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May 12, 2020
Uber Technologies, Inc.
PSG0038150

California Public Utilities Commission
Consumer Protection and Enforcement Division
Transportation Licensing and Analysis Branch
505 Van Ness Avenue
San Francisco, CA 94102

Re: Reply of Uber Technologies, Inc. to San Francisco Municipal Transportation Agency, San Francisco County Transportation Authority, San Francisco Mayor's Office on Disability, Disability Rights California and Disability Rights Education & Defense Fund's Protests to Uber Technologies, Inc.'s Advice Letters 1, 2, and 3

Pursuant to Decision ("D.") 20-03-007 and General Order 96-B, §7.4.3., Uber Technologies, Inc. ("Uber") hereby replies to the protests submitted by parties regarding Advice Letter 1 ("AL-1"), Advice Letter 2 ("AL-2") and Advice Letter 3 ("AL-3"). Protests were submitted on May 5, 2020, by the following parties:

- San Francisco Municipal Transportation Agency, San Francisco County Transportation Authority, and San Francisco Mayor's Office on Disability (collectively "San Francisco")
- Disability Rights California and Disability Rights Education & Defense Fund (collectively "Disability Rights Advocates")

BACKGROUND

Uber filed AL 1, AL 2, and AL 3 pursuant to D.20-03-007, issued March 19, 2020, pertaining to Senate Bill ("SB") 1376 and the TNC Access for All Act ("Act"). D.20-03-007 implements the framework within which to apply for an offset as described within Public Utilities ("P.U.") Code §5440.5.

PROTESTS

Five parties protested Uber's AL-1, AL-2, and AL-3. Although the content of each of Uber's Advice Letters is different, San Francisco submitted three substantively identical protests. Similarly, Disability Rights Advocates submitted one protest within which it used the same arguments to oppose each of Uber's Advice Letters (1 - 3), despite the fact that the information provided within each Advice Letter is substantively different. The protests are summarized as follows, for reference:

San Francisco

San Francisco argues that Uber has failed to meet its burden to establish confidential protection of its redacted information. San Francisco also claims that Uber’s data does not show that there is “presence and availability” of WAV service or an “improved level of service” in retroactive response times. San Francisco requests that CPED “direct Uber to re-serve unredacted Advice Letters on all parties; and issue a notice continuing or reopening the protest period for an additional 20 days following service of the unredacted Advice Letters to allow the parties to analyze the Advice Letters and, if necessary, submit a supplemental protest.”¹ Alternatively, San Francisco requests that the Advice Letters be rejected outright because “CPED cannot reasonably find that Uber has met the required statutory burden.”² Lastly, San Francisco argues that if CPED is inclined to approve the Advice Letters without additional protests by the parties, San Francisco preserves the right to request an evidentiary hearing.

Disability Rights Advocates

Disability Rights Advocates claim that Uber’s³ service of the Advice Letters was improper; the relief requested violates statute or Commission order; and the analysis, calculations, or data in the advice letter contain material errors or omissions.⁴

UBER’S REPLY TO PROTESTS

The protests are procedurally and substantively flawed. Both San Francisco and Disability Rights Advocates’ protests misinterpret the intent of SB 1376 and D.20-03-007, and rely heavily on policy objections in an attempt to re-litigate the substance of Uber’s Advice Letters. This approach to protesting is invalid per General Order (“GO”) 96-B, §7.4.2, which states “a protest may not rely on policy objections to an advice letter where the relief requested in the advice letter follows rules or directions established by statute or Commission order applicable to the utility.”⁵ Additionally, “a protest may not be made where it would require relitigating a prior order of the Commission.”⁶ Uber’s Advice Letters 1, 2 and 3, are consistent with the Commission’s findings in D.20-03-007, and the framework authorized by SB 1376.

Further, San Francisco protests Uber’s Advice Letters 1 - 3 based on §7.4.2(6), which permits protest if “the relief requested in the advice letter is unjust, unreasonable, or discriminatory, provided that such a protest may not be made where it would require relitigating a prior order of the Commission.” But San Francisco’s protest is filled with disagreements regarding

¹ San Francisco protest at 2 and 10.

