 CPUC2d 196, OP 1 (1998); D.98-12-075, 1998 Cal. PUC LEXIS 1016, *56 (discussion of the policy behind daily fines and affirming that "[f]or a "continuing offense," Public Utilities Code § 2108 counts each day as a separate offense.").

⁶⁹ D.98-12-075 indicates that the principles therein distill the essence of numerous Commission decisions concerning penalties in a wide range of cases, and the Commission expects to look to

Footnote continued on next page

considered in setting fines: (1) the severity of the offense and (2) the conduct of the utility. In addition, the Commission considers the financial resources of the utility, the totality of the circumstances in furtherance of the public interest, and the role of precedent. (D.98-12-075, mimeo at 34-39.)⁷⁰ We discuss the specific criteria and determine below its applicability to Rasier-CA's conduct.

6.2.1. Criterion 1: Severity of the Offense

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

- **Physical harm**: The most severe violations are those that cause physical harm to people or property, with violations that threatened such harm closely following.
- **Economic harm**: The severity of a violation increases with (i) the level of costs imposed upon the victims of the violation, and (ii) the unlawful benefits gained by the public utility. Generally, the greater of these two amounts will be used in setting the fine. The fact that economic harm may be hard to quantify does not diminish the severity of the offense or the need for sanctions.
- **Harm to the Regulatory Process**: A high level of severity will be accorded to violations of statutory or Commission directives, including violations of reporting or compliance requirements.

these principles as precedent in determining the level of penalty in a full range of Commission enforcement proceedings. (*Mimeo* at 34-35.)

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

⁷¹ 1998 Cal. PUC LEXIS 1016 at 71-73.

- **The number and scope of the violations:** A single violation is less severe than multiple offenses. A widespread violation that affects a large number of consumers is a more severe offense than one that is limited in scope.

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

6.2.2. Criterion 2: Conduct of the Utility

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

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

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

⁷³ 1998 Cal. PUC LEXIS 1016 at 73-75.

as opposed to inadvertent wrongdoing, will be considered an aggravating factor. The level and extent of management's involvement in, or tolerance of, the offense will be considered in determining the amount of any penalty.

- **The Utility's Actions to Disclose and Rectify a Violation:** Utilities are expected to promptly bring a violation to the Commission's attention. What constitutes "prompt" will depend on circumstances. Steps taken by a utility to promptly and cooperatively report and correct violations may be considered in assessing any penalty.

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

6.2.3. Criterion 3: Financial Resources of the Utility

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

- **Need for Deterrence:** Fines should be set at a level that deters future violations. Effective deterrence requires that the Commission recognize the financial resources of the utility in setting a fine.
- **Constitutional Limitations on Excessive Fines:** The Commission will adjust the size of fines to achieve the objective of deterrence, without becoming excessive, based on each utility's financial resources.

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

⁷⁴ 1998 Cal. PUC LEXIS 1016 at 75-76.

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

We answer this question in the affirmative based on the legal theories of parent/subsidiary and alter-ego liability. Such a result was affirmed in *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, wherein Ernest Hahn, Inc., a nationwide developer of regional shopping centers, was found to be the alter ego of its wholly owned subsidiary, Hahn Devcorp, a developer of community and neighborhood shopping centers. Both entities were sued for breach of contract and fraud, and the jury heard evidence that the parent and subsidiary companies had net values of \$497 million and \$4.1 million respectively. The Court of Appeal affirmed the finding that Hahn and Devcorp had formed a single enterprise, thus making it appropriate for finding that Devcorp was the alter ego of Hahn for purposes of establishing liability and determining damages.⁷⁶

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

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

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

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

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

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

Agreement with Rasier-CA.⁷⁸ Non-California transportation providers execute the Rasier Software Sublicense & Online Services Agreement with Rasier, LLC.⁷⁹

