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.	R. 12-12-011 (Filed December 20, 2012)

REPLY OF THE SAN FRANCISCO CITY ATTORNEY'S OFFICE, SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY, SAN FRANCISCO INTERNATIONAL AIRPORT, AND SAN FRANCISCO COUNTY TRANSPORTATION AUTHORITY TO THE RESPONSES OF LYFT AND RASIER-CA LLC TO THE JOINT PARTIES' MOTION FOR OFFICIAL NOTICE

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I. REPLY

Pursuant to Commission Rule of Practice and Procedure 11.1, on January 10, 2019, ALJ Chiv granted the Joint Parties' request for leave to file a reply to the responses of Lyft and Rasier-CA LLC (Uber). In that order, ALJ Chiv stated that the Reply should be filed no later than January 22, 2019. The Joint Parties' Motion sought official notice of incontrovertible facts relevant to the Commission's consideration of whether and how to share TNC data with local governments.

Both Lyft and Uber wildly misconstrue the Joint Parties' motion and argue that facts stemming from the *Lyft v. City of Seattle* case, already cited to by parties in this proceeding, are no longer relevant. Lyft and Uber's arguments in response to the motion are an attempt to distract the Commission from the following facts that they cannot and, in fact, do not dispute:

(A) the Washington Supreme Court overturned the lower court's erroneous injunction barring public disclosure of zip-code based ride data;

(B) the fact that on remand, the trial court entered a stipulated agreement to publicly release the zip-code based ride data;

(C) the legal requirements of the Seattle Municipal Code;

(D) the form and content of those forms used by the City of Seattle;

(E) the San Francisco County Transportation Authority issued a report studying congestion attributable to TNCs, finding that TNCs were largely responsible for the increases in congestion in San Francisco;

(F) as reported by the Seattle Times, zip code based ride data that was previously confidential is now being disclosed publicly; and

(G) KQED reported that the San Francisco County Transportation Authority's study determined that TNCs are largely responsible for congestion in San Francisco.

The Commission should grant the Joint Parties Motion for Official Notice as to Exhibits A through G. Further, because they are legally operative records appropriate for judicial notice, the Commission may rely upon Exhibits A through D not just to substantiate the existence of those records, but also facts that clearly derive from the legal effect of those documents.

A. Even Uber agrees that the Commission Should Take Official Notice of the Washington Supreme Court Decision, the Stipulated Order Dismissing Lyft and Uber's Complaint with Prejudice, Seattle's Municipal Code, and the Seattle Reporting Requirements.

Perhaps in recognition of the fact that Uber has already cited to the lower Washington court's erroneous ruling,[1] Uber concedes that it is appropriate for the Commission to take official notice of the Washington Supreme Court decision (Exhibit A), the stipulation and dismissal with prejudice unsealing the zip-code based ride data (Exhibit B), the Seattle municipal code requiring TNCs to report ride information (Exhibit C), and the form implementing the Seattle Code (Exhibit D).[2] While Uber attempts to cabin the significance of these documents to their mere existence, their substance speaks volumes and the Commission may rely upon the truth of the matters stated in each document because each is a legally operative document that speaks for itself.

In *Scott v. JP Morgan Chase Bank, N.A.*, the plaintiff, like Uber, argued that while the court could take judicial notice of the existence of a document, it could not take judicial notice of the facts asserted within the agreement. The court soundly rejected this argument, as applied to legally operative documents.

> The distinction that Scott draws, however, is immaterial to this case. Where, as here, judicial notice is requested of a legally operative document – like a contract – the court may take notice not only of the fact of the document and its recording or publication, **but also facts that clearly derive from its legal effect**. Moreover, **whether the fact derives from the legal effect of a document or from a statement within the document, the fact may be judicially noticed where, as here, the fact is not reasonably subject to dispute**."[3]

Relying upon precedent from the First District Court of Appeal, the *Scott* court found that "a court may take judicial notice not only of the existence and recordation of recorded documents but also a variety of matters that can be deduced from the documents,"[4] including the date a document is

[1] *See e.g.* Uber Opening Comments to Phase III.B Memo and Ruling of the Assigned Commissioner at p. 3.

[2] Uber Response to Joint Parties' Motion at p. 7.

[3] *Scott v. JP Morgan Chase Bank, N.A.*, (2013) 214 Cal.App.4th 743, 754 (emphasis added).

[4] *Id.*

executed, the parties to the transaction reflected in a document, and the legally operative language in the document.[5]

Each of Exhibits A through D are legally operative documents, and the facts contained in them are not reasonably subject to dispute. As a published decision of the Washington Supreme Court, Exhibit A is binding precedent upon the lower courts in Washington. The Washington Supreme Court decision contains legally operative statements such as those describing why the trial court's injunction as to the zip-code based ride data was improper, "The superior court erred … by accepting [Lyft and Ubers's] argument that [Washington precedent] carved out trade secrets from application of the PRA,"[6] and "based apparently on its legal error that trade secrets are categorically exempt from disclosure, the court reached the circular conclusion that 'public disclosure of trade secrets under the Public Records Act constitutes irreparable harm because such disclosure 'destroys the information's status as a trade secret.'"[7] The court also made findings regarding the public interest in disclosure. "The City collects zip code data from taxi companies, and it uses the data from those companies and the TNCs to evaluate traffic and infrastructure concerns, determine future needs, and assess claims of discriminatory redlining."[8] Each of these statements are contained in a decision of the court, and are entirely appropriate for official notice.