² San Francisco protest at 2 and 10.

³ Disability Rights Advocates incorrectly uses the term “utility” in an apparent reference to Uber.

⁴ Disability Rights Advocates protest at 1 and 4.

⁵ General Order 96-B, §7.4.2.

⁶ General Order 96-B, §7.4.2(6).

confidentiality and offset criteria which is a clear attempt at re-litigating the Commission findings and directives in D.20-03-007. Specifically, throughout Track 2 of Rulemaking (“R.”)19-02-012 San Francisco could have proposed methodologies, formulas, or templates for TNCs to utilize in demonstrating offset criteria. San Francisco, however, chose not to make any such proposals. Following that silence, San Francisco now seeks to upend and re-litigate the offset criteria requirements by introducing new arguments within their protest. San Francisco’s efforts are impermissible under the Commission’s rules.

The two main issues protested are regarding (1) confidentiality of redacted data; and (2) meeting the offset criteria (*i.e.* the presence and availability of WAVs via Uber’s technology). San Francisco and Disability Rights Advocates’ protests are procedurally and substantively flawed with regards to both of those issues and must be rejected.

1. Protestors Objections to the Confidentiality of Redacted Data are Erroneous and Baseless

a. Protestors Failure to Accept Uber’s Good Faith Offer to Share Unredacted Data Under an NDA

Notably, San Francisco and Disability Rights Advocates waited until two business days before protests were due to initiate a meet and confer to discuss their objections with redactions within Uber’s Advice Letters 1, 2, and 3. Despite this delayed request, Uber accommodated their concerns by scheduling a meet and confer to be held the next business day. At the meet and confer, Uber made a good faith effort to compromise and to identify the specific data San Francisco and Disability Rights Advocates purportedly needed for analysis. San Francisco and Disability Rights Advocates would not compromise and maintained they must receive all data unredacted. Uber is not opposed to the parties receiving unredacted data after executing a Non-Disclosure Agreement (“NDA”), and offered that path forward to San Francisco and Disability Rights Advocates. However, they rejected Uber’s offer. Accordingly, objections based on the premise that Uber will not share unredacted data are plainly false. Uber makes only commercially reasonable requests for confidentiality that enable it to continue its industry-leading work related to WAVs.

It is typical CPUC practice for parties to enter into NDAs to exchange information.⁷ Claims that signing an NDA would prevent adequate public representation are disingenuous. The protesting parties are participating to represent the public - that is their role in this proceeding and for which intervenor compensation was specifically authorized for in SB 1376.⁸ There is not a benefit to

⁷ See General Order 96-B, §10, and the Energy Utility Advice Letter template, which states: “Confidential information will be made available to appropriate parties who execute a nondisclosure agreement.” Available at: https://www.cpuc.ca.gov/Utility_Tariff_and_Advice_Letter_Information/

⁸ Pub. Util. Code § 5440.5(K)

the public in revealing market-sensitive information that may lead to suppressed competition when the parties supposedly representing them can make the same substantive points under the protections offered by an NDA. Disability Rights Advocates themselves state they “advocate on behalf of all Californians with disabilities.”⁹ Thus, they have the opportunity to analyze the unredacted data and substantively protest for the benefit of, and *on behalf of*, the public. They were given the opportunity to view all of the Advice Letter data, make their arguments and redact key figures within their filings, yet refused.

San Francisco reaches the erroneous conclusion that because certain data is redacted, the Advice Letters contain material omissions and are flawed. In reaching this conclusion, San Francisco misrepresents what GO 96-B, §7.4.2(3) and §7.4.2(6) state and represent.¹⁰ GO 96-B, §7.4.2 states that “an advice letter may be protested on one or more of the following grounds” and sub-section (3) specifically allows a protest if “the analysis, calculations, or data in the advice letter contain material errors or omissions”.¹¹ San Francisco cannot rely on that provision to make the conclusory claim that the analysis, calculations or data in Uber’s Advice Letters contain errors or omissions if they refuse to enter into an NDA to review the unredacted data.

