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 COMMENTS OF THE SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY, SAN FRANCISCO COUNTY TRANSPORTATION AUTHORITY, AND SAN FRANCISCO INTERNATIONAL AIRPORT REGARDING RELEASE OF 2014-2019 ANNUAL TNC REPORTS

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INTRODUCTION

In response to the California Public Utilities Commission's (the "Commission's") Third Amended Scoping Memo and Ruling for Phase III of Rulemaking 12-12-011, issued on December 9, 2021, the San Francisco Municipal Transportation Agency and the San Francisco International Airport (collectively, "the City") and the San Francisco County Transportation Authority (together, the "City and County") submitted opening comments to assist the Commission in deciding whether all or parts of the Transportation Network Company ("TNC") annual reports submitted from 2014 to 2019 should be publicly disclosed. HopSkipDrive, Inc. ("HopSkipDrive"), Lyft, Inc. ("Lyft"), the San Francisco Taxi Workers Alliance, and Uber Technologies, Inc. ("Uber") also submitted opening comments. City and County submit these reply comments in response to the TNCs' opening comments.[1]

Only HopSkipDrive opposes outright the release of the 2014 to 2019 TNC annual reports. Lyft and Uber agree to releasing the reports but again argue for broad redactions on privacy, trade secret, and other grounds that the Administrative Law Judge ("ALJ") in these proceedings has repeatedly rejected. The City and County maintain that the TNCs should release the 2014 to 2019 annual reports, with the same redactions that the ALJ ruled appropriate for the 2021 annual reports.

DISCUSSION

1. The ALJ has already ruled on the fields TNCs may properly redact from annual reports.

Lyft and Uber attempt to re-argue legal issues that the ALJ has already settled. The ALJ's Ruling on Uber's and Lyft's Motion for Confidential Treatment of Certain Information in Their 2020 Annual Reports ("2020 Confidentiality Ruling") identified a limited subset of information that TNCs may redact from annual reports. The ALJ's Ruling Granting, in Part, the Motions of Uber, Lyft, HopSkipDrive, and Nomad Transit, LLC for Confidential Treatment of Portions of Their 2021 Annual TNC Reports ("2021 Confidentiality Ruling") further narrowed the subset of information that TNCs may redact. There is no basis for the Commission to treat the same information that has been

[1] For ease of reference, these reply comments refer to HopSkipDrive's opening comments as "HopSkipDrive Comments," Lyft's opening comments as "Lyft Comments," and Uber's opening comments as "Uber Comments."

determined to be "public" in the 2020 and 2021 annual reports any differently from the 2014 to 2019 annual reports.

Lyft and Uber again argue that broad categories of new data should be redacted.[2] The ALJ's prior rulings considered the arguments advanced by the TNCs and only allowed redaction of latitude and longitude information, certain driver information, and certain accident and incident information.[3] The ALJ denied the balance of Uber's and Lyft's motions because they did not meet the burden of proving that the data is trade secret, private, or otherwise subject to confidentiality. There is no reason to change course here. The TNCs cite no persuasive new case law,[4] and there is no difference in the data that is being reported.

Lyft and Uber assert that additional trip location and driver data should be withheld on privacy grounds.[5] On this issue, the ALJ recently considered and determined that waybills should not be protected on privacy grounds.[6] The ALJ further specifically identified what data was personally identifiable information and could be withheld as confidential.[7] Lastly, in response to Lyft's argument that the TNCs themselves are entitled to constitutionally protected privacy interests,[8] the ALJ previously highlighted that TNCs have a diminished expectation of privacy with respect to trip data because of the Commission's extensive jurisdiction over TNCs.[9]

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[2] Lyft Comments, pp. 3-7, 10-37; Uber Comments, pp. 2-10.

[3] 2020 Confidentiality Ruling, pp. 4-13; 2021 Confidentiality Ruling, pp. 1-2.

