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December 10, 2020

Via E-Mail  
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California Public Utilities Commission  
Consumer Protection and Protection Division  
Transportation Licensing and Analysis Branch  
505 Van Ness Avenue  
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Re: Protest to Uber Advice Letter 7, Q4 2019 – Q3 2020, Rulemaking R. 19-02-012, Decision (D.) 20-03-007

Pursuant to General Order 96-B, Section 7.4 and Section 10.5, the San Francisco Municipal Transportation Agency, San Francisco County Transportation Authority, and San Francisco Mayor's Office on Disability (collectively "San Francisco"), submit this protest and objection to confidentiality against Uber Technologies Inc.'s ("Uber") Advice Letter 7 requesting exemptions in the TNC Access for All rulemaking, R. 19-02-012, including attachments ("Advice Letter").<sup>1</sup>

## **I. Introduction**

In accordance with General Order 96-B, Section 7.4.2(3) and (6), San Francisco protests Uber's Advice Letter on the grounds that: (1) pursuant to Section 7.4.2(6), the relief requested is unjust with the data that is available as Uber fails to demonstrate adequately the "presence and availability" of WAV service or an "improved level of service," including reasonable response times, and (2) pursuant to Section 7.4.2(3), although Uber has provided more data in this Advice Letter, it has continued to redact fund expenditure data provided in its exemption request to avoid remitting hundreds of thousands of dollars to the Access Fund for a year, creating material errors or omissions. San Francisco includes in this protest an objection to Uber's claims of confidentiality pursuant to General Order 96-B, Section 10.5 for the redacted fund expenditure data because, under Commission Resolution ALJ-388, issued on November 16, 2020,

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<sup>1</sup> Because Uber's Advice Letters 6 and 7 are nearly identical in terms of redactions, the grounds for supporting the same, and overall deficiencies, San Francisco's protest and objections to confidentiality to Advice Letter 6 and 7 are nearly the same as well.

Uber has again failed to meet its burden to prove that the redacted fund expenditure data qualifies as a trade secret, and there is no basis from which to withhold the data from disclosure.

San Francisco requests that the CPED, as the Industry Division reviewing these requests, reject the exemption request outright as clearly erroneous pursuant to General Order 96-B, Section 7.6.1, as it fails to demonstrate that Uber has met any of the minimum requirements of the Act and Decision 20-03-007 (“Track 2 Decision”). The information that is available in the Advice Letter shows that Uber’s occasional record of reasonably prompt response times for a small number of WAV requests is entirely overshadowed by a consistent pattern of refusal of service to WAV users, indicating a significant failure to demonstrate reasonable response times for 80% of WAV trips requested, as required by the Act. The level of service provided cannot justify Uber’s request for an exemption from remitting Access Funds for an entire year in each geographic area. Given the record, CPED cannot reasonably find that Uber has met the required statutory burden.

Alternatively, San Francisco requests that the CPED reject Uber’s claims for confidentiality and refer the matter to the Administrative Law Judge division; direct Uber to re-serve the unredacted Advice Letter on all parties; and issue a notice continuing or re-opening the protest period pursuant to General Order 96-B, Section 7.5.1, for an additional 20 days following service of the unredacted Advice Letter to allow the parties to analyze the Advice Letter and, if necessary, submit a supplemental protest.

## **II. Uber’s Advice Letter Contains Material Errors and Does Not Meet The Burden for Exemption.**

The TNC Access for All Act requires “each transportation network company to be accessible to persons with disabilities in order to be exempt from paying the charge required.” (Cite Act.) Pursuant to the Act, TNCs must, at a minimum, have response times for **80 percent of WAV trips requested** via the TNC’s online-enabled application or platform within a time established by the commission for that geographic area. (Pub. Util. Code Section § 5440.5(a)(1)(G)(emph. added).) The Track 2 Decision established the WAV response times that TNCs must meet for a quarter in a geographic area, and also required the TNC must achieve the requisite response times for four consecutive quarters in order to receive an exemption. (Track 2, pp. 46-47.) To request an exemption a TNC must submit an advice letter for review by the Industry Division, here CPED, demonstrating it has met the established requirements. Based on the information submitted in Advice Letter 7, Uber failed to meet the minimum requirements, as set forth below, and the exemption requests should be rejected.