When one delves into how Uber began its operations in San Francisco, California in 2009,⁸⁰ and when we analyze the relationship between Uber and its subsidiaries, the interconnection between Uber and Rasier-CA becomes clear, making it appropriate as a matter of law to treat Uber and Rasier-CA as one in the same for purposes of assessing fines and penalties.⁸¹ Without any regulatory permission, Uber began offering rides in California to individuals in need of vehicular transportation who had subscribed to Uber's Terms of Service.⁸² These passengers could then log in to the Uber software application on their smartphone, request a ride, and be matched with an available Uber driver.⁸³ The cost of the ride is charged to the passenger's credit card which is on file with Uber.⁸⁴ Uber reserves the right to determine the ultimate price of the ride.⁸⁵

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

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

⁸⁰ Colman Decl. ¶ 3 (*O'Connor*).

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

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

⁸³ Colman Decl. ¶ 4 (*O'Connor*).

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

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

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

Rasier-CA's Certificate of Formation was filed with the Delaware Secretary of State on September 6, 2013.⁸⁹ On September 19, 2013, Rasier-CA filed an Application to Register a Foreign Limited Liability Company with the California Secretary of State.⁹⁰ Travis Kalanick is listed on Rasier-CA's Statement of Information filed with the California Secretary of State as the sole managing

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

⁸⁶ D.13-09-045 at 4, footnote 4.

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

⁸⁸ *Id.* at 12.

⁸⁹ State of Delaware Limited Liability Company Certificate of Formation.

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

partner, and as Uber's CEO on the California Secretary of State database.⁹¹ Without deciding whether Uber Technologies, Inc., should be classified as a TCP, the Commission nevertheless reasoned that "Uber is not exempt from the Commission's jurisdiction over charter-party carriers."⁹²

Additionally, the Commission found that UberX was a charter party carrier of passengers and was subject to the Commission's jurisdiction as a TNC.⁹³ Uber disputed this conclusion that UberX was a transportation provider. Instead, it argued that UberX "does not designate a specific transportation service, but rather it is one of the several classes of car that users of the Uber App may request. A car on the UberX platform can be driven by either a TCP holder providing a regulated TCP transportation service or a non-TCP holder providing peer-to-peer prearranged transportation service."⁹⁴ Uber claimed that its subsidiary, Rasier, LLC "contracts with non-TCP holders who use the Uber App to receive requests from users and provide peer-to-peer prearranged transportation service. Accordingly, Uber asserted that the Commission should regulate Rasier, LLC as a TNC, but only if and when Rasier, LLC applies to the Commission to become a TNC."⁹⁵

⁹¹ www.sos.ca.gov (Corp # C3318029).

⁹² D.13-09-045 at 12.

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

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

⁹⁵ *Id.*

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

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

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

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

Despite Uber's attempt to distinguish itself from the transportation services by recasting itself as a technology company or a wireless service, the facts are unrefuted, and this Commission has found, that Uber is providing a transportation service as a facilitator. Even Uber's own advertisements and

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

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

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

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

actions undercut its argument that it is not a transportation company. A review of its website and advertising materials reveals that Uber has referred to itself as an “On-Demand Car Service” and utilizes the tagline “Everyone’s Private Driver.”¹⁰² Uber even owns a U.S. trademark on “Everyone’s Private Driver.”¹⁰³

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

¹⁰² Order Denying at 4 (*O’Connor*).

¹⁰³ *Id.*

¹⁰⁴ <http://blog.uber.com>

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

¹⁰⁶ Order Denying at 5(*O’Connor*).

¹⁰⁷ Uber’s Comments on OIR at 2.

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

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

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

¹⁰⁸ Colman Decl. at ¶ 7 (*O'Connor*).

¹⁰⁹ *Id.* at ¶ 5.

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

¹¹¹ Exhibit 10.

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

¹¹³ *Id.*

- Uber claims a proprietary interest in its riders, and prohibits its drivers from answering rider queries about booking future rides outside the Uber app, or otherwise soliciting rides from Uber riders;¹¹⁴
- Uber exercises control over the qualification and selection of its drivers;¹¹⁵
- Uber terminates the accounts of drivers who do not perform up to Uber standards; and¹¹⁶
- Uber deactivates accounts of passengers for low ratings or inappropriate conduct.¹¹⁷

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

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

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

¹¹⁶ Colman Decl. at ¶ 9 (*O'Connor*).