To be clear, SB 1376 does not expressly state nor imply that any data related to offset requirements must be publicly disclosed.¹² San Francisco misrepresents the purpose of SB 1376, which is for “California [to] be a national leader in the deployment and adoption of on-demand transportation options for persons with disabilities.”¹³ Further, SB1376 specifically states, “It is the intent of the Legislature that wheelchair users who need WAVs have prompt access to TNC services, and for the commission to facilitate greater adoption of wheelchair accessible vehicles on transportation network companies’ online-enabled applications or platforms.”¹⁴ As the Legislature intended, the Commission is to facilitate greater adoption of WAVs on TNC platforms and execute the intent of the Act. The Commission is in possession of all of Uber’s unredacted data, and holds jurisdictional authority over Uber, so has the ability to use the unredacted data in rendering a disposition of Advice Letters 1 through 3.

b. San Francisco’s Improper Request for Evidentiary Hearings

San Francisco attempts to preserve a right to request an evidentiary hearing under GO 96-B, §7.4.1, asserting the following purported “disputed fact” warrants an evidentiary hearing: “that the redacted data is sensitive business information and disclosure of the redacted data would impair competition for the redacted WAV data, among other things.”¹⁵ San Francisco, however,

⁹ Disability Rights Advocates protest at 5.

¹⁰ San Francisco protest at 1 and 2.

¹¹ Disability Rights Advocates protest at 1 and 4.

¹² S.B. 1376, Cal. Legis. Serv. Ch. 701 (2018)

¹³ Pub. Util. Code § 5440(g)

¹⁴ Pub. Util. Code § 5440(g)

¹⁵ San Francisco protest at 2.

fails to meet the standard set out in §7.4.1, which requires the protest “must expressly request and explain the need for an evidentiary hearing. The explanation must identify material disputed facts and say why a hearing must be held.” San Francisco does not attempt to explain why a confidentiality dispute is material to the disposition of Uber’s Advice Letters 1 - 3, nor does it say why a hearing must be held. Further, the issue of data confidentiality in this case is not a disputable fact regularly subject to Commission evidentiary hearings, but will be addressed via the process described in GO 96-B §10.5 and §10.6.

c. Unfounded and Illogical Claims Regarding TNC Competition

With regards to confidentiality, San Francisco feigns that there is an open question as to who Uber’s competitors are. It is widely recognized and well publicized that Lyft and Uber compete vigorously with each other and others. Uber has recently filed an Application for Rehearing of D.20-03-014 (“TNC Data Confidentiality Decision”) on various grounds, one of which is that making a finding regarding an alleged lack of competition is contrary to law. To conclude that Uber must identify Lyft by name in each filing otherwise it fails to identify competition (or an unfair competitive advantage) would be illogical as it is common knowledge that Lyft is one of Uber’s largest competitors. On the contrary, specifically naming Lyft in each filing would give the misimpression that unnamed competitors should be treated differently. Once again, San Francisco is attempting to re-litigate an issue relevant to a formal proceeding (which resulted in D.20-03-014), and such arguments have no place in an advice letter protest.

d. Certain Specific WAV Data is Clearly Confidential and Has Never Before Been Released

San Francisco erroneously claims that the data provided in Advice Letters 1 - 3 is not significantly different from what is provided in TNC Annual Reports. (In making this point San Francisco copied verbatim from a protest against Lyft’s advice letters, and referenced “Lyft” where Uber believes they meant to reference “Uber”.) As Uber clearly indicated in its Confidential Declaration accompanied with each Advice Letter, data redacted includes amounts invested through a contract with a third-party WAV provider. That information has never been produced in an Annual Report before. Anyone with a foundational understanding of business and contracts could appreciate that the public disclosure of such information would create competitive harm and an unfair competitive advantage. Notably, the Disability Rights Advocates’ state that “the fact that Lyft disclosed some of the information that Uber redacted is evidence that there is no legitimate interest in keeping those categories confidential.”¹⁶ This statement acknowledges that Uber and Lyft are competitors, otherwise why would their redactions be comparatively significant? It is also a logical fallacy: Lyft and Uber may value different elements of their data differently and, moreover, both companies are making as many concessions as possible in order to appease all parties to the proceedings. It may be “difficult to

¹⁶ Disability Rights Advocates protest at 5.

comprehend”¹⁷ for San Francisco that revealing the supply and demand of WAVs in operation could create an unfair competitive advantage, but it is common business practice to not reveal specifics around the scope and penetration of products within a highly competitive marketplace, particularly when competition may lead to better service.