### **A. Uber’s Data Does Not Demonstrate Adequate Response Times for 80% of WAV Trips Requested**

A demonstration of adequate response times for 80% of WAV trips **requested**, as required under the Act, must rest on an actual showing by the data. From the data that Uber submitted on number of WAV trips completed, canceled, and not accepted, it is clear Uber’s data fails to demonstrate adequate response times for 80% of WAV trips requested during any quarter between Q4 2019-Q3 2020 for any of the three counties where it seeks an exemption (AL7 Data 1, Data 2, Data 3, and Data 4). Uber’s data instead shows that in the three counties for which exemptions are requested, no more than 20% of weekday WAV requests are ever completed for a quarter in a county, and usually far fewer are completed. The only “adequate” response times demonstrated, are

for 80% of the already small percentage of requests completed, not 80% of trips requested, as required.

Table 1 and Figure 1 below illustrate the “availability of WAVs” as indicated by the percentage of WAV trip requests that were fulfilled, excluding any trip requests that were cancelled by passengers for the past four quarters for the subject counties. These show that there were significant declines in the availability of WAVs between the beginning and end of this time period, with Q3 2020 WAV availability lower in all counties. Rather than improved availability of WAVs, Uber’s data shows less WAV availability.

Table 1. Availability of WAVs (% of Trips Completed, excluding passenger cancellations)

	Q4 2019	Q1 2020	Q2 2020	Q3 2020
Contra Costa	28%	31%	32%	22%
Orange	33%	32%	21%	13%
Riverside	33%	23%	19%	18%

Figure 1. Availability of WAVs (% of Trips Completed, excluding passenger cancellations)

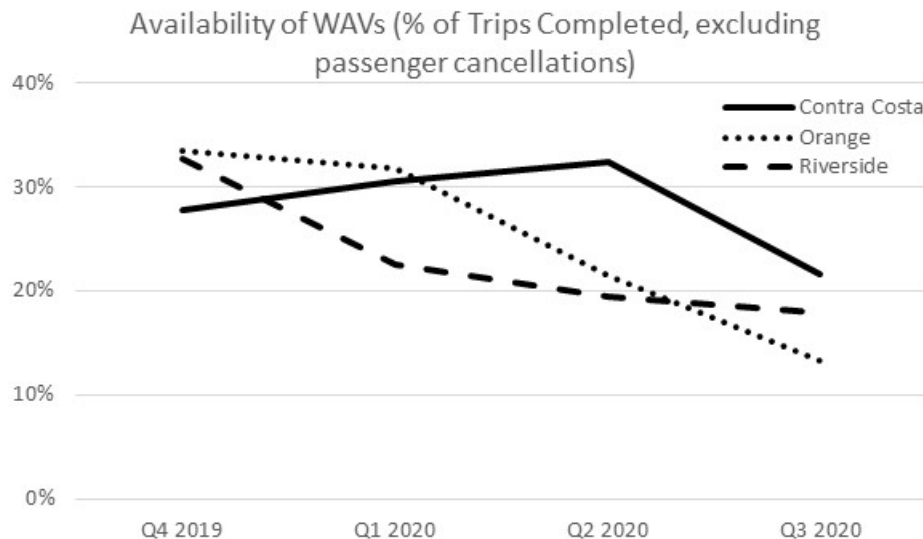
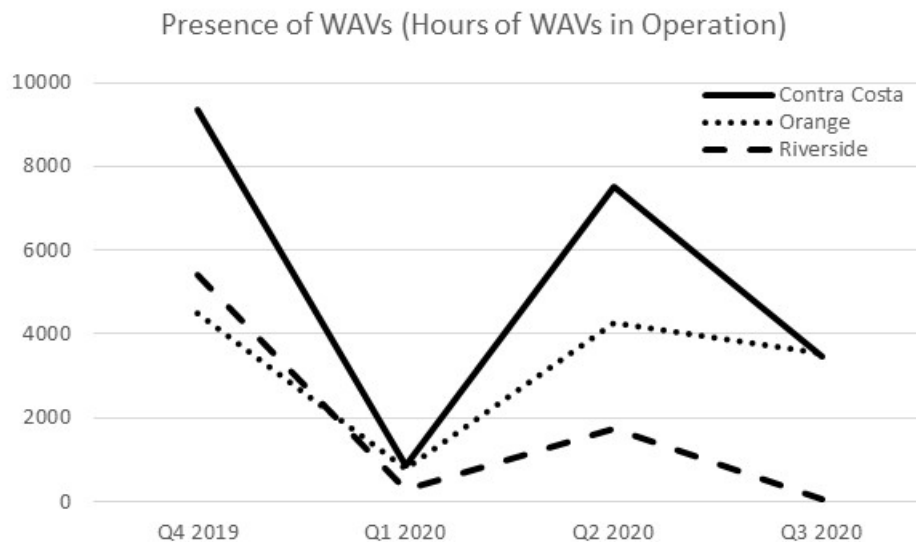