¹¹⁷ *Id.*

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

Footnote continued on next page

6.2.3.4. Rasier-CA's Revenues

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

6.2.3.5. Uber's Revenues

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

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

\$92 million.]; and Decision 04-09-023 *Opinion Authorizing Transfer of Control and Imposing a Fine* at 10, footnote 12 ["The Commission has previously considered the finances of utility parent companies, affiliates, and other non-regulated entities when setting fines, provided that such information is cognate, and germane to the fine. (D.04-04-017, *mimeo.*, p. 9; D.04-04-016, *mimeo.*, p. 19; D.03-08-058, *mimeo.*, p. 12; and D.03-05-033, *mimeo.*, p. 10."].)

¹¹⁹ Public Utilities Commission Transportation Reimbursement Account Revenue Detail.

¹²⁰ <http://blog.uber.com/4years>.

¹²¹ *Id.*

In a more recent blog, Mr. Kalanick states that Uber has “grown to millions of trips per day in nearly 300 cities in 55 countries.”¹²² If we were to assume that each ride costs \$10, Uber’s gross annual revenue would be \$3.6 billion. (1 million rides per day × \$10 = \$10 million × 30 days = \$300 million × 12 months = \$3.6 billion.) We also know that Uber takes a share of the cost of each ride the TNC driver agrees to provide. In the Rasier Software Sublicense & Online Services Agreement, there is a section entitled “Rasier’s Fee” which states: “In exchange for your access to and use of the Software and Service, including the right to receive the Requests, you agree to pay to the Company a fee for each Request accepted as indicated in the Service Fee Schedule.”¹²³ While we do not know the precise fee, other TNCs take approximately 20% of the ride fare charged to the passenger’s credit card on file.¹²⁴ Assuming Uber utilizes a similar 80/20 fare split, Uber’s 20% share of the \$3.6 billion in gross revenues would be \$720 million annually.

6.2.4. Criterion 4: Totality of the Circumstances

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

- **The Degree of Wrongdoing:** The Commission will review facts that tend to mitigate the degree of wrongdoing as well as facts that exacerbate the wrongdoing.

¹²² <http://blog.uber.com>.

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

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

¹²⁵ 1998 Cal. PUC LEXIS 1016, 76.

- **The Public Interest**: In all cases, the harm will be evaluated from the perspective of the public interest.

Rasier-CA's actions impeded the Commission's staff from exercising its obligations to analyze the required data so it could advise the Commission if the regulations imposed on the TNC industry were protecting the public interest. Since Rasier-CA has a sizeable market share of the TNC operations in California, the absence of Respondent's data created a significant hole in SED's impact analysis. In considering the totality of circumstances and degree of wrongdoing in this case, we conclude that a fine for the entirety of the time, discussed *infra*, that Rasier-CA violated D.13-09-045 is appropriate.

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

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

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

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

- *Cingular Investigation*, D.04-09-062 at 62 ("Section 2108 provides, in relevant part, that 'in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense. Both violations constitute

¹²⁶ 1998 Cal. PUC LEXIS 1016, 77.

continuing offenses during the relevant time periods. Considering the record as a whole, we find that the penalty for each violation should be calculated on a daily basis.”); and Conclusion of Law (COL) 4 (“Pursuant to §§ 2107 and 2108 and Commission precedent, for the violations of law for the period January 1, 2000 to April 30, 2002 (849 days), Cingular should pay a penalty of \$10,000 per day, or \$8,490,000.”);

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

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

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

- D.04-12-058, *Order Modifying and Denying Rehearing of Decision (D.) 04-09-062* at 18 [“The record in this proceeding also reflected that Cingular reported corporate

revenues of \$14.746 billion for year-end 2002, that Cingular had approximately 22 million customers at that time, and that Cingular's three million California customers constituted 14% of Cingular's customer base, and likely 14% of Cingular's revenues as well."]; and

- D.02-12-059, *Opinion Finding Violations and Imposing Sanctions* at 56 ["Thus, an approximate \$38 million fine is reasonable in this case when Qwest had total revenues for the year 2000 of \$11 billion, and its California residential long distance revenue for 2000 was about \$92 million."].)