[4] Lyft cites several additional cases, but none propose novel concepts regarding privacy, trade secrets, or application of the California Public Records Act ("CPRA"). For example, Lyft cites *Black, Sivalls & Bryson, Inc. v. Keystone Steel Fabrication, Inc.*, 584 F.2d 946, 952 (10th Cir. 1978) and *Brunswick Corp. v. Jones*, 784 F.2d 271, 275 (7th Cir. 1986), for the proposition that pricing policies and financial projections can constitute trade secrets. The Commission has already evaluated the TNC data factoring in these concepts and determined that there is no trade secret. Lyft similarly cites new privacy and CPRA cases that add no novel concepts to the analyses in the Commission's prior rulings, *see, e.g.*, Lyft Comments, pp. 4, 7-9, 20-21, 26, 32, 35-36.

[5] Lyft Comments, pp. 3-5, 10-25; Uber Comments, pp. 2-5.

[6] 2021 Confidentiality Ruling, p. 5.

[7] *Id.* pp. 12-13.

[8] Lyft Comments, pp. 23-25.

[9] 2021 Confidentiality Ruling, pp. 14-15.

Lyft and Uber next advance trade secret arguments nearly identical to their arguments in prior commenting.[10] Lyft even copies and pastes large sections of block text from a declaration in support of its arguments in 2021.[11] Again, the ALJ responded to and dismissed Lyft's takings argument and rejected Lyft's and Uber's trade secrets arguments.[12]

Finally, for good measure, Lyft and Uber again suggest that the balancing test under the CPRA should find in favor of withholding additional data categories.[13] The ALJ has already repeatedly found that the balancing test weighs in favor of disclosure.[14]

The City and County appreciate that Lyft and Uber have agreed to produce the 2014 to 2019 annual reports, but there is no reason to revisit the prior ALJ rulings regarding appropriate redactions. The parties extensively briefed the issues, and the ALJ thoughtfully analyzed and ruled on them.

2. Requiring disclosure of the historical TNC data is not inappropriate retroactive rulemaking, and the current rulemaking constitutes due process.

Lyft argues that public disclosure of the prior TNC annual reports would be a "retroactive repeal" of a prior Commission decision.[15] HopSkipDrive makes similar arguments.[16] To the extent any of the information is trade secret, Lyft argues that disclosure would also constitute an unlawful taking.[17] Neither assertion has merit.

Lyft argues that a "retroactive repeal" of a prior rule would deprive the TNCs of due process.[18] To the extent that Lyft is concerned about due process in requiring the release of historical TNC data, the present rulemaking provides the appropriate due process, through notice and an opportunity for briefing by the affected parties. *See People v. W. Air Lines* (1954) 42 Cal. 2d 621, 632 ("Due process

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[10] Lyft Comments, pp. 5-7, 25-36; Uber Comments, pp. 7-9.

[11] Lyft Comments, pp. 27-31.

[12] 2021 Confidentiality Ruling, pp. 12-54.

[13] Lyft Comments, p. 37; Uber Comments, pp. 9-10.

[14] 2020 Confidentiality Ruling, pp. 22-23; 2021 Confidentiality Ruling, pp. 61-78.

[15] Lyft Comments, pp. 7-8.

[16] HopSkipDrive Comments, pp. 2-4.

[17] Lyft Comments, pp. 8-10.

[18] *Id.* at 7-8 (citing *County of Sacramento v. Lewis* (1998) 523 U.S. 833, *Morrison v. State Bd. of Ed.* (1969) 1 Cal.3d 214).

as to the commission's initial action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made."). While the prior reports may have been submitted confidentially, here the Commission is conducting a rulemaking for feedback from the affected parties before requiring the TNCs to essentially submit new reports (with appropriate redactions) for public release.