Table 2 and Figure 2 below illustrate the “presence of WAVs” as indicated by the hours of WAVs in operation in the three subject counties for the past four quarters. They show that there were significant declines in the hours of WAVs in service during this time period, with Q3 2020 WAV presence lower in all counties, and practically unavailable in Riverside County. Rather than improved presence of WAVs, Uber’s data shows less WAV presence.

Table 2. Presence of WAVs (Hours of WAVs in Operation)

	Q4 2019	Q1 2020	Q2 2020	Q3 2020
Contra Costa	9371	874	7509	3444
Orange	4504	801	4249	3543
Riverside	5412	292	1725	56

Figure 2. Presence of WAVs (Hours of WAVs in Operation)



During all four quarters for which Uber requests an exemption, WAV passengers continued to persistently experience unavailability or refusal of service – a key problem the Act was trying to fix. For these reasons, Uber’s data shows that its WAV service did not meet the requirements for an exemption request in Q4 2019, Q1 2020, Q2 2020, or Q3 2020. It would be unjust and unreasonable to award funds to Uber when it has not met the minimum requirements of the Act. Uber’s data fails to demonstrate adequate response times as required by the Act, and CPED should reject its exemption request in the Advice Letter on this basis.

### **B. Uber’s Unredacted Data Essentially Contains No Accounting of Funds Expended.**

The Track 2 Decision stated that since “an exemption permits a TNC to retain quarterly fees for the next full year, we find it reasonable that a TNC seeking an exemption should submit the same information required in an Offset Request. Accordingly, a TNC seeking an exemption shall submit the same information as required in an Offset Request for four consecutive quarters.” (Track 2, p. 48.) Under the fourth element required to be awarded an offset, a TNC must provide a “full accounting of fund,” as well as demonstrate that an improved level of service, including reasonable response times, is due to *investments for WAV service* compared to the previous quarter. (Track 2 Decision, pp. 25-26 (emphasis added). Due to Uber’s extensive redactions of Expenditure Data in Q2 and Q3 2020, as noted in the protest to Advice Letter 4 and 6, it is unclear what costs Uber incurred providing WAV service and there is no showing whether these investments improved WAV service.

### **III. Resolution ALJ-388 Rejected Uber’s Claims of Confidentiality Regarding Fund Expended Data, and Uber Has Again Failed to Meet its Burden.**

Based on prior disputes over confidentiality over Uber’s Advice Letters 1-3, the Commission issued Resolution ALJ-388 on November 16, 2020, flatly rejecting all of Uber’s claims. The Resolution noted that GO 66-D sets forth the requirements that a person must comply with in requesting confidential treatment of information submitted to the Commission and that GO 96-B provides further rules concerning disclosure of information obtained through the Advice

Letter process, which are consistent with the constitutional and statutory requirements applicable to disclosure of government records. (Resolution, p. 4.)