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

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

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

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

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

6.3. Calculation of the Fine or Penalty

6.3.1. Rasier-CA’s Position

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

6.3.2. SED’s Position

As of February 5, 2015, SED claims Rasier-CA has been out of compliance for 139 days. Multiplied by the recommended daily penalty of \$2,000 a day, the total recommended penalty is currently \$278,000.¹³⁰ SED also notes that if the Commission were to treat each of the fifteen failures to comply as a separate penalizing offense, the penalty could be \$3.72 million.¹³¹

6.3.3. Discussion

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

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

Reporting Requirement	What Remains Outstanding	Days Out of Compliance	Daily Fine Amount	Recommended Fine
g (Report on Accessibility)	The number and percentage	279 (from September 24, 2014 to	\$5,000	\$1,395,000

¹³⁰ SED’s Opening Brief at 13-14.

¹³¹ *Id.* at 15.

	of customers who requested accessible vehicles	June 30, 2015)		
g (Report on Accessibility)	How often the TNC was able to comply with requests for accessible vehicles	279 (from September 24, 2014 to June 30, 2015)	\$5,000	\$1,395,000
j (Report on Providing Service by Zip Code)	The concomitant date, time, and zip code of each ride that was subsequently accepted or not accepted	284 (from September 19, 2014 to June 30, 2015)	\$5,000	\$1,420,000
k (Report on Problems with Drivers)	The cause of each incident	284 (from September 19, 2014 to June 30, 2015)	\$5,000	\$1,420,000
j (Report on Providing Service by Zip Code)	The amount paid or donated	284 (from September 19, 2014 to June 30, 2015)	\$5,000	\$1,420,000
Subtotal				\$7,050,000

We must also add to this subtotal the 138 days past the reporting deadline it took Rasier-CA to comply with Reporting Requirement j’s demand for information by zip code in which each ride ended and the distance travelled and the date, time, and zip code of each request, both completed and not completed.

We assess this fine determination at a daily rate of \$2,000, resulting in a fine of **\$276,000.**

Total fine: \$7,326,000.

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

Rasier-CA's authority to operate as a TNC shall be suspended 30 days after the issuance of this decision. The authority shall remain suspended until all outstanding reporting requirements have been complied with and the assessed fine has been paid.

8. Assignment of Proceeding

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

Findings of Fact

1. On September 19, 2013, the Commission adopted D.13-09-045, creating a new category of transportation charter party carrier (TCP) of passengers called Transportation Network Companies (TNCs).
2. D.13-09-045 set forth the various requirements that TNCs must comply with in order to operate in California.
3. Among other regulatory requirements, the Decision required TNCs to submit annual reports containing certain information. Specifically, the Decision states that:
 - One year from the effective date of these rules and annually thereafter, each TNC shall submit to the Safety and Enforcement Division a report detailing the number and percentage of their customers who requested accessible vehicles, and how often the TNC was able to comply with requests for accessible vehicles.
 - One year from the effective date of these rules and annually thereafter, each TNC shall submit to the Safety

and Enforcement Division a verified report detailing the number of rides requested and accepted by TNC drivers within each zip code where the TNC operates; and the number of rides that were requested but not accepted by TNC drivers within each zip code where the TNC operates. The verified report provided by TNCs must contain the above ride information in electronic Excel or other spreadsheet format with information, separated by columns, of the date, time, and zip code of each request and the concomitant date, time, and zip code of each ride that was subsequently accepted or not accepted. In addition, for each ride that was requested and accepted, the information must also contain a column that displays the zip code of where the ride began, a column where the ride ended, the miles travelled, and the amount paid/donated. Also, each report must contain information aggregated by zip code and by total California of the number of rides requested and accepted by TNC drivers within each zip code where the TNC operates and the number of rides that were requested but not accepted by TNC drivers.