Uber strongly disagrees with San Francisco’s claim that WAV operational data is not trade secret, nor available for Commission analysis.¹⁸ Quite the contrary, Uber has submitted unredacted data to the Commission, within the Commission-issued templates, with regards to the relevant WAV information that it collects in the ordinary course of business. If the redacted data seems insufficient for San Francisco to complete their own analysis, they could have made a good faith effort to work with Uber to view the unredacted data in accordance with standard CPUC practices, rather than making a superficial attempt at a meet and confer one day before protests were due and refusing Uber’s offer to share data under an NDA. Nowhere in D.20-03-007 or SB 1376 is there a requirement that the public scrutinize WAV program data to determine whether or not a TNC is eligible for an offset.

Moreover, San Francisco goes on to assert that “parties must have access to the WAV data Uber seeks to hide to assess whether Uber has met the ‘presence and availability’ or ‘improved level of service’ factors required to show whether it is entitled to its multi-million dollar offset request”¹⁹ and fails to mention that Uber offered just that - a chance for San Francisco to view the unredacted data under an NDA, however, San Francisco refused to accept that offer. Disability Rights Advocates correctly claims that “each category of data redacted by Uber is relevant to determining whether Uber has met the criteria for offsets”. The Commission has the jurisdictional authority to approve or reject Uber’s Advice Letters based on the unredacted data that Uber has provided. To claim that Uber “seeks to hide” whether it has met the “presence and availability” offset criteria by redacting the data is a clear misrepresentation of the fact that Uber provided all unredacted data to the Commission.²⁰

Further, San Francisco claims that since Uber is seeking “public funds” via the TNC Access for All Fee, it must reveal the underlying data to the public. San Francisco’s argument that expenditures detailing partnership costs, wages/salaries, and promo code values (among other things) should be made public, is incredulous. In a highly competitive marketplace, with rapidly dynamic changes, it is clear that these specifics are sensitive commercial information. With this argument, San Francisco fails to appreciate that the funds expended by a TNC to improve WAV access may not be tied *only* to the \$0.10/per-ride TNC Access for All Fee (what they deem the “public funds”), and the data provided may include costs above and beyond what was collected through the TNC Access for All Fee.

¹⁷ San Francisco protest at 6.

¹⁸ San Francisco protest at 5.

¹⁹ San Francisco protest at 6.

²⁰ San Francisco protest at 6.

It goes against public policy to request that a business, in a highly competitive marketplace, divulge sensitive information to its competitor under an assumption that it *may* receive *some* public funds in return. Uber created and invested heavily in a WAV program before SB 1376 was even signed into law, and before a single cent was collected under the TNC Access for All framework. The amounts collected are based on the number of TNC trips taken in any given quarter, which can vary widely, as evidenced by the precipitous drop in the number of rides throughout the COVID-19 pandemic. It would be imprudent for a company to base the sole funding of a program off such variable inputs as the number of rides and the potential for collection from an offset advice letter. The Act was put into place knowing the hurdles in providing effective and efficient WAV service, which local governments, such as San Francisco have had little success in achieving despite many years at trying.

2. Protestors Offer Meritless Arguments Regarding Offset Criteria

In general, San Francisco and the Disability Rights Advocates claim Uber has not met its burden to demonstrate that offsets are warranted. However, their broad and erroneous arguments fail on several aspects.