The Resolution noted that in the Track 2 Decision, the Commission stated that a parallel decision to be adopted in Rulemaking (R.) 12-12-011 “shall govern confidentiality as it relates to information submitted pursuant to SB 1376.” (*Id.*, citing Track 2 Decision, p. 43.) D.20-03-014, the parallel decision, made clear that a person submitting information to the Commission must satisfy the requirements of GO 66-D. (*Id.*, citing D. 20-03-14, at 23.) The Track 2 Decision also designated that the General Rules of the GO 96-B Advice Letter process, with limited modifications, shall apply to Offset Requests. (Track 2, pp. 48-49.) As such, Rule 10 of GO 96-B governs the analysis here.

Rule 10.1 of GO 96-B states that “[b]ecause matters governed by this General Order are informal, it is rarely appropriate to seek confidential treatment of information submitted in the first instance in the advice letter process.” Rule 10.2 provides that “[a] person requesting confidential treatment under this General Order bears the burden of proving why any particular document, or portion of a document, must or should be withheld from public disclosure.”

Rule 10.3(d) and (e) require a person seeking confidential treatment to: “Identify any specific provision of state or federal law, or Commission decision, the person believes prohibits disclosure of the information for which it seeks confidential treatment and explain in detail the applicability of the law or decision to that information.” It also requires to “Identify any specific privilege, if any, the person believes it holds and may assert to prevent disclosure of information and explain in detail the applicability of that law to the information for which confidential treatment is requested. Accordingly, Uber bears the burden of proving that the information at issue in their offset and exemption requests satisfy Rule 10’s pleading and substantive requirements. (Resolution, p. 5.)

Against this backdrop, the public policy interests must be kept at the forefront. As noted in the Resolution, the Act requires the Commission to submit a report to the Legislature “on compliance with the section and on the effectiveness of the on-demand transportation programs or partnerships funded pursuant to this section.” The required report underscores the Legislature’s public interest intent in understanding the effectiveness of the TNC WAV programs, as well as the capabilities and the challenges of providing on-demand WAV access. (Resolution, pp. 22-23.) In addition, the purpose of the required data submissions in the exemption requests is to ensure that TNCs are only permitted to retain Access Funds upon a high showing quarter over quarter of improved WAV service. Of particular importance, the data here is being provided to support the request for Uber to be exempt from remitting payment of Access Funds collected from every California passenger for an entire year from a geographic area. To do so, Uber must establish it meets the response time requirements, and submit the same information for an offset request. But incredibly, Uber attempts to shield how it expended the funds and whether they indeed improved WAV service from parties to this rulemaking on the unsupported premise that this data for which it seeks reimbursement in and of itself is economically valuable. This twisted logic turns the purposes of the Act and the California Public Records Act on its head. More importantly, the redactions make it impossible for the parties to this proceeding to assess whether Uber has met the Commission’s minimum requirements for exemptions as set forth in its Track 2 Decision.

#### **IV. Uber Once Again Has Failed to Meet Its Burden To Establish the Expenditure Data is a Trade Secret.**

While Uber has redacted less data here than in past Advice Letters, it still must meet its burden to prove the data qualifies for statutory protection. Even though Uber has the benefit of the Resolution, which

provides specific guidance on this issue, Uber still has failed to meet its burden. Uber's claims of confidentiality in its Advice Letter cover only two quarters (Q2 and Q3 2020) and involve three areas of redacted expenditure data in the AL spreadsheets: (1) Fund Expended tab, Column Q – Transportation Service Partner Fees/Incentives and/or Management Fees, Column U – Consultants/Legal, Column Y - Total Partnership Costs, and Column BD Total Expended; (2) Fund Certification tab, Partnership Costs, which encompasses the aggregated information in the Fund Expended tab; and (3) Contact Information tab, which includes the amount of contract expenses per quarter. Uber also redacted the aggregated total of funds sought in its Cover Letter. Uber asserts that all the redacted data ("Expenditure Data") reflects commercially sensitive and highly confidential contractual pricing terms that qualify as trade secrets under 18 U.S.C. § 1832, Cal. Civil Code § 3426 et seq., and Evidence Code § 1060, the disclosure of which would reveal valuable information. (See Uber AL 6, Declaration of Confidentiality Pursuant to General Order 96-B, Section 10.3 on behalf of Uber Technologies, Inc. Regarding Advice Letter 6, ¶3 ("Uber Declaration").) Notably, Uber provided this exact information in its Advice Letters 1 and 2 for Q4 2019 and Q1 2020 respectively, and has no issue with the data for the prior quarters being disclosed.