- One year from the effective date of these rules and annually thereafter, each TNC shall submit to the Safety and Enforcement Division a verified report in electronic Excel or other spreadsheet format detailing the number of drivers that were found to have committed a violation and/or suspended, including a list of zero tolerance complaints and the outcome of the investigation into those complaints. Each TNC shall also provide a verified report, in electronic Excel or other spreadsheet format, of each accident or other incident that involved a TNC driver and was reported to the TNC, the cause of the incident, and the amount paid, if any, for compensation to any party in each incident. The verified report will contain information of the date of the incident, the time of the incident, and the amount that was paid by the driver's insurance, the TNC's insurance, or any other source. Also, the report will provide the total number of incidents during the year.

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

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

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

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

7. Rasier-CA provided its claimed confidential responses on October 10, 2014 and a DVD on October 20, 2014. SED reviewed these further responses and determined that SED has not received all of the information for Reporting Requirements g, j, and k ordered by D.13-09-045.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25. On September 24, 2014, Uber was served with the complaint.

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

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

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

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

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

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

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

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

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

Conclusions of Law

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

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

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

4. Rasier-CA remains out of compliance with the remaining reporting requirements of Reporting Requirement j since Rasier-CA's production did not

include information on the concomitant date, time and zip code of each ride that was subsequently accepted or not accepted (*i.e.* of the driver at the time they accept or decline a ride request), as well as fare information.

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

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

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

8. Rasier-CA is out of compliance with the remaining reporting requirements of Reporting Requirement k because Rasier-CA has not provided information on the cause of each incident.

9. Rasier-CA was aware of the September 14, 2014 reporting deadlines imposed by D.13-09-045.

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

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

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

13. Compliance with a Commission's ordering paragraphs is mandatory, and compliance may not be excused by the Respondent's claimed lack of knowledge

as to why the information is needed or how the required information may be used.

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

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

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

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

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

19. Rasier-CA has not substantially complied with the remaining requirements of Reporting Requirement j.

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

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

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

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

24. Uber is the parent of Rasier, LLC and Rasier-CA.

25. Rasier, LLC and Rasier-CA are the wholly-owned subsidiaries of Uber.

26. Uber's control over the transportation services provided by Rasier-CA is extensive.

27. The Commission may consider Uber's revenues in setting a fine against Uber's subsidiary.

28. Rasier-CA should be fined \$7,326,000.

29. Rasier-CA's authority to operate as a TNC shall be suspended 30 days after the issuance of this decision.

ORDER

IT IS ORDERED that:

1. Rasier-CA, LLC (Rasier-CA) shall pay a \$1,000.00 contempt fine, and a \$7,326,000 fine, by check or money order payable to the California Public Utilities Commission (Commission) and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102, within 40 days of the effective date of this order. Rasier-CA shall write on the face of the check or money order "For deposit to the General Fund pursuant to Decision _____."

2. All money received by the California Public Utilities Commission's Fiscal Office pursuant to Ordering Paragraph 1 shall be deposited or transferred to the State of California General Fund.

3. Rasier-CA, LLC's (Rasier-CA) license to operate as a Transportation Network Company shall be suspended. Rasier-CA's suspension shall start 30 days after this decision is served and neither Rasier-CA nor SED files an appeal,

and/or a Commissioner does not request review. But if this decision is appealed or a Commissioner requests review, then the suspension shall start 30 days after the modified decision is issued. The suspension shall remain in effect until Rasier-CA complies fully with the outstanding requirements in Reporting Requirements' g, j, and k in Decision 13-09-045 and pays the above-enumerated fines.

4. Rasier-CA, LLC's Motion to Strike Portions of Safety and Enforcement Division's Verified Reply is denied.

5. The Order to show Cause portion of this rulemaking is closed.

6. The remainder of Rulemaking 12-12-011 is open.

This order is effective today.

Dated _____, at San Francisco, California.