It is insulting for San Francisco to state that Uber wishes to create a “slush fund”²¹ for the “recovery of routine business costs.”²² Uber was the first TNC to enable WAV services via its platform, has the geographically broadest platform for the WAV industry, and has likely invested the most capital in contracting with third-party WAV providers, even *before* the possibility of any recoupment of funds was even an option. The Legislature understands the challenges with enabling WAV service, and likely so do parties and cities, since on-demand WAV services have never before been successfully executed (*i.e.* typically 24-hour minimum wait times for current paratransit services), despite cities having years of access to public subsidy not funded by the operators themselves.

a. Presence and Availability of WAVs

San Francisco is correct that D.20-03-007 (also referred to by San Francisco as the “Track 2 Decision”) did not adopt a specific methodology to prove the presence and availability of WAVs.²³ However, in their attempt to claim that CPED cannot “simply write the statutory requirement for a demonstration of presence and availability out of their analysis for offset eligibility”²⁴, they ignore the Commission delegated role in the execution of SB 1376. The Legislature explicitly said:

²¹ San Francisco protest at 2.

²² San Francisco protest at 2.

²³ San Francisco protest at 10.

²⁴ San Francisco protest at 8.

“**The commission shall** authorize a TNC to offset against the amounts due pursuant to this subparagraph for a particular quarter the amounts spent by the TNC during that quarter to improve WAV service on its online-enabled application or platform for each geographic area and thereby reduce the amount required to be remitted to the commission.”²⁵ (emphasis added)

It cannot be more clear in the direct language of SB 1376 that the commission **shall** authorize offsets for TNCs, and has the authority to create the standards by which to do so.

San Francisco claims that “mere submission of data does not ‘demonstrate’ presence and availability.”²⁶ When in fact data is submitted for the purposes of doing just that - demonstrating presence and availability of WAVs. Simply because San Francisco wishes to protest something, does not mean it is acceptable to misconstrue what TNCs must provide to show that WAVs are on the road (*i.e.* data regarding the presence and availability of WAVs).

The Disability Rights Advocates agree that SB 1376 requires TNCs that apply for an offset to “demonstrate ‘the presence and availability of drivers with WAVs on its online-enabled application or platform.’ This demonstration must be made through the data presented to the Commission in Uber’s Advice Letters.”²⁷ On one hand, the Disability Rights Advocates agree that presence and availability data be submitted to the Commission for review. On the other hand, Disability Rights Advocates claim that the presence and availability data is insufficient because it’s redacted.²⁸ Again, parties fail to understand that the redaction of data does not mean that the Commission cannot make a determination, because the Commission has the unredacted data.

San Francisco’s superficial analysis of Uber’s presence and availability data cherry-picks certain sentences to attempt to make its point and omits critical facts that may cut against its argument. For instance, San Francisco fails to take into account that Uber’s Advice Letter 1 states: “Regarding the benchmarks set in relation to the retroactive offsets at issue here, data provided in the Commission-issued templates shows that in Los Angeles county the presence and availability of WAVs on the Uber platform has increased from Quarter 3, 2019, to Quarter 4, 2019, and Quarter 1, 2020.”²⁹ Instead San Francisco quotes the later part of that paragraph that offers details on challenges for WAV service in certain geographic areas. But the intent of the Legislature was to explore such challenges and work with stakeholders to reach solutions. Rather than offer constructive solutions to address such challenges, San Francisco attempts to discredit

²⁵ Pub. Util. Code §5440.5(B)(ii)

²⁶ San Francisco protest at 8.

²⁷ Disability Rights Advocates protest at 2.

²⁸ Disability Rights Advocates protest at 2, “If Uber does not present this data, it cannot demonstrate “the presence and availability of drivers with WAVs on its online-enabled application or platform.”

²⁹ Uber AL-1 at 6.

Uber's good faith efforts to improve WAV service. That is neither productive, nor serves the public's best interests.

b. Improved Levels of Service

Without offering any supporting citations, San Francisco erroneously claims that "The Track 2 Decision suggests that improvements should be measured in minutes."³⁰ This is a false and unsupported statement. There is no such suggestion that improvements should be measured in minutes. Further, San Francisco says that "CPED should consider that the Uber submittal does not contain the following required template tabs: "Offset Response Time" and "Exemption Response Time" and is thus inadequate on its face."³¹ Uber followed CPED's provided templates and instructions and San Francisco's claim should be disregarded.