Uber continues to ignore the strong public interest and need for parties to review this data. In order to meet the requirements for an exemption, Uber must meet the required response times, improvements quarter over quarter, and submit the same information required for offsets. The Act requires a breakdown of funds for offsets, echoed by the Commission in the Track 2 Decision, reflecting the need to make sure that public dollars collected to improve WAV access are being spent appropriately. To demonstrate a full accounting of funds expended, the fourth required element of an offset request, a TNC shall submit: (1) a completed Appendix A with sufficient detail to verify how the funds were expended and with the amount expended for each item, and (2) a certification attesting to the accuracy of its accounting practices. (Track 2 Decision, pp. 25-26.) A TNC seeking an offset for a contractual arrangement with a WAV provider must identify the parties to the contract, the duration of and amount spent on the contract, and how the amount was determined. (*Ibid.*) Without being able to see the breakdown of funds, as noted above, it is impossible for parties to assess whether Uber meets this requirement.

"Trade secret" is defined in California Civil (Civ.) Code § 3426.1(d) as "information such as 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; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain their secrecy." (Resolution, pp. 5-6; Civ. Code § 3426.) Uber's claims still fall short of the specificity required to meet their burden to establish that the Expenditure Data constitutes trade secrets under the Resolution.

In accordance with Section 10.5 of General Order 96-B, San Francisco met and conferred with Uber, but the parties were unable to resolve San Francisco's objections to its claims of confidentiality informally. As part of the meet and confer, Uber offered to release the redacted data if San Francisco executed a non-disclosure agreement. Because, as detailed below and in the objections to Advice Letters 1-4, Uber still has failed to meet its burden to show that the redacted information in the Advice Letter (or any of its previous Advice Letters 1-4) is subject to exemption under the California Public Records Act or San Francisco Sunshine Ordinance, San Francisco is not able to enter into a non-disclosure agreement.

### **A. Uber Failed to Establish That the Expenditure Data Is Business Information**

The Resolution held that Uber failed to demonstrate how any of the categories it redacted in Advice Letters 1-3, including the Expenditure Data listed above, contained “information, including a formula, pattern, compilation, program, device, method, technique, or process,” under Civ. Code § 3426.1(d). (Resolution, pp. 8-9.)

Uber’s attempt to remedy this deficiency fails. Uber claims that the redacted information “constitutes ‘business information (such as financial information, cost and pricing, manufacturing information . . .)’ that Uber has ‘created, on its own, to further its business interests.’” (Uber Declaration, ¶4(a), citing Resolution, p. 7.) But of the examples cited, Uber is only seeking to protect “cost” information, in the form of third-party provider fees, consultant/legal fees, and contract fees for WAV service. Moreover, even Uber does not affirmatively state that the information constitutes a trade secret. Rather the declaration and the single case cited state that cost information “*can* constitute a trade secret protected from disclosure” citing for example *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1455 (2002). (Uber Declaration, ¶4(b)(emph. added).)

Notably, *Whyte*, the only authority cited, only discusses pricing and profit margins, and not cost information. Indeed, the case goes on to state that “pricing and bidding methods [are] not trade secrets if only general methods of doing business.” (*Whyte*, 101 Cal.App.4th, at 1455.) Additionally, *Whyte* involved “specific products (locks) sold to specific customers (The Home Depot and other ‘big box’ retailers, such as Lowe’s and Sears), which made the putative pricing trade secrets specific and articulable.” (*See Mitigation Techs., Inc. v. Pennartz*, 2015 WL 12656936, at \*6 (C.D. Cal. Mar. 13, 2015).) However, here, Uber simply concludes that the cost information is protectable, with no context of how that information is relevant or related to its products or business model. (*See id.*) Therefore, Uber has failed to meet its burden to demonstrate that the Expenditure Data is “business information,” as required, again failing to satisfy Rule 10.3’s threshold pleading requirement to “explain in detail the applicability of the law or decision to that information.”