The cases Lyft cites are also inapposite in that they addressed actions by government agencies that would (1) penalize a party for prohibited conduct after the fact[19] or (2) alter an individual's right to recover compensation after the fact.[20] Here, all that is at issue is the submission of historical TNC data. The TNCs are not at risk of violating a retroactive statute or rule, nor are they at risk of being denied previously promised compensation, as was the case in all of the cases cited.

Lyft also cites a 2004 Commission decision which states that "Commission decisions generally apply on a prospective basis . . . ."[21] At issue in that decision, again, was a party's right to reimbursement for costs (specifically, for gas and electric submetering). The Commission is not bound by a 2004 decision regarding ratepayer reimbursement here, especially where the Commission previously qualified that the rule is only generally – and not always – applicable. And regardless of what the previous decision said regarding confidentiality of the prior annual reports, if disclosure of the information is required under the CPRA, then the information must be disclosed.[22]

HopSkipDrive similarly argues that, because a Commission ruling from last year required prospective (rather than retroactive) application of confidentiality rules for renewable portfolio

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[19] *See Id.*. (discussing *Morrison v. State Bd. of Ed.* (1969) 1 Cal.3d 214 (holding that a teacher could not be subject to discipline for conduct not made explicitly clear in advance); *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069 (evaluating the validity of an ordinance banning camping and storage of personal property in public areas); *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015) (reviewing a statute prohibiting courses or classes that promote resentment toward a race or class of people or that promote ethnic solidarity instead of treatment of pupils as individuals)).

[20] *See Id.*. (discussing *Aetna Cas. & Sur. Co. v. Industrial Acc. Commission* (1947) 30 Cal.2d 388 (reviewing changes to a labor statute that provided employees compensation for injuries); *Bowen v. Georgetown University Hosp.* (1988) 488 U.S. 204 (evaluating changes to a rule determining the cap on reimbursable Medicare wage costs)).

[21] *Id.* p. 8 (citing *Yucaipa Mobilehome Residents' Ass'n*, Order Denying Rehearing of D.04-05-056).

[22] *See* 2021 Confidentiality Ruling, p. 7 ("The California Public Records Act (CPRA) *requires* that public agency records be open to public inspection unless they are exempt from disclosure under the provisions of the CPRA" (emphasis added)).

standard ("RPS") contracts, the same concept should apply to the TNC data.[23] However, the Commission has a very different role in regulating RPS contracts, "to balance public disclosure, pro-competitive policy framework, and transparency policy goals with the statutory provisions requiring confidential treatment of market-sensitive RPS procurement data."[24] Here, the Commission has repeatedly determined that TNC data has no similar market sensitivity.

Lyft takes the flawed argument a step further and opines that if "retroactive repeal" of the prior rule would require the disclosure of trade secret data, it would be an "unlawful taking under the Fifth Amendment of the Constitution.[25] Lyft goes on to discuss two cases that dealt with the disclosure of trade secret data.[26] The premise of both of those cases was that there must be a trade secret in order for compensation to be due. As discussed above, the ALJ has already repeatedly ruled that the publicly released TNC annual report data does not constitute trade secrets. Absent a trade secret, there is no constitutional taking.

CONCLUSION

The City and County maintain that the TNCs should publicly disclose the 2014 to 2019 annual reports, subject to the same redactions that were specified in the 2021 Confidential Ruling, as summarized in Table X of City and County's opening comments. The TNCs present no persuasive new legal precedents or facts to justify further redactions on privacy, trade secret, or any other basis, and Lyft's and HopSkipDrive's new arguments regarding retroactive application of a ruling are unpersuasive. The City and County respectfully request that the Commission require disclosure of the 2014 to 2019 reports as soon as practicable.

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[23] HopSkipDrive Comments, pp. 2-3 (citing Decision 21-11-029).

[24] Decision 21-11-029, p. 4.

[25] Lyft Comments, p. 8.

[26] *Id.* at 9-10 (discussing *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, *Syngenta Crop Protection, Inc* (2006) *v. Helliker*, 138 Cal.App.4th 1135).

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Respectfully submitted,

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