San Francisco and Disability Rights Advocates claim time and again there "is no showing" that Uber met the statutory requirements, but base those arguments on the fact that redactions to the data are present. For instance, San Francisco states that "Due to Uber's extensive redactions, it is unclear what costs Uber incurred providing WAV service and there is no showing whether these investments improved WAV service."³² Uber completed CPED's required templates and provided the Commission with unredacted data consistent with its directives. Simply because San Francisco and Disability Rights Advocates cannot see the data, and do not wish to enter into an NDA with Uber consistent with standard Commission practice, does not mean that Uber is not fulfilling its offset showing obligations.

c. Improper Attempts to Re-Litigate Offset Criterion

Disability Rights Advocates wrongly attempt to re-litigate the purpose of the TNC Access for All Act within their Advice Letter protest. With regards to the TNC Access for All Fee, Disability Rights Advocates claim that "these funds are not Uber's own money – they are funds collected for a public purpose, to redress the fact that, since their inception, the TNCs have failed to comply with disability access laws. If the funds are not applied as an offset, they will instead be distributed by the government for the purpose of providing accessible rides to people with disabilities."³³ This statement clearly shows the incompatibility of their position with the established intent of the TNC Access for All Act.³⁴ As discussed above, the Act was created to be applicable to TNCs, and not for TNCs to become a conduit to funding other entities. It would cut against the Legislature's intent to create a TNC-fee to increase access to TNC platforms, to then distribute such fees to non-TNCs. The Legislature did not intend for available offset funds

³⁰ San Francisco protest at 9.

³¹ *Id.*

³² San Francisco protest at 10.

³³ Disability Rights Advocates protest at 5.

³⁴ Pub. Util. Code § 5440(g) and (j).

to be denied to TNCs just to be distributed much later to other entities that may someday hypothetically choose (but are not required) to enable their services via one or more TNC platforms.

3. **Protesting Parties' Material Omissions**

Beyond the specific errors described above made by San Francisco and Disability Rights Advocates in their protests, they also make several general material omissions in their analysis. First, Q3 of 2019 sets the baseline of WAV service and investment from which to analyze WAV service going forward. Parties should have submitted separate arguments and protests to that specific Advice Letter because they cannot justifiably make the same claims when it is impossible to show technical "improvement" for Q3 since there are no previous quarters to compare the data to.

Second, San Francisco and Disability Rights Advocates do not acknowledge the impact of COVID-19 on Q1 2020 results, despite publicly available information (and likely clearly knowing) that rides have been heavily impacted throughout that quarter. It should be uncontroversial to include such impact into any analysis of presence and availability.

Third, San Francisco and Disability Rights Advocates do not attempt to analyze how the amounts invested correlate to the service enabled. Indeed, one might inquire as to why it takes millions of dollars in investments to enable service that is later deemed "abysmal".³⁵ For if the parties were genuinely interested in enabling improved WAV service they would not protest receipt of funds by TNCs to enable bolstered WAV service. Rather, one would expect San Francisco and the Disability Rights Advocates to offer solutions as to how funds should be *better* allocated or how partnerships can be *enhanced* through offset funds. As the parties surely know, no entity has executed an on-demand WAV service open to the general public before Uber first began its program to enable such service. Withholding access to funds at this stage would not benefit the public nor increase access for the people with disabilities, which is the true goal of the Act.

CONCLUSION

In sum, AL-1, AL-2 and AL-3, are consistent with the Commission's determinations in D.20-03-007, and the Legislative intent behind SB 1376. The protests are procedurally and substantively flawed and must be rejected.

For the forgoing reasons, Uber respectfully requests that the Commission reject the protests and promptly approve AL-1, AL-2, and AL-3.

³⁵ Disability Rights Advocates protest at 3.

Respectfully submitted,

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