### **B. Uber Failed to Establish that the Expenditure Data Derives Independent Economic Value and Is Not Generally Known.**

Next, Uber claims that the Expenditure Data, which is nothing more than costs to third party partners and vendors, constitutes economically valuable information that is generally not known to the public. (Uber Declaration, ¶3(b).) The Resolution rejected this claim. With respect to the “funds expended” category and certification, the Resolution stated that “D.20-03-007 requires the costs to be aggregated and grouped into 20 broad categories, such as ‘transportation service partner fees / incentives / management fees,’ ‘marketing costs,’ or ‘training costs.’” (Resolution, p. 11.) Uber claims that “[d]isclosure of the redacted granular expense information would cause material economic harm to Uber by enriching competitors who gain access to information about Uber’s payments to third parties.” (Uber Declaration, ¶3(c).)

The Resolution disagreed, stating “[w]e cannot see how the fund amounts would reveal competitively harmful information, if disclosed. For example, the total amount . . . Uber expended on ‘transportation service partner fees/incentives/management fees’ is an aggregated amount, and does not differentiate hourly rates or specific pricing information that could be of use to a competitor.” (Resolution, p. 11.) The same holds true for Uber’s “consultants/legal” fees. And the other redacted information, “total partnership costs” in Column Y and “total expended” in Column BD are merely

totals of the “transportation service partner” fees and the “consultant/legal” aggregated by county and quarter, so there is nothing competitively harmful in that data either.

Uber does not address the Resolution’s ruling. Rather, the only response it provides is that “the fees charged by third party WAV providers for each ride taken on the platform...can be easily discerned by Uber’s competitors using other publicly available information.” (Uber Declaration, ¶3(c).) Uber claims that “competitors who have access to publicly disclosed information regarding the total number of WAV trips taken on the platform in Los Angeles County during a quarter could use straightforward arithmetic to divide the total fees paid to Uber’s transportation service partner in Los Angeles County to deduce the cost to Uber per ride using the third-party service provider.” (Uber Declaration, ¶3(c).)

But this example, if true, rests on many assumptions, which Uber has not substantiated. First, it assumes that all Uber’s WAV trips are through third party vendors. Second, it assumes that Uber uses a per trip fee structure for each third-party provider agreement. And if Uber does use that fee structure, this disclosure runs counter to its argument that the terms of its contracts need to be kept private as it voluntarily disclosed it in the Advice Letter. On the other hand, if this is not the fee structure, then the example is meaningless. Third, it also assumes that only trips completed require third party expenditures, which does not make sense, as the offset/exemption inquiry requires that Uber also show rides requested, and canceled. Given all these loose threads, Uber’s example, even if true, is incomplete and fails to provide any discernable insight into the value of Uber’s third-party payments. Moreover, this example sheds no light on how a competitor could discern what the aggregated “consultant/legal” fees are in the aggregated amounts. Surely, those contract terms are not based on a fee per trip model, but Uber is silent on this point.

Similarly, with regard to contractual payments, Uber states that “[c]ompetitors could also seek to undercut Uber’s contractual terms with its third-party WAV partners by, for example, seeking out better contract terms with those same partners.” (Uber Declaration, ¶3(d).) But Uber is not required to provide contractual terms, and is only required to provide aggregate contractual cost per county per quarter. The Resolution already rejected this claim:

Uber’s assertion is that if disclosed, unnamed competitors could use Uber’s data to “determine supply, demand, insight into resources, and gain an unfair competitive advantage” and “inhibit competition.” For its third-party WAV payment information (Category i), Uber asserts that this data could give competitors an “unfair business advantage” and “pose potential negative impacts and/or harm” on Uber’s partners....the funds expended and third-party WAV payment data contain aggregated totals and do not reveal granular information, such as hourly rates or pricing information, that could be of use to a competitor. (Resolution, pp. 14-15.)