Exhibit B is a stipulation and order from the King County Superior Court dismissing Lyft and Uber's complaint with prejudice, and ordering certain records related to zip-code based ride data "that were sealed by order dated October 26, 2016 shall be unsealed." This is also clearly a legally operative document. It is signed by the judge, and filed with the Clerk of the King County Superior Court. As a legally operative document, the Commission may take official notice of "facts that clearly derive from its legal effect."[9] Thus, the Commission should take official notice of the fact that, by ordering those documents to be unsealed, the order makes public the zip-code based ride data. As a

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[5] *Id.* at p. 755.

[6] *Lyft v. City of Seattle* (2018) 190 Wash.2d 769, 788.

[7] *Id.* at p. 794.

[8] *Id.* at p. 793.

[9] *Scott v. JP Morgan Chase Bank, N.A.*, 214 Cal.App.4th at 754.

stipulated judgment, the Commission should also take official notice of the fact that the parties contesting this motion, and disclosure of similar information more broadly in this proceeding, agreed to make that data available to the public, even though both Lyft and Uber had previously asserted that it was a trade secret.

Exhibit C is a part of the municipal code of the City of Seattle, also clearly a legally operative document. The code also speaks for itself in that it plainly states the legal requirements for TNCs operating in Seattle. The Commission should take official notice of not only the existence of the ordinance, but also the fact that in Seattle TNCs are required to report, on a quarterly basis, the:

- Total number of rides provided by each taxi or for-hire vehicle license holder or individual Transportation Network Company;
- Type of dispatch for each ride (hail, phone, app, etc.)
- Percentage or number of rides picked up in each zip code;
- Pick up and drop off zip codes of each ride;
- Percentage by zip code of rides that are requested but unfulfilled; (phone or app only)
- Number of collisions; including the name and number of the affiliated TNC, taxicab, and for-hire driver, collision fault, injuries, and estimated damage;
- Number of requested rides for an accessible vehicle;
- Crimes against driver reports;
- Passenger complaints; and
- Any other data identified by the Director to ensure compliance.[10]

Exhibit D is the form of reporting required pursuant to those laws posted on the City of Seattle's Department of Finance and Administrative Services' website. The Department of Finance and Administrative Services' form implements the legal requirements of the Seattle municipal code, and constitutes a legal representation of those requirements. Even if the Commission determines that this form is not a legally operative document by itself, the Commission may still take notice of the form because the facts regarding the form and its contents are not reasonably subject to dispute.

B. Lyft's Arguments Related to Relevance Are Misplaced and Misleading.

In its response, Lyft glosses over whether the Commission should take official notice of the existence of these exhibits and propounds arguments based on relevance in a thinly veiled attempt to argue the merits of its position. To be clear, the Joint Parties offered several short statements of relevance to demonstrate why the documents are germane to this track of the proceeding to comply

[10] Seattle Municipal Code § 6.310.540.

with the well-settled principle that "although a court may judicially notice a variety of matters only relevant material may be noticed."[11] The Joint Parties' statements in the brief motion were not an attempt to argue the merits of their position, but rather, advise the Commission of the existence and relevance of the documents related to the issue under consideration.

According to Lyft "the more substantive issue with the Joint Motion is that the documents for which it seeks official notice concern a lawsuit litigated under a different set of facts and a different regulatory framework, in a different state, and under a materially different legal standard for the issuance of an injunction."[12] Put differently, one might conclude that Lyft believes the Washington case is irrelevant and therefore not appropriate for judicial notice. If true, Lyft's objection would apply with equal force to comments from Uber and other parties that cited to and relied upon the Washington decision as evidence that courts have determined that zip-code based ride data should not be disclosed to the public.[13] But, since Uber and other parties have already raised the specter of the Washington case in this proceeding, Exhibits A through D have been put at issue and are therefore relevant to the Commission's consideration of whether and how to share TNC data with local governments. Thus, Lyft's relevance arguments are misplaced.

Apparently lacking other grounds to oppose the Exhibits related to the Washington case, Lyft mischaracterizes the purposes for which the Joint Parties sought official notice. For example, Lyft claims that "because the significance of the Stipulation is disputed and the Stipulation is irrelevant to this proceeding, official notice of the Stipulation would be improper under California law."[14] Similarly, rather than address whether the Seattle Municipal Code is appropriate for official notice, Lyft mischaracterizes the Joint Parties' motion as a request for notice that Lyft sought to frustrate

[11] See *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, (overruled by *In re Tobacco Cases II* (2007) 41 Cal.4th 1257 on other grounds).

[12] Lyft Response to Joint Parties' Motion at p. 1.

[13] *See e.g.* Rasier-CA LLC Opening Comments to Phase III.B Memo and Ruling of the Assigned Commissioner at p. 3, and Reply comments of California Manufacturers & Technology Association to Phase III.B Memo and Ruling of the Assigned Commissioner at p. 9.