Moreover, Uber’s examples of why disclosing contract fees is potentially harmful are inconsistent. In Section 3(d) of its declaration, Uber fears its unnamed competitors will get a better deal than Uber by seeing this aggregated information. And in Section 3(e), Uber claims that third-party WAV partners could use this contract pricing information to identify opportunities to raise their prices. But this makes no sense as the contractors already know their own pricing so how will redacting it from the public make a difference? Uber also fails to point out that providing the information may actually lead to competition among contractors that would benefit Uber and WAV riders. Uber has once again failed to provide the required specificity as to how third-party contract information, which is still aggregated by county by quarter, has independent economic value.

Finally, with regard to the redacted figure in the cover letter, the Resolution again flatly rejected that this could be a trade secret: “[t]hat figure is an aggregated amount of all payments



made to third-party partners for that quarter in all counties.... because that figure is an aggregated number, and does not differentiate hourly rate or pricing information, we are not persuaded that third-party WAV providers could extrapolate competitive pricing information.” (Resolution, p. 12.) Uber’s Advice Letter offers nothing more on this point, and thus, it once again failed to prove the aggregate cover letter amount is a “trade secret.”

Uber also concedes that it has provided this very same information it seeks to keep confidential here for its Advice Letters 1 and 2. Therefore, it has failed to demonstrate that the redacted Expenditure Data is not generally known to the public. (Uber Declaration, ¶4(c).) Although Uber claims that it did not provide this quarter’s data to the public, its prior disclosure undercuts its claim that this information is particularly valuable to Uber during the early stage development of the WAV program by virtue of the fact that it disclosed this information to the public. (*Id.*)

In conclusion, while Uber has narrowed its redactions to Expenditure Data, and added some vague examples why they have independent economic value, it has provided nothing that would alter the Commission’s rejection of Uber’s claims of confidentiality under the Resolution:

Uber’s conclusory assertions that all of the “funds expended” categories constitute trade secrets fails to satisfy their respective burdens to prove with particular facts that such information meets the definition of a trade secret. Based on the limited explanation provided in their declarations, as well as the lack of facts identifying the boundaries of their trade secret assertions, we find no basis for withholding any of the “funds expended” amounts, pursuant to Civ. Code § 3426.1(d). (Resolution, p. 12.)

Uber once again has failed to satisfy its burden under Rule 10.3 to explain in detail how the Expenditure Data derives independent economic value from not being generally known to the public or to other persons who can obtain economic value from its disclosure. (*See id.*, p. 14.)

## **V. Conclusion.**

In sum, Uber’s exemption request in Advice Letter 7 fails on multiple grounds and should be rejected. First, Uber has failed to meet the threshold requirements for exemption in the Act and Track 2 Decision. Uber’s data does not show there is “presence and availability” of WAV service to meet the Act’s requirements. Further, Uber’s showing of outreach and accounting of expenditures, half of which is redacted without justification, is equally lacking. Second, Uber’s claims of confidentiality fail under the requirements of the Resolution, and governing orders. Although Uber has redacted less data here, it has failed to meet its burden to establish the Expenditure Data constitutes a trade secret. Therefore, the CPED should find the claims unwarranted and refer the matter once again to the Administrative Law Judge Division. Uber should be required to re-serve the unredacted Advice Letter, and the CPED should continue or reopen the protest period to allow the parties additional time to submit supplemental protests after reviewing the same. For the reasons stated herein, San Francisco requests that the Advice Letter is rejected outright as CPED cannot reasonably find that Uber has met the required statutory burden.

Sincerely,

By: \_\_\_\_\_/s/

Tilly Chang

Executive Director

San Francisco County Transportation Authority

By: \_\_\_\_\_/s/  
Jeffrey Tumlin  
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San Francisco Municipal Transportation Agency

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cc: Lisa Tse, Adam Bierman, Jane Lee, westregs@uber.com