[14] Lyft Response to Joint Parties' Motion at p. 7.

Seattle's regulatory requirements; "But SF presents no evidence that Lyft or Rasier 'sought to frustrate' Seattle's data reporting requirements."[15]

Simply because Lyft seeks to dispute the significance of the document, or mischaracterize the relevance Joint Parties attribute to that document does not change the fact that those documents are legally operative, whose existence and legal effect of those documents, are appropriate for official notice under the Evidence Code. Under Lyft's theory, any party could frustrate a motion for official notice by simply disputing the significance of facts contained in the records. This is incorrect, and not what is required by the Evidence Code.

Despite starting with the position that the Washington case is irrelevant, after a four page legal analysis of the Washington Supreme Court's decision, Lyft changes its tune and asserts that, actually, the Washington Supreme Court decision has value as "persuasive authority on the question of whether TNC ride data constitutes a trade secret,"[16] but not on the whether such data should be disclosed. The Commission should disregard these self-serving comments, and efforts at obfuscation.

C. Lyft Agrees that the San Francisco Transportation Authority's Report: TNCs and Congestion Is Appropriate for Official Notice.

As to the report *TNCs and Congestion*, Lyft concedes that the Commission could take official notice of the existence of an agency report.[17] The Joint Parties agree that "the taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom."[18] The Joint Parties are not asking the Commission to accept as undisputable truth each and every statement made in the report. Rather, the Joint Parties seek official notice that the San Francisco County Transportation Authority, the agency authorized under the Public Utilities Code to manage congestion in San Francisco, issued a report analyzing the congestion impacts caused specifically by TNCs in San Francisco. Whether draft or final, it does not change the incontrovertible fact that the San Francisco County Transportation Authority issued the report analyzing the congestion impacts attributable to TNCs.

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[15] *Id.*

[16] Lyft Response to Joint Parties' Motion at p. 6.

[17] Lyft Response to Joint Parties' Motion at p. 8.

[18] *Mangini*, 7 Cal. 4th at 1063-1064.

While Lyft asserts that SF has not stated for what purpose the CPUC should take official notice of the report, the existence of the report is sufficient to demonstrate that ride info "is of particular interest to the City and other local jurisdictions because TNC operations impact local jurisdictions in many ways, including changes in traffic congestion, and transit modality."[19] This report, in conjunction with evidence already in the record in the form of comments and declarations from local entities, establish the potential utility of TNC data including the ability to address local planning concerns related to traffic and congestion. This is a public policy that would be served by sharing the TNC data with local jurisdictions. The existence and issuance of the report are not reasonably subject to dispute and the Commission should take official notice of these facts.

D. The Existence of the Newspaper Articles are Appropriate for Official Notice.

The City sought official notice of the newspaper articles to substantiate historical facts: i.e. "the dispute between Lyft, Uber and the City of Seattle over the treatment of the zip code based ride data, the resolution of the lawsuit, Lyft and Uber's willingness to allow the information to be publicly disclosed, and the TNC and Congestion report."[20] While both Lyft and Uber raise arguments related to the truth of the matters stated in the articles, neither Lyft nor Uber disputed these facts, or claimed that even one of the historical facts the Joint Parties seek official notice of are untrue. Thus, official notice is appropriate under Evid Code 452(g)-(h). At a minimum, the Commission should take official notice of the fact that November 5, 2018, the Seattle times reported that the zip-code based ride data that was previously being kept secret was now being disclosed publicly. Likewise, the Commission may take official notice of the fact that on October 16, 2018, KQED reported that the City's analysis found that Uber and Lyft are the biggest contributors to congestion.

E. The Commission Should Ignore Lyft's Attempts to Raise Procedure Over Substance.

Lyft argues that the Commission should deny the Joint Parties' motion because it did not attach a declaration authenticating the documents. However, Commission Rule of Practice and Procedure 13.6(a) states that so long as the substantial rights of the parties are preserved, the "technical rules of

[19] Motion at p. 4.

[20] Motion at p. 5.

evidence ordinarily need not be applied in hearings before the Commission." Based on longstanding practice before the Commission, such authentication is unnecessary, and neither Lyft nor Rasier have argued that the documents are not what the Joint Parties represent them to be, which would typically be the cause of concern over authentication. As a quasi-legislative proceeding, the Commission typically conducts these types proceeding through comments and workshops, without a formal evidentiary hearing where the Commission typically applies the more formal rules of evidence.

Lyft and Uber will not suffer any undue prejudice if the Commission grants the motion. Lyft and Uber both had opportunity to, and did respond to the motion. The Commission has indicated that a ruling on this issue is coming shortly, and the Joint Parties desired to ensure that the Commission was aware of recent developments related to this track of the proceeding. Upon the issuance of any proposed decision, all parties to this proceeding will have opportunity to comment on the merits of the substantive issue.

II. CONCLUSION

For the foregoing reasons, the Commission should grant the Joint Parties' request for official notice.

Dated: January 22, 2019

Respectfully submitted,

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By: /s/
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On behalf of:
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